Appendix A

United States Court of Appeals
for the Eighth Circuit

No. 18-3461

Hawo O. Ahmed

Plaintiff - Appellee

v.

Heather Weyker, in her individual capacity as a St. Paul Police Officer

Defendant - Appellant

No. 18-3471

Hamdi A. Mohamud

Plaintiff - Appellee

v.

Heather Weyker, in her individual capacity as a St. Paul Police Officer

Defendant - Appellant

Appeals from United States District Court
for the District of Minnesota

Submitted: June 18, 2020
Filed: December 23, 2020

Appendix A

Before KELLY, ERICKSON, and STRAS, Circuit Judges.

STRAS, Circuit Judge.

The plaintiffs are trying to hold a rogue law-enforcement officer responsible for landing them in jail through lies and manipulation. But for us, a more fundamental question is at stake: who gets to make the call about whether a federal remedy is available? As we recently held, the decision lies with Congress, not us, so we vacate the district court's ruling. *See Farah v. Weyker*, 926 F.3d 492 (8th Cir. 2019).

I.

This appeal is another chapter in the aftermath of an investigation into an alleged interstate sex-trafficking scheme that was plagued with problems from the start. Of the thirty people who were indicted, *United States v. Adan*, 913 F. Supp. 2d 555, 558–59 (M.D. Tenn. 2012), only nine were ultimately tried, *United States v. Fahra*, 643 F. App'x 480, 483 (6th Cir. 2016), and each was acquitted, *id.* at 484. Since then, numerous civil-rights complaints have been filed against St. Paul Police Officer Heather Weyker for her conduct during the investigation.

A.

Two of those complaints were filed by Hawo Ahmed and Hamdi Mohamud. They, along with their

friend Ifrah Yassin, were attacked one evening at an apartment building in Minneapolis. Their attacker was Muna Abdulkadir, a witness for the government in the sex-trafficking case. During the incident, Abdulkadir "smash[ed]" Ahmed's windshield and "struck" Yassin, all while "brandishing [a] knife." Following the attack, Ahmed and Mohamud called 911, and Abdulkadir made a call of her own to Weyker. Worried about the possibility of losing a witness, Weyker sprang into action.

She first contacted Minneapolis Police Officer Anthijuan Beeks, who responded to the 911 call. Weyker told him that she had "information and documentation" that Ahmed, Mohamud, and Yassin "had been actively seeking out Abdulkadir" in an effort "to intimidate" her for agreeing to cooperate in a federal investigation.

Abdulkadir was indeed a federal witness, but everything else Weyker said was "untrue." She had no "'information' or 'documentation.'" Rather, she just wanted to "shield[ ] Abdulkadir from arrest" to "further incentiv[ize] . . . her" continued participation in the investigation. The plan worked. Officer Beeks arrested Ahmed, Mohamud, and Yassin "on suspicion of tampering with a federal witness," *see* 18 U.S.C. § 1513(b), based "on Weyker's intentional misrepresentations."

Weyker did not stop there. The next day, she prepared a criminal complaint and a sworn affidavit. In doing so, she once again "fabricated facts, knowingly

relayed false information, and withheld exculpatory facts, all with the intention that [the three women] would continue [to be] detained for crimes [for] which she knew there [was] no actual probable cause or arguable probable cause."

These actions were not without consequences. Mohamud, a minor at the time, spent just short of 25 months in federal custody, with a "small portion" of it on supervised release. Ahmed gave birth during the more than 25 months she spent in custody. Eventually, the government dismissed the case against Mohamud, and a jury acquitted Ahmed.

After their release, both women sued Weyker in her individual capacity on one overarching false-arrest theory. *See* U.S. Const. amend. IV; *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978); *Small v. McCrystal*, 708 F.3d 997, 1006 (8th Cir. 2013). Due to Weyker's dual status, they pleaded two causes of action against her: one as a St. Paul police officer, *see* 42 U.S.C. § 1983, and another as a deputized federal agent, *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

Weyker asked the district court to dismiss both claims. *See* Fed. R. Civ. P. 12(b)(6). One reason was qualified immunity: the requirement that any right she may have violated had to be clearly established. *See Morgan v. Robinson*, 920 F.3d 521, 523 (8th Cir. 2019) (en banc). The other was based on the limited availability of a cause of action against federal officers.

See Bivens, 403 U.S. at 397. The district court allowed both claims to move forward, concluding both that qualified immunity was unavailable and that the plaintiffs had a cause of action against Weyker.[1]

Just last year, we decided a nearly identical case that also involved Weyker. *See Farah*, 926 F.3d 492. Five of the plaintiffs had been charged and detained as suspected participants in the sex-trafficking scheme. *Id.* at 496–97. Some were acquitted following a trial, and the government dropped the charges against the others. *Id.* at 496. All, however, accused Weyker of "exaggerating and inventing facts in reports[;] hiding [exculpatory] evidence"; manipulating witnesses; and "deceiv[ing] prosecutors, the grand jury, and other investigators" along the way. *Id.* at 496–97. Like Ahmed and Mohamud, they sought relief under both *Bivens* and section 1983. *Id.* at 497. We held that, if Weyker

[1] For this reason, the availability of a *Bivens* action is squarely before us on appeal. Indeed, Weyker has argued all along that the plaintiffs do not have a cause of action against her as a deputized federal officer. *See* Defendant's Memorandum in Support of Motion to Dismiss at 37–47, 0:17-cv-02070-JNE-TNL (D. Minn. Oct. 20, 2017), ECF No. 19; *see also* Plaintiff Mohamud's & Plaintiff Ahmed's Memorandum of Law Opposing Defendant's Motion to Dismiss at 15–16, 0:17-cv-02070-JNE-TNL (D. Minn. Dec. 4, 2017), ECF No. 25. It is also her lead argument on appeal. *See* Consolidated Br. for the Appellant at 13–26; *see also* Consolidated Response Br. for the Appellees at 12–15. To the extent that the dissent has second thoughts about our decision to reach this issue now, *Farah* all but settled that we can. 926 F.3d at 497, 502–03, 503 n.1 (treating the *Bivens* issue in a similar posture as a "threshold question" and declining to decide qualified immunity first).

was acting as a federal officer at the time, no cause of action was available. *Id.* at 502. We then remanded for consideration of whether the plaintiffs could proceed under section 1983. *Id.* at 502–03.

Yassin was the final plaintiff in the case. *See id.* We never decided whether an implied cause of action was available to her because Weyker never "meaningfully briefed" the issue. *Id.* at 503. Today, Weyker asks us to answer the question that we left open in *Farah*.

II.

We now address this "threshold question": whether an implied cause of action is available to Ahmed and Mohamud under the Constitution itself, more commonly known as a "*Bivens* action." *Hernandez v. Mesa*, 140 S. Ct. 735, 742–43 (2020); *Farah*, 926 F.3d at 497; *see Bivens*, 403 U.S. at 397. Answering it calls for "a two-step inquiry," *Hernandez*, 140 S. Ct. at 743, over which our review is de novo, *Farah*, 926 F.3d at 497. At the motion-to-dismiss stage, we assume that all factual allegations in their complaints are true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A.

"On only three occasions has the Supreme Court [recognized] a cause of action under *Bivens*." *Farah*, 926 F.3d at 497; *see Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979); *Bivens*, 403 U.S.

388. Expanding *Bivens* is, according to the Supreme Court, "now a 'disfavored' judicial activity." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (quoting *Iqbal*, 556 U.S. at 675); *see also Hernandez*, 140 S. Ct. at 743 ("[F]or almost 40 years, we have consistently rebuffed requests to add to the claims allowed under *Bivens*."). The reason is that the separation of powers generally vests the power to create new causes of action in Congress, not us. *See, e.g.*, *Hernandez*, 140 S. Ct. at 742; *Abbasi*, 137 S. Ct. at 1857.

With this presumption against creating new *Bivens* actions in mind, *Neb. Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005), our analysis has two steps. Under step one, if a case "present[s] one of the three *Bivens* claims the [Supreme] Court has approved in the past," it "may proceed." *Farah*, 926 F.3d at 498 (internal quotation marks omitted). If it does not, then we go on to the next step. *Id.*

At step two, the question is whether "any special factors counsel hesitation before implying a new cause of action." *Id.* (internal quotation marks and brackets omitted). If there is "reason to pause before applying *Bivens* in a new context or to a new class of defendants[,] we [must] reject the request." *Hernandez*, 140 S. Ct. at 743.

B.

Just as we concluded in *Farah*, "[n]o Supreme Court case exactly mirrors the facts and legal issues

presented here." 926 F.3d at 498. Neither *Carlson* nor *Davis* is a match, which leaves *Bivens* as the only possibility. *See Carlson*, 446 U.S. at 1618, 16 n.1 (allowing a cruel-and-unusual-punishment claim to proceed after prison officials fatally mishandled an inmate's serious asthmatic condition); *Davis*, 442 U.S. at 235–36, 243–44 (recognizing a cause of action for a sex-discrimination claim under the Fifth Amendment).

1.

The claims in *Bivens* arose out of a warrantless search and an illegal arrest. 403 U.S. at 389. Specifically, federal law-enforcement officers had "threatened to arrest [Bivens's] entire family" as they shackled him; "searched [his] apartment from stem to stern"; and after booking and interrogating him, "subjected [him] to a visual strip search." *Id.*; *see Abbasi*, 137 S. Ct. at 1860 (describing the case as "a claim against FBI agents for handcuffing a man in his own home without a warrant"). Under those circumstances, the Supreme Court held that he had "a cause of action [against the officers] under the Fourth Amendment" and that "money damages" were potentially available "for any injuries he ha[d] suffered." *Bivens*, 403 U.S. at 397.

Our task is to determine whether *this* "case is different in a meaningful way from . . . *Bivens*." *See Abbasi*, 137 S. Ct. at 1859. As we explained in *Farah*, relevant differences can include, among other things,

"the sorts of actions being challenged, the mechanism of injury, and the kinds of proof those injuries would require." 926 F.3d at 500; *see also Abbasi*, 137 S. Ct. at 1859–60 (providing "examples" of differences without establishing "an exhaustive list"). Even "small" differences can be "meaningful." *Abbasi*, 137 S. Ct. at 1865 (calling this step "eas[y to] satisf[y]"); *see Hernandez*, 140 S. Ct. at 743 ("[O]ur understanding of a 'new context' is broad."). The case before us is meaningfully different from *Bivens* in four ways.

First, "the sorts of actions being challenged" here are different. *Farah*, 926 F.3d at 500. The focus in *Bivens* was on an invasion into a home and the officers' behavior once they got there. 403 U.S. at 389. Here, by contrast, Weyker did not enter a home, even if the actions she allegedly took—like manufacturing evidence and lying—were just as pernicious. *Farah*, 926 F.3d at 499; *see also Franks*, 438 U.S. at 155–56 (holding that fabricating probable cause through material and knowingly false information in a warrant application violates the Fourth Amendment); *Small*, 708 F.3d at 1006 (explaining that an officer violates an individual's Fourth Amendment rights when he persuades someone else that there is probable cause "based solely on information the officer knew to be false" (quotation marks omitted)). Lying and manipulation, however bad they might be, are simply not the same as the physical invasions that were at the heart of *Bivens*. *See Farah*, 926 F.3d at 499; *cf. Canada v. United States*, 950 F.3d 299, 307 (5th Cir. 2020) (holding that the Supreme

Court's prior *Bivens* cases were meaningfully different from a situation in which IRS agents had "intentionally manipulated a penalty assessment").

Second, and closely related, Weyker's role in the arrests was different. In contrast to the officers in *Bivens*, she did not arrest anyone herself, nor was she even on the scene when the arrests occurred. *See Abbasi*, 137 S. Ct. at 1859–60 (listing "the generality or specificity of the official action" as a meaningful potential difference). Rather, she provided allegedly false information to another officer in a different police department, who then arrested the plaintiffs. *See Cantú v. Moody*, 933 F.3d 414, 423 (5th Cir. 2019) (holding that a "claim involv[ing] different conduct by different officers from a different agency" than in *Bivens* presented a new context). In this way, Weyker's actions fell somewhere along the spectrum between a *Franks*-type violation and a simple warrantless arrest. *Compare Franks*, 438 U.S. at 155–56 (involving a situation in which an officer makes "a false statement knowingly and intentionally, or with reckless disregard for the truth"), *with District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) ("A warrantless arrest is reasonable if the officer has probable cause to believe that the suspect committed a crime in the officer's presence."). Not only is this factual difference from *Bivens* meaningful, it also narrows the doctrinal divide between a false-affidavit theory, which the dissent concedes is foreclosed by *Farah*, and one based solely on the initial arrest itself.

Third, although "the mechanism of injury" is a closer call, there is still one meaningful difference. *Farah*, 926 F.3d at 499. In *Bivens*, the injuries included "humiliation, embarrassment, and mental suffering [that] were directly caused by the officers' conduct." *Id.* (internal quotation marks omitted). Ahmed and Mohamud suffered these same injuries, but the "direct[] caus[al]" chain is missing. *Id.* Multiple "independent legal actors"—Officer Weyker, Officer Beeks, and even prosecutors—played a role.[2] *Id.* Indeed, the dissent concedes as much by invoking the collective-knowledge doctrine. *See United States v. Thompson*, 533 F.3d 964, 969 (8th Cir. 2008) (explaining the collective-knowledge doctrine, which involves multiple actors). Even though it is true that "the mechanism of injury" is less attenuated here than in *Farah*, which involved "a series of intervening steps," the claims are still less "straightforward" than in *Bivens*. *Farah*, 926 F.3d at 499.

Fourth, proving these claims would require a different type of showing. *Abbasi*, 137 S. Ct. at 1860. For the allegedly false affidavit, Ahmed and Mohamud would have to establish that (1) Weyker's statements were false; (2) she made them "knowingly and intentionally, or with reckless disregard [for] the truth"; and (3) without them, there would be no probable cause.

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[2] We read the plaintiffs' allegations as primarily concerned with the role that Weyker played in their *arrests*. To the extent they seek "damages arising out of [their] post-arrest indictment[s]," any such "claim must proceed, if at all, under section 1983." *Farah*, 926 F.3d at 503 n.2.

Williams v. City of Alexander, 772 F.3d 1307, 1311 (8th Cir. 2014) (quotation marks omitted); *see Haywood v. City of Chicago*, 378 F.3d 714, 719–20 (7th Cir. 2004) (applying *Franks* to misrepresentations made in the context of continued detention). *Bivens* did not require this type of fact-checking and conscience-probing, 403 U.S. at 389; *Farah*, 926 F.3d at 499, which can, as the Supreme Court has warned, impose "substantial costs," *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). Similarly, for the arrest itself, there would have to be an examination into whether Officers Beeks would have had probable cause to arrest the plaintiffs in the absence of Weyker's allegedly false information. *See Green v. Nocciero*, 676 F.3d 748, 754–55 (8th Cir. 2012); *Fisher v. Wal-Mart Stores, Inc.*, 619 F.3d 811, 814–18 (8th Cir. 2010); *see also Smoak v. Hall*, 460 F.3d 768, 779–80 (6th Cir. 2006) (explaining that whether reasonable suspicion existed depended on "the facts known to the . . . troopers who actually participated in the seizure," not simply what the dispatchers, who relayed misleading and incomplete information, told them). Although it would not quite rise to the level of conscience-probing, it would still require fact-checking what Beeks knew and when. *See Green*, 676 F.3d at 754–55; *Fisher*, 619 F.3d at 814–18. No comparable inquiry was in play in *Bivens*. 403 U.S. at 389 (involving actions only by the arresting officers).

2.

When one or more meaningful differences exist, it is not enough to identify a few similarities. The

plaintiffs and dissent make much of the fact that this case, like *Bivens*, arose out of an allegedly illegal arrest. But "a modest extension is still an extension," *Abbasi*, 137 S. Ct. at 1864, even if it involves "the same constitutional provision," *Hernandez*, 140 S. Ct. at 743.

If the test sounds strict, it is. As an example, the Supreme Court refused to recognize an implied cause of action for a claim of inadequate medical treatment against officers in a *privately* contracted prison, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63–64, 73–74 (2001), even though it had previously recognized an identical claim against a prison guard in a *federally* run prison, *Carlson*, 446 U.S. at 16–18. *See Hernandez*, 140 S. Ct. at 743 (comparing *Carlson* and *Malesko* on this basis). If *Malesko* was a new context, then this case is too. *See Farah*, 926 F.3d at 498–500; *see also Abbasi*, 137 S. Ct. at 1856 (explaining that the Supreme Court had "no[ ] inten[t] to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure *context in which it arose*" (emphasis added)); *Cantú*, 933 F.3d at 423 (concluding that an unlawful-seizure claim under the Fourth Amendment presented a new context when the plaintiff alleged that officers "falsified affidavits," rather than "entered [a] home without a warrant").

C.

At step two, the task is to determine whether, in this new context, an implied cause of action is available. The focus is on whether there are any "special

factors" that "cause[] [us] to pause before acting without express congressional authorization." *Abbasi*, 137 S. Ct. at 1857–58 (quotation marks omitted). "It does not take much," *Farah*, 926 F.3d at 500, because Congress is usually "in the better position" to weigh the costs and benefits of creating "a new substantive legal liability," *id.* (quoting *Abbasi*, 137 S. Ct. at 1857). On this point, *Farah* once again does much of the heavy lifting. *Id.*

Just like in *Farah*, a trial would "risk . . . burdening and interfering with the executive branch's investigative . . . functions." *Id.* Perhaps the *level* of interference would be less than in *Farah*, as the plaintiffs argue, but a jury would still need to determine what Weyker knew, what she did not know, and her state of mind at the time. *Williams*, 772 F.3d at 1311. There are, as we explain above, "substantial costs" associated with requiring public officials to litigate these types of issues, including "the diversion" of public resources and deterring "able citizens from . . . public office." *See Harlow*, 457 U.S. at 814, 816. It may well be that the costs are worth it, but Congress is better equipped than we are to make the call. *Farah*, 926 F.3d at 501.

Moreover, as in *Farah*, other remedies are available "to address injuries of the sort the plaintiffs have alleged[]." *Id.* "The so-called Hyde Amendment allows courts to award attorney fees to criminal defendants who prevail against 'vexatious, frivolous, or . . . bad[-] faith' positions taken by the government." *Id.* (quoting

Act of Nov. 26, 1997, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (codified at 18 U.S.C. § 3006A note)). And for "those who are wrongly convicted and sentenced," damages may be available. *Id.* (citing 28 U.S.C. § 1495). We are especially reluctant to supplement those remedies with our own, which could upset the existing remedial structure. *Abbasi*, 137 S. Ct. at 1858; *Farah*, 926 F.3d at 501–02. This factor alone, as the Supreme Court has explained, is "a convincing reason" not to extend *Bivens*. *Abbasi*, 137 S. Ct. at 1858 (quotation marks omitted).

None of this should be surprising. After all, the Supreme Court has not recognized a new *Bivens* action "for almost 40 years." *Hernandez*, 140 S. Ct. at 743; *see also Abbasi*, 137 S. Ct. at 1857 (collecting cases). Our conclusion here is no different.

III.

So what happens next? Just because a *Bivens* remedy is off the table does not mean the plaintiffs' cases are over. If the district court determines on remand that Weyker was acting under color of *state* law, their section 1983 claims may proceed, subject to Weyker's defense of qualified immunity.[3] *Farah*, 926 F.3d at

[3] It is premature at this point to address Weyker's argument that the district court abused its discretion when, in addressing qualified immunity, it declined to take judicial notice of matters outside the pleadings. *See Cravens v. Smith*, 610 F.3d 1019, 1029 (8th Cir. 2010) (standard of review); 2 James Wm. Moore, *Moore's Federal Practice* § 12.34[2], at 12-94 (3d ed. 2020).

502–03, 503 n.1 (declining "to skip over the under-color-of-state-law element to decide . . . qualified immunity"); *see Magee v. Trs. of Hamline Univ.*, 747 F.3d 532, 535 (8th Cir. 2014) (evaluating whether an officer acted under color of state law).

IV.

We accordingly vacate and remand to the district court to dismiss the plaintiffs' *Bivens* claims and determine whether their cases can proceed under 42 U.S.C. § 1983.

KELLY, Circuit Judge, dissenting.

In Ziglar v. Abbasi, 137 S. Ct. 1843 (2017), the Supreme Court cautioned that extending Bivens to new contexts is a "disfavored judicial activity." Id. at 1857 (cleaned up). But because I believe that one of plaintiffs' claims does not extend Bivens to a new context, I respectfully dissent from the court's conclusion otherwise.[4]

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[4] As an initial matter, I note that it may be premature to address Officer Weyker's claim that Bivens does not afford a potential remedy for plaintiffs' claimed injuries. Officer Weyker appeals the district court's denial of her motion to dismiss the case based on qualified immunity. But that opinion concluded that there was "no need to decide" at that time whether Bivens or 42 U.S.C. § 1983 provided the "proper vehicle" for plaintiffs' claims, and we "ordinarily, we do not decide issues the district court did

Appendix A

In 2017, plaintiffs Hawo Ahmed and Hamdi Mohamud filed complaints against Officer Heather Weyker in federal court. The complaints identify two separate instances in which Officer Weyker allegedly lied about Ahmed and Mohamud's suspected criminal activity, leading to their detention in federal custody. First, Ahmed and Mohamud claim that Officer Weyker knowingly provided false information to Officer Anthijuan Beeks, which caused Officer Beeks to arrest and transport them to jail when he otherwise had no basis to do so. Second, they claim that, after this initial arrest, Officer Weyker submitted a federal criminal complaint and supporting affidavit, in which she omitted exculpatory information and included information that she knew to be false. This affidavit led the court to issue arrest warrants for Ahmed and Mohamud. They were then placed in federal custody and eventually indicted for violating multiple federal laws. In both of these actions, Ahmed and Mohamud contend, Officer Weyker fabricated "probable cause that did not otherwise exist," causing them to be "seized, arrested, detained, charged and indicted" in violation of their Fourth Amendment rights.

I agree with the court that, based on our precedent, no Bivens remedy is available for plaintiffs' claim that Officer Weyker violated their Fourth Amendment rights by submitting a false affidavit to the district

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not adjudicate." Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 603 (8th Cir. 2009) (quoting Daisy Mfg. Co. v. NCR Corp., 29 F.3d 389, 395 (8th Cir. 1994)).

court. In Farah v. Weyker, 926 F.3d 492 (8th Cir. 2019), this court held that a claim that a federally deputized officer (namely, Officer Weyker) "duped prosecutors and a grand jury into believing that the plaintiffs were part of a multi-state sex-trafficking conspiracy" was "meaningfully different" from established Bivens cases. Id. at 498. Because "special factors" weighed against extending Bivens to the new context, we declined to do so. Id. at 500-02. As largely the same differences and special factors are present in Ahmed and Mohamud's second allegation against Officer Weyker, Farah forecloses the possibility of Bivens relief on that claim.

But Farah does not foreclose relief for Ahmed and Mohamud's first allegation—that Officer Weyker lied to Officer Beeks, which resulted in their unlawful arrest.[5] As Ahmed and Mohamud describe it in their complaints, this claim asserts that Officer Weyker caused them to be arrested without probable cause. See United States v. Thompson, 533 F.3d 964, 969-70 (8th Cir. 2008) (explaining that the question of whether officers have probable cause to arrest is based on the collective knowledge of all officers involved). This was the claim at issue in Bivens. Though Bivens also alleged that officers used unreasonable force during their search of his home, one of his core contentions was that the officers did not have probable cause when they

[5] The court describes prosecutors as "play[ing] a role" in the events underlying Ahmed and Weyker's claim. Supra at 8. On my read, the only legal actors involved in the arrest were Officer Weyker and Officer Beeks.

arrested him. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) ("[Bivens's] complaint asserted that the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest; fairly read, it alleges as well that the arrest was made without probable cause."). Rather than representing an extension of Bivens, plaintiffs' claim falls squarely within the cause of action recognized by Bivens itself. Cf. Abbasi, 137 S. Ct. at 1856 (refusing to "cast doubt on the continued force, or even the necessity, of Bivens in the search-and-seizure context in which it arose"); see also Hicks v. Ferreya, 965 F.3d 302, 311-12 (4th Cir. 2020) (applying Bivens to a claim of unlawful seizure during a traffic stop); Jacobs v. Alam, 915 F.3d 1028, 1038-39 (6th Cir. 2019) (applying Bivens to claims for excessive force, false arrest, malicious prosecution, fabrication of evidence, and civil conspiracy); Brunoehler v. Tarwater, 743 F. Appx. 740, 743-44 (9th Cir. 2018) (unpublished) (applying Bivens to claims of search and arrest without probable cause).

In concluding that plaintiffs' claim presents a new context, the court highlights several differences between plaintiffs' claim and Bivens that it finds relevant: differences between the "sorts of actions being challenged," "the mechanism of injury" and role of Officer Weyker in that injury, and the type of showing required to prove plaintiffs' claim. See supra at 7-8. To the court, these differences require it to move on to step two of Abbasi and determine whether "special

factors" exist that would counsel hesitation in extending a Bivens remedy.

I do not see the differences that the court does. As to the first claimed difference, the type of action being challenged here was also at issue in Bivens: an arrest unsupported by probable cause. That Bivens also included a separate claim about the officers' use of force within Bivens's home does not undermine the fact that in both that case and this one the plaintiffs' claimed injuries stemmed from the arrest itself. Similarly, the mechanism of injury and role Officer Weyker played are the same as in Bivens: actions by law enforcement officers, one of whom was Officer Weyker. The court points to the absence of a "direct causal chain" and the involvement of "multiple independent legal actors" in this case, see supra at 7, but the situation is simpler than the court makes it out to be. Officer Weyker is alleged to have lied to Officer Beeks about the basis for probable cause to arrest plaintiffs, and Officer Beeks arrested plaintiffs based on that false information. It is unclear to me why we should take pains to separate out Officer Weyker's role in plaintiffs' arrest, particularly when in other contexts we readily recognize the collective role different officers play in effectuating arrests. See, e.g., Thompson, 533 F.3d at 969-70 (describing the collective knowledge doctrine). Finally, the showing required to prove plaintiffs' claim here would be the same as that required in Bivens. In any challenge to a warrantless arrest, the person claiming a violation of her Fourth Amendment rights must show

that the facts known to the officers involved did not provide a reasonable probability of criminal activity. See, e.g., District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (explaining probable cause standard). Regardless of why a plaintiff might allege that probable cause was lacking, the court assessing her claim must examine what the officers knew at the time of the arrest—an inquiry that may, in any case, involve "fact-checking" of how those officers came to their conclusions.[6] Cf. Fisher v. Wal-Mart Stores, Inc., 619 F.3d 811, 817 (8th Cir. 2010) (when one officer instructs another to make an arrest, "[w]e consider the pertinent question to be whether [the instructing officer] had probable cause at the time of the arrest: that is, whether the facts and circumstances would have led to a reasonable conclusion that a crime had been committed"). This is the showing that the plaintiff in Bivens would have had to make and that Ahmed and Mohamud would be making here.

We are also guided by Abbasi, which provides examples of "differences that are meaningful enough to make a given context a new one." Abbasi, 137 S. Ct. at

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[6] Williams v. City of Alexander, 772 F.3d 1307 (8th Cir. 2014), which addresses an allegedly false warrant affidavit, may support the conclusion that plaintiffs' false affidavit claim is different than that in Bivens. See id. at 1311 ("[W]hen a police officer deliberately or recklessly makes false statements to demonstrate probable cause for an arrest warrant, the warrant may be invalidated under Franks v. Delaware."). But in my view, Franks plays no role in a claim that officers effectuated a warrantless arrest without probable cause.

1859-60. These include "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 or potential special factors that previous Bivens cases did not consider." Id. at 1860. No meaningful differences are present here. Like the agents in Bivens, Officer Weyker was an investigative officer who is alleged to have violated plaintiffs' Fourth Amendment right to be free of unlawful arrest. Cf. Hernandez v. Mesa, 140 S. Ct. 735, 743-44 (2020) (establishing that "[a] claim may arise in a new context even if it is based on the same constitutional provision" as a previous claim, but describing Bivens as covering "an allegedly unconstitutional arrest and search" by local police officers). The judicial guidance on conducting a lawful arrest remains clear, and the mandate comes from the Constitution. Recognizing plaintiffs' claim risks no more intrusion into the functioning of another branch of government than did Bivens, which also turned on the knowledge and actions of police officers. And here, plaintiffs challenge an "individual instance[ ] . . . of law enforcement overreach, which due to [its] very nature [is] difficult to address except by way of damages actions after the fact." Abbasi, 137 S. Ct. at 1862. While these factors are not exhaustive, see id. at 1859-60, each supports the conclusion

that the context for plaintiffs' false arrest claim is not new.

The Supreme Court in Abbasi did "not intend[] to cast doubt on the continued force, or even the necessity, of Bivens in the search-and-seizure context in which it arose." Id. at 1856; see also id. at 1856-57 ("Bivens does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward."). I find no meaningful difference between plaintiffs' Fourth Amendment false arrest claim and what the Supreme Court recognized in Bivens and has continued to recognize in Abbasi and Hernandez. In my view, a Bivens remedy is available to Ahmed and Mohamud on this claim.[7] Because the court denies them this remedy, I respectfully dissent.

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[7] The court maintains that Ahmed and Mohamud may still seek recourse for their claimed harm under § 1983. However, I note that the district court has already determined in a related case that, on the date in question, Officer Weyker was acting as a federally deputized officer, not under color of state law, making a § 1983 claim unavailable. See Yassin v. Weyker, No. 16-cv-2580 (JNE/TNL), 2020 WL 6438892 at *4-5 (D. Minn. Sept. 30, 2020), appeal filed, No. 20-3299 (8th Cir. Nov. 2, 2020). The court's decision here will thus have the likely effect of denying plaintiffs any legal remedy for the constitutional violation they allege. See Abbasi, 137 S. Ct. at 1863 ("There is a persisting concern, of course, that absent a Bivens remedy there will be insufficient deterrence to prevent officers from violating the Constitution.").

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Hamdi A. Mohamud,

Plaintiff,

v.

Heather Weyker, in her individual capacity as a St. Paul Police Officer,

Defendant.

Case No. 17-cv-2069 (JNE/TNL) ORDER

Hawo O. Ahmed,

Plaintiff,

v.

Heather Weyker, in her individual capacity as a St. Paul Police Officer,

Defendant.

Case No. 17-cv-2070 (JNE/TNL) ORDER

Filed: September 18, 2018

Asserting that they were seized in violation of the Fourth Amendment, Hamdi A. Mohamud and Hawo O. Ahmed brought actions against Heather Weyker under 42 U.S.C. § 1983 (2012) and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Mohamud and Ahmed alleged that Weyker, a St. Paul police officer, provided false information, fabricated evidence, and withheld exculpatory evidence about them. They were arrested and subsequently charged with witness tampering and obstructing sex

trafficking enforcement. Ahmed was acquitted after a jury trial. The charges against Mohamud were dismissed.

Weyker moved to dismiss Mohamud's and Ahmed's actions, arguing that she is entitled to qualified immunity because Mohamud and Ahmed failed to plausibly allege Weyker violated any clearly established constitutional right. Weyker also asserted that no cause of action exists under either *Bivens* or § 1983 to sue her in her individual capacity. For the reasons set forth below, the Court denies Weyker's motions.

I. BACKGROUND

Mohamud's and Ahmed's amended complaints are essentially identical. The following summarizes them.

On June 16, 2011, Mohamud, Ahmed, and another individual were involved in an altercation with Muna Abdulkadir.[1] The incident took place at Abdulkadir's apartment building in Minneapolis, Minnesota. Ahmed and Abdulkadir agreed to fight to settle their "beef." After agreeing to fight, Abdulkadir indicated she wanted to go upstairs and change her clothes. The four entered an elevator, where a scuffle briefly took

[1] Ifrah Yassin is the third individual who was involved in the altercation with Abdulkadir. Yassin brought an action against Weyker and others that is similar to the actions brought by Mohamud and Ahmed. The Court granted in part and denied in part Weyker's motion to dismiss Yassin's claims. *Yassin v. Weyker*, Case No. 16-cv-2580 (JNE/TNL), 2017 WL 3425689 (D. Minn. Aug. 9, 2017), *appeal docketed*, No. 17-3208 (8th Cir. Oct. 13, 2017).

place. Abdulkadir exited the elevator, and the other three descended in the elevator.

Abdulkadir retrieved a knife from her apartment, proceeded downstairs, and exited the building. Abdulkadir approached Ahmed's vehicle and smashed its windshield with the knife. A short time later, Ahmed, Mohamud, and the other individual exited the building. Abdulkadir struck the other individual with the knife. Ahmed, Mohamud, and the other individual called 911 to report Abdulkadir for assault and property damage.

When Abdulkadir realized the police had been summoned, she returned to her apartment building and called Weyker. Abdulkadir told Weyker that she had been in a fight; that she had attacked Mohamud, Ahmed, and the other individual with a knife; that the police had been summoned; that she was hiding in a neighbor's apartment; and that she feared she was going to be arrested.

A Minneapolis police officer, Anthijuan Beeks, responded to the 911 call made by Ahmed, Mohamud, and the other individual. When he arrived on the scene, Beeks regarded them as victims of a crime committed by Abdulkadir. He had no reason to suspect that Ahmed, Mohamud, and the other individual had sought to harm, threaten, or intimidate Abdulkadir because of her role as a witness in a federal prosecution.

Approximately 20 minutes after he arrived on the scene, Beeks received a message that he should contact Weyker before he continued his investigation. He

called her, and she told him that Abdulkadir is a federal witness in a prostitution investigation in which 30 people had been indicted; that Weyker had information and documentation that Ahmed, Mohamud, and the other individual had been actively seeking out Abdulkadir and attempting to intimidate and harm Abdulkadir; and that one of Ahmed's friends was dating a man who had been indicted in the prostitution investigation. Weyker knowingly gave false information to Beeks. She had no information or documentation that Ahmed, Mohamud, and the other individual were actively looking for Abdulkadir and attempting to intimidate or harm Abdulkadir. Weyker had no information that one of Ahmed's friends was dating a man who had been indicted in the prostitution investigation.

After he spoke with Weyker, Beeks interviewed Abdulkadir about the altercation. Abdulkadir told Beeks that the altercation started with a casual conversation. Abdulkadir did not say anything about having a dispute with Ahmed, Mohamud, and the other individual; about Ahmed, Mohamud, and the other individual making any threats; about the prostitution investigation or her role in it; about Ahmed, Mohamud, and the other individual having a knife; about why she agreed to fight Ahmed; or about being injured by a knife. Beeks determined that Abdulkadir had not attempted to call 911 and that she instead obtained a knife, proceeded downstairs, and smashed the windshield of Ahmed's car. Abdulkadir admitted to Beeks that she struck the other individual with the knife.

In addition to speaking with Beeks, Weyker spoke with a Minneapolis police sergeant, Gary Manty, on June 16, 2011. Weyker gave Manty false information: that a friend of Ahmed and Mohamud had stated to Abdulkadir that her friends were incarcerated because of Abdulkadir; that the incarcerated individuals were Somali Outlaws; that a friend of Ahmed and Mohamud was acquainted with a man who had been indicted in the prostitution investigation; that Ahmed, Mohamud, and the other individual went to Abdulkadir's apartment building to intimidate Abdulkadir about being a federal witness against individuals who were arrested and charged in the prostitution investigation; and that Abdulkadir feared for her life and feared retaliation because of her involvement in the prostitution investigation.

Weyker provided the false information to Beeks and Manty to shield Abdulkadir from arrest. Weyker sought to assist Abdulkadir to avoid criminal charges so as to provide Abdulkadir an incentive to continue to work with Weyker by fabricating evidence and providing false testimony in the prostitution investigation.

Beeks arrested Ahmed, Mohamud, and the other individual on suspicion of tampering with a federal witness. While transporting them to jail, Beeks told them they were arrested because of the assertions Weyker had made about them.

On June 17, 2011, Weyker executed a federal criminal complaint and a supporting affidavit against Ahmed, Mohamud, and the other individual for tampering

with a federal witness and obstructing the prostitution investigation. Weyker included false information in the criminal complaint. For instance, Weyker stated the altercation was related to the prostitution investigation, but she knew there were no facts to support the assertion. Weyker stated the friend of Ahmed and Mohamud confronted Abdulkadir because Abdulkadir was the reason her friends were incarcerated, but Weyker knew there was no factual basis to support the statement. Weyker claimed that Abdulkadir had been attacked with a knife and injured, but Weyker knew there was no evidence that Abdulkadir was attacked with a knife or injured. Weyker stated that Ahmed, Mohamud, or the other individual chased Abdulkadir outside with a knife, but Weyker knew Ahmed, Mohamud, and the other individual did not have a knife and did not chase Abdulkadir. Weyker asserted that Ahmed, Mohamud, or the other individual attacked Abdulkadir's mother, but Weyker knew nobody had attacked Abdulkadir's mother. Weyker stated that Ahmed, Mohamud, and the other individual had threatened Abdulkadir about putting people in jail, but Weyker knew no such threats were made.

Weyker did not provide exculpatory evidence in the criminal complaint and supporting affidavit. For example, Weyker did not state that Ahmed, Mohamud, and the other individual called 911 to report being assaulted by Abdulkadir. Weyker did not stated that Abdulkadir contacted Weyker while hiding from the Minneapolis police out of fear of being arrested for assaulting Mohamud, Ahmed, and the other individual.

Weyker did not state that that there was no record of Mohamud, Ahmed, and the other individual being involved with the individuals who were indicted in the prostitution investigation. Weyker did not state that there was no record of Mohamud, Ahmed, and the other individual communicating with Abdulkadir about the prostitution investigation. Weyker did not state that the on-scene investigator's interview with Abdulkadir revealed no statement about Mohamud, Ahmed, and the other individual threatening Abdulkadir; no statement about Mohamud, Ahmed, and the other individual attacking Abdulkadir with a knife; and no statement about Mohamud, Ahmed, and the other individual mentioning Abdulkadir's role as a witness in the prostitution investigation.

On June 17, 2011, warrants to arrest Mohamud and Ahmed were issued, and they were placed in federal custody. They were indicted on June 29, 2011, for violating federal laws. From June 17, 2011, to July 30, 2013, Ahmed remained in federal custody. She was acquitted of all charges after a jury trial. From June 17, 2011, to July 10, 2013, when all charges against her were dismissed, Mohamud remained in federal custody. She was subject to supervised release for a short time.

II. DISCUSSION

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff satisfies this requirement by "plead[ing] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678.

In considering a motion to dismiss for failure to state a claim, "a district court generally may not consider materials outside the pleadings." *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 982 (8th Cir. 2008). A district court may "consider some public records, materials that do not contradict the complaint, or materials that are 'necessarily embraced by the pleadings.'" *Id.*

"[D]efendants seeking dismissal under Rule 12(b)(6) based on an assertion of qualified immunity 'must show that they are entitled to qualified immunity on the face of the complaint.'" *Kulkay v. Roy*, 847 F.3d 637, 642 (8th Cir. 2017) (alteration in original) (quoting *Carter v. Huterson*, 831 F.3d 1104, 1107 (8th Cir. 2016)); *accord Stanley v. Finnegan*, 899 F.3d 623, 627 (8th Cir.

2018); *Kiesling v. Holladay*, 859 F.3d 529, 533 (8th Cir. 2017). "The doctrine of qualified immunity generally shields public and government officials performing discretionary functions from civil liability 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Kulkay*, 847 F.3d at 642 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "To determine whether a defendant is entitled to dismissal on the basis of qualified immunity, we consider '(1) whether the official's conduct violated a constitutional right; and (2) whether the violated right was clearly established.'" *Stanley*, 899 F.3d at 627 (quoting *Manning v. Cotton*, 862 F.3d 663, 668 (8th Cir. 2017)).

The parties presented matters outside the pleadings in connection with Weyker's motions to dismiss. The Court excludes them. *See* Fed. R. Civ. P. 12(d); *Covey v. Assessor of Ohio Cty.*, 777 F.3d 186, 193 & n.7 (4th Cir. 2015) ("Although some of the parties' filings (such as the criminal complaint) could have been used for limited purposes . . . any disputed testimony contained therein should have been ignored in favor of the complaint's allegations. Perhaps more simply, the court could have wholly ignored such attachments and relied exclusively on the complaint." (citation omitted)); *Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 701 (8th Cir. 2003) (quotation omitted) (stating a court has complete discretion to determine whether to accept any material beyond the pleadings offered in connection with a Rule 12(b)(6) motion); *cf. Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006)

("[A]lthough the final determination of March 2005 and Massie's testimony may be public records of which a court may take judicial notice, 'it may do so on a motion to dismiss only to establish the existence of the opinion, not for the truth of the facts asserted in the opinion.'").

"A warrantless arrest is consistent with the Fourth Amendment if it is supported by probable cause, and an officer is entitled to qualified immunity if there is at least 'arguable probable cause.'" *Ulrich v. Pope Cty.*, 715 F.3d 1054, 1059 (8th Cir. 2013) (quoting *Borgman v. Kedley*, 646 F.3d 518, 522-23 (8th Cir. 2011)). "Probable cause exists if the totality of facts based on reasonably trustworthy information would justify a prudent person in believing the individual arrested had committed an offense." *Small v. McCrystal*, 708 F.3d 997, 1003 (8th Cir. 2013) (quoting *Copeland v. Locke*, 613 F.3d 875, 879 (8th Cir. 2010)). "Arguable probable cause exists even where an officer mistakenly arrests a suspect believing it is based in probable cause if the mistake is 'objectively reasonable.'" *Ulrich*, 715 F.3d at 1059 (quoting *Borgman*, 646 F.3d at 523). "The probable cause standard inherently allows room for reasonable mistakes by a reasonable person, but the qualified immunity standard affords law enforcement officials an even wider berth for mistaken judgments 'by protecting all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Hunter v. Bryant*, 502 U.S. 224, 229 (1991)).

"A warrant based upon an affidavit containing 'deliberate falsehood' or 'reckless disregard for the truth'

violates the Fourth Amendment." *Small*, 708 F.3d at 1006 (quoting *Bagby v. Brondhaver*, 98 F.3d 1096, 1098 (8th Cir. 1996)). "[W]hen a police officer deliberately or recklessly makes false statements to demonstrate probable cause for an arrest warrant, the warrant may be invalidated" under *Franks v. Delaware*, 438 U.S. 154 (1978). *Williams v. City of Alexander*, 772 F.3d 1307, 1311 (8th Cir. 2014). "To establish a *Franks* violation, the plaintiff must prove '1) that a false statement knowingly and intentionally, or with reckless disregard to the truth, was included in the affidavit, and 2) that the affidavit's remaining content is insufficient to provide probable cause.'" *Id.* (quoting *United States v. Box*, 193 F.3d 1032, 1034-35 (8th Cir. 1999)). "Under *Franks*, [a plaintiff] can challenge the affidavit based on the omission of facts by proving '1) that facts were omitted with the intent to make, or in reckless disregard of whether they thereby make, the affidavit misleading, and 2) that the affidavit, if supplemented by the omitted information, could not support a finding of probable cause.'" *Id.* at 1312 (quoting *Box*, 193 F.3d at 1035).

"It is clearly established that a warrantless arrest, unsupported by probable cause, violates the Fourth Amendment." *Dowell v. Lincoln Cty.*, 762 F.3d 770, 777 (8th Cir. 2014) (quoting *Small*, 708 F.3d at 1003). It is also clearly established that "a seizure without 'a truthful factual showing sufficient to constitute probable cause' violates the Fourth Amendment." *Livers v. Schenck*, 700 F.3d 340, 357 (8th Cir. 2012) (quoting *Hedges v. Poletis*, 177 F.3d 1071, 1074 (8th Cir. 1999)).

Weyker asserted that she is entitled to qualified immunity because "probable cause existed for Officer Beeks to arrest Plaintiffs independent of any information provided by Officer Weyker"; "Plaintiffs' initial arrest complied with the Fourth Amendment because probable cause existed for other crimes"; "the federal criminal complaint filed by Officer Weyker was supported by probable cause"; "Plaintiffs' assertions of innocence and reliance on the judicial opinions in the sex trafficking cases lend no plausibility to a Fourth Amendment violation"; and "Plaintiffs' claims are barred because Plaintiffs did not mount a successful probable cause challenge during their criminal proceedings." Weyker's arguments relied heavily on matters outside the pleadings. According to the Ahmed's and Mohamud's amended complaints, Beeks regarded Ahmed and Mohamud as victims of a crime committed by Abdulkadir when he arrived on the scene on June 16, and nothing in his subsequent investigation, except the allegedly false information conveyed to him by Weyker, led him to believe that Ahmed or Mohamud had engaged in any criminal activity. Ahmed and Mohamud alleged that Weyker knowingly recounted a false narrative to support the criminal complaint against them. Given the allegations of Ahmed and Mohamud, their failures to successfully contest probable cause during their criminal cases do not vitiate their claims against Weyker. *See Manuel v. City of Joliet,* 137 S. Ct. 911, 919-20 (2017). The Court concludes that Ahmed and Mohamud plausibly alleged Weyker violated rights under the Fourth Amendment and that their allegedly violated rights were clearly established. *See Odom v.*

Kaizer, 864 F.3d 920, 922-23 (8th Cir. 2017); *Dowell*, 762 F.3d at 777; *Livers*, 700 F.3d at 357. At this stage of the litigation, Weyker is not entitled to qualified immunity.

In similar cases, the Court discerned no need to "decide whether the proper vehicle for [the plaintiff's] claims is a § 1983 or Bivens cause of action." *Osman v. Weyker*, Case No. 16-cv-908 (JNE/TNL), 2017 WL 3425647, at *6-7 (D. Minn. Aug. 9, 2017), *appeal docketed*, No. 17-3209 (8th Cir. Oct. 13, 2017); *see Yassin*, 2017 WL 3425689, at *3 n.5. The Court does the same here.

III. CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Weyker's motions to dismiss [Docket No. 15 in Case No. 17-cv-2069; Docket No. 16 in Case No. 17-cv-2070] are DENIED.

Dated: September 18, 2018

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3461

Hawo O. Ahmed

Appellee

v.

Heather Weyker, in her individual capacity as a St. Paul Police Officer

Appellant

No: 18-3471

Hamdi A. Mohamud

Appellee

v.

Heather Weyker, in her individual capacity as a St. Paul Police Officer

Appellant

Appeals from U.S. District Court
for the District of Minnesota
(0:17-cv-02070-JNE)
(0:17-cv-02069-JNE)

Appendix C

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 16, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Ifrah Yassin,

Plaintiff,

v.

Heather Weyker, individually and in her fficial capacity as a St. Paul Police Officer; John Does 1–2, individually and in their official capacities as St. Paul Police Officers; John Does 3–4, individually and in their official capacities as supervisory members of the St. Paul Police Department; and The City of St. Paul,

Defendants.

Case No. 16-cv-2580 (JNE/TNL)
ORDER

Zane A. Umsted and Joshua A. Newville, Madia Law LLC, appeared for Ifrah Yassin.

Glenn Greene and David G. Cutler, United States Department of Justice, appeared for Heather Weyker.

Filed: September 30, 2020

Ifrah Yassin asserted claims against the City of St. Paul and members of the St. Paul Police Department under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of the Fourth, Fifth, Sixth,

and Fourteenth Amendments. In August 2017, the Court dismissed Yassin's claims against the City of St. Paul and John Does 3–4; dismissed Yassin's claims against Heather Weyker for violations of the Fifth, Sixth, and Fourteenth Amendments; and denied Weyker's motion to dismiss Yassin's claims under § 1983 and *Bivens* for violations of the Fourth Amendment.[1] Order 13, Aug. 9, 2017, ECF No. 47. Weyker appealed. The United States Court of Appeals for the Eighth Circuit "affirm[ed] the denial of Weyker's motion to dismiss Yassin's unlawful-arrest claim and remand[ed] her case for further proceedings consistent with [its] opinion." *Farah v. Weyker*, 926 F.3d 492, 503–04 (8th Cir. 2019).[2] On remand, Weyker moved for summary judgment. For the reasons set forth below, the Court grants Weyker's motion.

I. BACKGROUND

On June 16, 2011, Yassin, Hamdi Mohamud, and Hawo Ahmed were involved in an altercation with Muna Abdulkadir. The incident took place at Abdulkadir's apartment building in Minneapolis, Minnesota. The four entered an elevator, where the altercation took place. Abdulkadir eventually exited the elevator, and the other three descended in the elevator.

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[1] Yassin's claims against John Does 1–2 were dismissed without prejudice by stipulation.

[2] "To the extent Yassin is . . . suing for damages arising out of her post-arrest indictment, the claim must proceed, if at all, under section 1983." *Farah*, 926 F.3d at 503 n.2.

Abdulkadir retrieved a knife from her apartment, proceeded downstairs with her mother and her brother, and exited the building. Abdulkadir approached Ahmed's vehicle and smashed its windshield with the knife. A short time later, Yassin, Ahmed, and Mohamud exited the building. Abdulkadir slapped Yassin with the knife. Yassin called 911 and reported that Abdulkadir had slapped her with a knife and smashed the windshield.

After Yassin called 911, Abdulkadir and her family members returned to their apartment. Fearing arrest, Abdulkadir went to a neighbor's apartment and called Weyker, a St. Paul police officer and, from August 2010 to August 2014, a Special Deputy United States Marshal. Weyker's duties as a Special Deputy United States Marshal included investigative work on a federal task force whose efforts led to the indictments of approximately 30 individuals in 2010 in the Middle District of Tennessee. Abdulkadir was a witness in that investigation.

A Minneapolis police officer, Anthijuan Beeks, responded to the 911 call made by Yassin. Beeks interviewed Yassin, Ahmed, and Mohamud while other officers attempted to locate Abdulkadir. Yassin and Ahmed told Beeks that they had been in an altercation with Abdulkadir and that Abdulkadir was the aggressor. Yassin told Beeks about Abdulkadir's use of the knife and damage to Ahmed's car. Mohamud told Beeks she had witnessed the events but did not participate in them.

Approximately 15 or 20 minutes after he arrived on the scene, Beeks received a message to call Weyker. Beeks called Weyker, who introduced herself as a St. Paul police officer. Weyker also introduced the other law enforcement officers who were on the call. Weyker told Beeks that Abdulkadir was a witness in a federal prostitution investigation; that the investigation resulted in the indictment of 30 Somali males; and that Weyker had information and documentation that Yassin, Ahmed, and Mohamud were looking for Abdulkadir to intimidate her or cause bodily harm to her.

Beeks decided to speak to Yassin, Ahmed, and Mohamud separately. He placed Yassin in the back of a squad car. Yassin told Beeks that she struck Abdulkadir after Abdulkadir hit Ahmed, who was pregnant, in the stomach. Yassin denied knowing about the federal prostitution investigation, acknowledged rumors of 30 men being locked up, and asserted that Abdulkadir was a prostitute.

Beeks continued his investigation. He viewed several videos taken by cameras in the apartment building. One shows Abdulkadir, Yassin, Ahmed, and Mohamud entering the elevator. Another shows Abdulkadir running from the elevator as Yassin and Ahmed chase and strike Abdulkadir.

After he viewed the videos, Beeks located Abdulkadir and interviewed her. Abdulkadir told Beeks that Yassin, Ahmed, and Mohamud attacked Abdulkadir in the elevator, that one of the three stopped the elevator by pressing a "stop" button, that Abdulkadir was able

to make the elevator move again, and that Abdulkadir was able to escape the three when the elevator doors opened. Abdulkadir also told Beeks that she took a knife from her apartment, that she smashed the windshield, and that she struck Yassin with the knife.

Additional law enforcement officers were present at the scene. They included agents from the Federal Bureau of Investigation and a sergeant from the Minneapolis Police Department, Gary Manty. Beeks spoke with one of the agents after the agent interviewed Yassin and Ahmed. Beeks also conferred with Manty, who had spoken with Weyker. She told Manty that Yassin, Ahmed, and Mohamud were attempting to intimidate Abdulkadir because Abdulkadir was a witness in a federal sex-trafficking case. Yassin, Ahmed, and Mohamud were arrested.

On June 17, 2011, the United States filed a criminal complaint against Yassin in the Middle District of Tennessee. The United States charged Yassin with retaliation against a witness. Weyker signed the criminal complaint, submitted an affidavit in support of it, and identified herself as an FBI Task Force Officer and St. Paul Police Officer. On June 29, 2011, Yassin was indicted in the Middle District of Tennessee for retaliation against a witness and obstruction. In July 2013, a jury found her not guilty of all charges.

Three years after her acquittal, Yassin brought this action. She alleged that Weyker "did not have 'information and documentation' that Yassin, Ahmed, and Mohamud had been actively seeking out Abdulkadir to

intimidate her and cause bodily harm to her because of her role in the federal investigation"; that Weyker "had no 'information or documentation' of any kind regarding Yassin, Ahmed, and Mohamud – the first time that she even heard of any of them was on June 16, 2011 – the day of the incident"; and that "[t]he reason that Officer Weyker provided false information to Officer Beeks is that Abdulkadir was a lynchpin of Weyker's manufactured human-trafficking case against approximately 30 Somali males." (Compl. ¶¶ 21, 24)

II. DISCUSSION

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To support an assertion that a fact cannot be or is genuinely disputed, a party must cite "to particular parts of materials in the record," show "that the materials cited do not establish the absence or presence of a genuine dispute," or show "that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A)–(B). "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). In determining whether summary judgment is appropriate, a court must view genuinely disputed facts in the light most favorable to the nonmovant, *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009), and draw all justifiable inferences from the evidence in the nonmovant's favor, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Weyker moved for summary judgment, asserting that Yassin cannot sue Weyker under § 1983, that Yassin cannot sue Weyker under *Bivens*, and that Weyker is entitled to qualified immunity. Yassin maintained that Weyker is "subject to liability under § 1983"; that, in the alternative, "Yassin's claim may proceed under *Bivens*"; and that Weyker is not entitled to qualified immunity.

A. Section 1983

Weyker asserted that Yassin cannot sue Weyker under § 1983 because Weyker did not act under color of state law. According to Yassin, Weyker's "emphasis of her St. Paul credentials during the course of her misconduct . . . makes her a state actor." In addition, Yassin maintained that Weyker is subject to liability under § 1983 under theories of "dual employment" or "joint activity."

Section 1983 states:

> 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 . . . .

42 U.S.C. § 1983. A plaintiff asserting a claim under § 1983 must show that she "has been deprived 'of a right secured by the "Constitution and laws" of the United States' and that the defendant acted 'under color of any statute . . . of any State.'" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 931 (1982) (alteration in original) (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970)); *see West v. Atkins*, 487 U.S. 42, 48 (1988) ("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."). "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.'" *West*, 487 U.S. at 49 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). "Conduct causing a deprivation of civil rights must be 'fairly attributable' to the state to be considered under color of state law." *Smith v. Insley's Inc.*, 499 F.3d 875, 880 (8th Cir. 2007) (quoting *Lugar*, 457 U.S. at 937). "The defendant must act or purport to act 'in the performance of official duties, even if he oversteps his authority and misuses power.' Acts of officials in 'the ambit of their personal pursuits are plainly excluded' from Section 1983 liability." *Magee v. Trs. of Hamline Univ.*, 747 F.3d 532, 535 (8th Cir. 2014) (citation omitted) (quoting *Johnson v. Phillips*, 664 F.3d 232, 240 (8th Cir. 2011), and *Dossett v. First State Bank*, 399 F.3d 940, 949 (8th Cir. 2005)). "[W]hether a police officer is acting under color of state

law turns on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties." *Id.* (alteration in original) (quoting *Roe v. Humke*, 128 F.3d 1213, 1216 (8th Cir. 1997)). Section 1983 "is inapplicable to persons acting under color of federal law." *Haley v. Walker*, 751 F.2d 284, 285 (8th Cir. 1984) (per curiam).

"The Fourth Amendment . . . requires that an officer have probable cause before making a warrantless arrest. Probable cause exists when a police officer has reasonably trustworthy information that is sufficient to lead a person of reasonable caution to believe that the suspect has committed or is committing a crime." *Veatch v. Bartels Lutheran Home*, 627 F.3d 1254, 1257 (8th Cir. 2010) (citation omitted). "[P]retrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case. The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements." *Manuel v. City of Joliet*, 137 S. Ct. 911, 918 (2017) (citation omitted); *see Stewart v. Wagner*, 836 F.3d 978, 983 (8th Cir. 2016). If the legal proceeding used to establish probable cause is tainted such that probable cause is lacking, "then the ensuing pretrial detention violates the confined person's Fourth Amendment

rights." *Manuel*, 137 S. Ct. at 920 n.8 (rejecting view that a grand jury indictment "does expunge such a Fourth Amendment claim"); *see King v. Harwood*, 852 F.3d 568, 587–88 (6th Cir. 2017).

Weyker asserted that Yassin cannot sue Weyker under § 1983 because Weyker did not act under color of state law. Weyker stated that she "was deputized as a Special Deputy U.S. Marshal, sponsored by the FBI, from August 24, 2010, through August 31, 2014"; that her "duties as a Special Deputy included investigative work on a task force supporting the FBI's investigation of approximately 30 subjects associated with Somali gangs"; and that the investigation led to a federal sex-trafficking prosecution "that Yassin was later accused of obstructing." Because she "was federally deputized when Yassin was arrested for tampering with the federal prosecution that Weyker was supporting as a federal officer," Weyker asserted that "§ 1983 is not available to challenge [Yassin's] arrest."

Yassin responded that she may sue Weyker under § 1983 because Weyker presented herself as a St. Paul police officer when she spoke to Beeks on June 16, 2011; Weyker drafted her police report as a St. Paul police officer; and Weyker worked with Abdulkadir "for nearly a year before she was deputized." In addition, Yassin asserted that Weyker is liable under § 1983 based on Weyker's "dual employment":

> While Weyker emphasizes her federal credentials, there can be no dispute that she was also employed by the St. Paul Police Department

> during the relevant period of time. As such, her decision to wield state-level authority against Ms. Yassin supports a § 1983 [claim], regardless of the extent of her federal employment.

Finally, Yassin maintained that Weyker "engaged in a joint activity supporting § 1983 liability" by "roping in state actors (Office[r] Beeks and Sergeant Manty) as unknowing dupes in her efforts to violate Ms. Yassin's constitutional rights."

Weyker's employment as a St. Paul police officer, her identification as a St. Paul police officer on her call with Beeks, her documentation of Yassin's arrest,[3] and Weyker's relationship with Abdulkadir before Weyker's deputation do not demonstrate that Weyker was acting under color of state law. *Cf. Magee*, 747 F.3d at 536 ("While his editorial noted he was an officer, this recites his occupation and does not necessarily indicate he was acting in his official capacity."). Weyker was a federally deputized member of a federal task force whose efforts yielded indictments against approximately 30 individuals in 2010 in the Middle District of Tennessee. Abdulkadir was a witness in that investigation. After she received a call from Abdulkadir, Weyker called Beeks. Federal law enforcement officers were also on the call. Weyker told Beeks that Abdulkadir was a witness in a federal prostitution investigation; that the investigation resulted in the indictment

[3] In her St. Paul Police Department supplemental offense/incident report, Weyker identified herself as an FBI Task Force Officer.

of 30 Somali males; and that Weyker had information and documentation that Yassin, Ahmed, and Mohamud were looking for Abdulkadir to intimidate her or cause bodily harm to her. As a federally deputized member of the task force, Weyker was not acting under color of state law when she allegedly violated Yassin's Fourth Amendment rights. *See King v. United States*, 917 F.3d 409, 433 (6th Cir. 2019) ("Although Detective Allen was a detective with the Grand Rapids Police and was therefore employed by the state, Detective Allen was working full time with an FBI task force at the time of the incident at issue. . . . As a deputized federal agent, Detective Allen carried federal authority and acted under color of that authority rather than under any state authority he may have had as a Grand Rapids Police detective."), *cert. granted sub nom. Brownback v. King*, 140 S. Ct. 2563 (2020), and *cert. denied*, 140 S. Ct. 2565 (2020); *Guerrero v. Scarazzini*, 274 F. App'x 11, 12 n.1 (2d Cir. 2008) ("Guerrero framed his false arrest claims against Scarazzini and McAllister as arising under 42 U.S.C. § 1983; however, because Scarazzini and McAllister were federally deputized for their Task Force work, this claim was properly brought (as the parties agree) as a *Bivens* action."); *DeMayo v. Nugent*, 517 F.3d 11, 14 n.5 (1st Cir. 2008) ("DeMayo originally brought his claims without knowledge that Nugent and Lugas were part of a DEA task force, rendering 42 U.S.C. § 1983 the appropriate avenue for relief, although his complaint does not explicitly indicate whether the action lay under § 1983 or *Bivens*. The parties and the district court, however, all treated the

suit as lying under *Bivens* after the officers' roles were revealed.").

As to Yassin's assertion of joint activity, she has not directed the Court to any evidence that supports her assertion. Instead, she characterized Beeks and Manty as "unknowing dupes" in Weyker's alleged "efforts to violate Ms. Yassin's constitutional rights." Yassin has not supported her assertion of "joint activity." *See Arar v. Ashcroft*, 585 F.3d 559, 568 (2d Cir. 2009) ("A federal officer who conspires with a state officer may act under color of state law; but since 'federal officials typically act under color of *federal* law,' they are rarely deemed to have acted under color of state law." (citation omitted)); *Premachandra v. Mitts*, 753 F.2d 635, 641 n.7 (8th Cir. 1985) (en banc) ("Conspiracies that make federal officials liable under section 1983 are not commonplace but nor are they unheard of."); *cf. Magee*, 747 F.3d at 536 ("To be liable under § 1983, a private actor must be a 'a willful participant in joint activity with the State' in denying a plaintiff's constitutional rights." (quoting *Dossett*, 399 F.3d at 947)). Yassin's claim against Weyker for violation of Yassin's Fourth Amendment rights may not proceed under § 1983.

B. *Bivens*

Weyker asserted that Yassin cannot sue Weyker under *Bivens*. Weyker asserted that Yassin's "evidence-fabrication claim presents a new *Bivens* context for which numerous special factors counsel hesitation."

Yassin responded that this Court previously concluded that her Fourth Amendment claim does not present a new context for a *Bivens* action, that the Eighth Circuit did not disturb this Court's resolution of the issue, and that "this Court's prior resolution of the issue remains the law of the case."

The Court previously declined to reach the question of whether Yassin's Fourth Amendment claim should be brought under § 1983 or *Bivens*:

> Because the Court finds that only the Fourth Amendment, and not substantive due process, is applicable; because a Fourth Amendment claim in this case does not present a new context for a *Bivens* action; and because § 1983 and *Bivens* claims are analyzed similarly, the Court does not reach the question of whether Yassin's claim should be brought under § 1983 or *Bivens*.

Order 7 n.5, Aug. 9, 2017, ECF No. 47. The Eighth Circuit did not decide that Yassin's claim is viable under *Bivens*. Instead, the court of appeals assumed it was and considered the issue of qualified immunity:

> Yassin's case is different. Her primary theory is that she was unlawfully arrested because Weyker falsely told another police officer that she was trying to intimidate a federal witness. We need not decide whether this theory of liability would require us to extend *Bivens*, because Weyker has not meaningfully briefed the point on appeal.

> Even if we assume that Yassin's unlawful-arrest claim is viable under *Bivens*, however, Weyker still claims that she is entitled to qualified immunity for every action she took during the investigation. So we must address the two familiar qualified-immunity questions: assuming Yassin's allegations are true, did Weyker violate her constitutional rights? And if so, were those rights clearly established? On both points, our review is de novo, and our answer is yes.

Farah, 926 F.3d at 503 (citations omitted) (footnote omitted).

This Court's statement in the August 9 Order that "a Fourth Amendment claim in this case does not present a new context for a *Bivens* action" is not the law of the case:

> We have described the law of the case doctrine as providing that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." The underlying intent of the doctrine is to "prevent[] the relitigation of settled issues in a case, thus protecting the settled expectations of parties, ensuring uniformity of decisions, and promoting judicial efficiency." The doctrine applies to appellate decisions, as well as to final decisions by the district court that have not been appealed. It does not apply to interlocutory orders, however, "for they can always be reconsidered and

> modified by a district court prior to entry of a final judgment."

First Union Nat'l Bank v. Pictet Overseas Tr. Corp., 477 F.3d 616, 620 (8th Cir. 2007) (alteration in original) (citations omitted); *see Gander Mountain Co. v. Cabela's, Inc.*, 540 F.3d 827, 830 (8th Cir. 2008) ("The doctrine applies to decisions made by appellate courts and final decisions made by district courts that have not been appealed."). The Court turns to whether Yassin's claim may proceed under *Bivens*.

"Determining whether an implied cause of action is available under *Bivens* involves two steps." *Farah*, 926 F.3d at 498. They are:

> First, we must determine whether the cases before us present one of "the three *Bivens* claims the Court has approved in the past" or whether, instead, allowing the plaintiffs to sue would require us to extend *Bivens* to a "new context." If there is a previously recognized *Bivens* claim alleged, then the cases may proceed. If not, then we advance to the second step and ask whether any "special factors counsel[] hesitation" before implying a new cause of action "in the absence of affirmative action by Congress." Only if we are confident that "the Judiciary is well suited . . . to consider and weigh the costs and benefits of allowing a damages action" will we take it upon ourselves to do so. Otherwise, we will leave the balancing to Congress.

Id. (alterations in original) (citations omitted) (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857–60 (2017)); *see*

Hernandez v. Mesa, 140 S. Ct. 735, 743 (2020). "The proper test for determining whether a case presents a new *Bivens* context is":

> If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. 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 1859–60.

Weyker asserted that "[t]he core holding of the Eighth Circuit's consolidated opinion in this matter is broad and unequivocal" and that the "holding applies with equal force to Yassin's 'primary theory' of *Bivens* liability—that Yassin 'was unlawfully arrested because Weyker falsely told another police officer that she was trying to intimidate a federal witness.'" The Court agrees.

"No Supreme Court case exactly mirrors the facts and legal issues presented here. The one that comes closest is *Bivens* itself. *Bivens* involved a claim against federal agents for an illegal arrest and warrantless search." *Farah*, 926 F.3d at 498 (citations omitted). "Weyker's alleged misdeeds [in this case] are different from those in *Bivens*, even if the 'constitutional right at issue' is the same. The agents in *Bivens* handcuffed and strip-searched the plaintiff and combed through his apartment, all without a warrant. Weyker did none of these things, nor anything similar." *Id.* at 498–99 (citations omitted). Yassin alleged that "she was unlawfully arrested because Weyker falsely told another police officer that [Yassin] was trying to intimidate a federal witness." *Id.* at 503.

In addition, "the mechanism of injury is different. In *Bivens*, the plaintiff's injuries—'humiliation, embarrassment, and mental suffering'—were directly caused by the officers' conduct." *Id.* at 499. Here, Weyker was not the arresting officer; she was not present at the scene. She passed on information to officers at the scene who investigated Yassin and others. The investigation included interviews of several individuals and review of video taken by cameras in the apartment building. Based on that investigation, Yassin was arrested.

Finally, "recognizing an implied cause of action here would pose a greater risk of interference with the other branches of government than it did in *Bivens*." *Id.* "The initial step would be to discover what Weyker said, to whom she said it, and when. The information

Weyker provided to investigators . . . would then need to undergo examination for its truth or falsity. For any false information she provided, the question would be whether the evidence was material. The determination would center on whether other evidence available to investigators . . . would have independently led them to . . . detain" Yassin. *Id.*

"By any measure, [Yassin's claim is] meaningfully different from the Fourth Amendment claim at issue in *Bivens*. [She] does not allege [Weyker] entered [her] home without a warrant or violated [her] rights of privacy." *Cantú v. Moody*, 933 F.3d 414, 423 (5th Cir. 2019), *cert. denied*, 207 L. Ed. 2d 1052 (2020); *see Farah*, 926 F.3d at 500.

Weyker asserted that the Court "should not extend or assume the existence of a *Bivens* remedy for Yassin's claim for the same panoply of special factors that gave the Eighth Circuit 'pause' with respect to the related claims against Officer Weyker." The Court agrees. To prevail, Yassin needs "to show that Weyker's allegedly false information was what established probable cause" for Yassin's arrest. *Farah*, 926 F.3d at 500. That "after-the-fact inquir[y] . . . pose[s] a risk of intrusion on executive-branch authority to enforce the law and prosecute crimes." *Id.* at 501. "Another 'special factor counselling hesitation' is what Congress has already done to address injuries of the sort" Yassin has allegedly suffered. *Id.* at 501. "[T]he existence of a statutory scheme for torts committed by federal officers" is yet another. *Cantú*, 933 F.3d at 423. The Court

concludes that Yassin's Fourth Amendment claim is not viable under *Bivens*.[4]

III. CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Weyker's Motion for Summary Judgment [Docket No. 74] is GRANTED.

2. Yassin's Complaint is DISMISSED WITH PREJUDICE as to Heather Weyker, John Does 3–4, and the City of St. Paul.

LET JUDGMENT BE ENTERED ACCORDINGLY.

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

[4] Having concluded that Yassin's Fourth Amendment claims against Weyker may not proceed under § 1983 or *Bivens*, the Court need not consider the arguments regarding qualified immunity. *See Neb. Beef, Ltd. v. Greening*, 398 F.3d 1080, 1085 (8th Cir. 2005) ("Because we resolve the instant case on the lack of a *Bivens* remedy, we do not reach the issue of qualified immunity.").

Appendix E

United States Court of Appeals
for the Eighth Circuit

No. 17-3207

Yasin Ahmed Farah

Plaintiff - Appellee

v.

Heather Weyker, individually and in her official capacity as a St. Paul Police Officer

Defendant - Appellant

The City of St. Paul; John Does 1–5, in their individual capacities as St. Paul Police Officers; Richard Roes 1–5, in their individual capacities as federal law enforcement officers

Defendants

The Human Trafficking Institute

Amicus on Behalf of Appellant

Appendix E

No. 17-3208

Ifrah Yassin

Plaintiff - Appellee

v.

Heather Weyker, individually and in her official capacity as a St. Paul Police Officer

Defendant - Appellant

The City of St. Paul; John Does 1–2, individually and in their official capacities as St. Paul Police Officers; John Does 3–4, individually and in their official capacities as supervisory members of the St. Paul Police Department

Defendants

The Human Trafficking Institute

Amicus on Behalf of Appellant

Appendix E

No. 17-3209

Hamdi Ali Osman

Plaintiff - Appellee

v.

Heather Weyker, in her individual capacity as a St. Paul Police Officer

Defendant - Appellant

The City of St. Paul; John Bandemer, in his individual and official capacities as a St. Paul Police Sergeant; Robert Roes 4–6, in their individual and official capacities as supervisory members of the St. Paul Police Department

Defendants

The Human Trafficking Institute

Amicus on Behalf of Appellant

Appendix E

No. 17-3210

Ahmad Abnulnasir Ahmad

Plaintiff - Appellee

v.

Heather Weyker, in her individual capacity as a St. Paul Police Officer

Defendant - Appellant

The City of St. Paul; John Bandemer, in his individual and official capacities as a St. Paul Police Sergeant; John Does 1–2, in their individual capacities as St. Paul Police Officers; John Does 3–4, in their individual and official capacities as supervisory members of the St. Paul Police Department

Defendants

The Human Trafficking Institute

Amicus on Behalf of Appellant

Appendix E

No. 17-3212

Bashir Yasin Mohamud

Plaintiff - Appellee

v.

Heather Weyker, in her individual capacity as a St. Paul Police Officer

Defendant - Appellant

The City of St. Paul; John Bandemer, in his individual and official capacities as a St. Paul Police Sergeant; John Does 1–2, in their individual capacities as St. Paul Police Officers; John Does 3–4, in their individual and official capacities as supervisory members of the St. Paul Police Department

Defendants

The Human Trafficking Institute

Amicus on Behalf of Appellant

Appendix E

No. 17-3213

Mohamed Amalle

Plaintiff - Appellee

v.

Heather Weyker, in her individual capacity as a St. Paul Police Officer

Defendant - Appellant

The City of St. Paul; John Bandemer, in his individual and official capacities as a St. Paul Police Sergeant; John Does 1–2, in their individual capacities as St. Paul Police Officers; John Does 3–4, in their individual and official capacities as supervisory members of the St. Paul Police Department

Defendants

The Human Trafficking Institute

Amicus on Behalf of Appellant

Appeals from United States District Court for the District of Minnesota - Minneapolis

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Submitted: November 14, 2018
Filed: June 12, 2019

Appendix E

Before COLLOTON, SHEPHERD, and STRAS, Circuit Judges.

STRAS, Circuit Judge.

If a federal law-enforcement officer lies, manipulates witnesses, and falsifies evidence, should the officer be liable for damages? We hold that the Constitution does not imply a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), so the answer must come from Congress, not from us. And Congress has, so far, answered no.

I.

In 2008, police officers in St. Paul, Minnesota, were investigating a suspected sex-trafficking operation involving minors. After one alleged victim was reported missing in Minneapolis and then turned up in Nashville, federal investigators in Tennessee became involved too. The government eventually charged thirty people with a variety of crimes allegedly arising out of an extensive conspiracy that spanned ten years and four states.

The cases against nine of the defendants, including Ahmad Ahmad and Mohamed Amalle, proceeded to trial in the Middle District of Tennessee. The jury acquitted some, while the district court acquitted the others after the jury found them guilty. *See United States*

v. Adan, 913 F. Supp. 2d 555, 579 (M.D. Tenn. 2012). In affirming, the Sixth Circuit expressed "acute concern, based on [a] painstaking review of the record, that this story of sex trafficking and prostitution may be fictitious." *United States v. Fahra*, 643 F. App'x 480, 484 (6th Cir. 2016) (unpublished). Prosecutors dropped the charges against the remaining defendants, including Yasin Farah, Hamdi Osman, and Bashir Mohamud.

Ahmad, Amalle, Farah, Osman, and Mohamud each sued Officer Heather Weyker, who had led the investigation for the St. Paul Police Department. They accused Weyker of exaggerating and inventing facts in reports, hiding evidence that would have exonerated them, and pressuring and manipulating the alleged victims into lying. She deceived prosecutors, the grand jury, and other investigators, according to the complaints filed in each case, about the ages of the alleged victims, whether the victims were coerced into sex, and the relationships among the supposed conspirators. By doing so, the plaintiffs claimed, Weyker caused them to be charged and detained for periods ranging from four months to over three years, all in violation of the Fourth Amendment's prohibition on unreasonable seizures. *See Manuel v. City of Joliet*, 137 S. Ct. 911, 919–20 (2017).

A sixth plaintiff, Ifrah Yassin, was not part of the alleged federal conspiracy. Rather, according to Yassin's complaint, she was arrested for witness intimidation based on false information from Weyker. The arrest arose out of a fight between a cooperating

witness in the sex-trafficking investigation and one of Yassin's friends. After the fight started, Yassin called 911 and the witness called Weyker. Weyker then told the officer responding to the 911 call that, based on "information and documentation," Yassin and her friends were trying to intimidate the witness and prevent her from cooperating in a federal investigation. Relying on Weyker's tip, the officer arrested Yassin, who was later charged with witness tampering and obstruction of justice. A jury acquitted her of both charges.

The crux of Yassin's case against Weyker is that no "information and documentation" ever existed. Rather, Weyker caused Yassin's unlawful arrest and detention by lying about the reason for the altercation.

All six, including Yassin, sought damages. Recognizing that Weyker had been deputized as a U.S. Marshal toward the conclusion of the joint investigation, they pleaded causes of action under both 42 U.S.C. § 1983, which authorizes constitutional claims against state officials; and *Bivens*, which operates similarly against federal officials, notwithstanding the absence of a statutory cause of action, *see* 403 U.S. at 397. Weyker moved to dismiss, arguing that neither theory was viable. She reasoned that section 1983 did not apply to her because she was a deputized federal official. As for *Bivens*, she claimed that nothing she was accused of doing was actionable. And even assuming the plaintiffs could sue her, she added, she was entitled to qualified immunity because the facts they alleged did not show

that she had violated their clearly established constitutional rights.

The district court disagreed. It concluded that even if Weyker was right that *Bivens* was the plaintiffs' only remedy, the claims against her could still proceed. Weyker immediately appealed, *see Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007) (holding that the courts of appeals have jurisdiction to hear interlocutory appeals challenging "the recognition of the entire [*Bivens*] cause of action" in qualified-immunity cases), and we consolidated all six appeals in light of the overlapping facts and legal issues involved.

II.

We begin with the five plaintiffs charged in the original conspiracy prosecution. The threshold question is whether their cases are the type for which a *Bivens* remedy is available. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (holding that a federal employee demoted for exercising his First Amendment rights did not have a *Bivens* claim). We address this "purely legal question" de novo. *Neb. Beef, Ltd. v. Greening*, 398 F.3d 1080, 1083 (8th Cir. 2005).

On only three occasions has the Supreme Court implied a cause of action under *Bivens*. *See Carlson v. Green*, 446 U.S. 14, 16–18 (1980); *Davis v. Passman*, 442 U.S. 228, 248 (1979); *Bivens*, 403 U.S. at 397. Since then, the Court has become "far more cautious" and has, in fact, "'consistently refused to extend *Bivens* to

any new context or new category of defendants'" for almost forty years. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855, 1857 (2017) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). Recognizing that the *Bivens* inquiry is about "*who* should decide" whether to create a new cause of action, the Court has answered "most often . . . Congress." *Id.* at 1857 (emphasis added) (citation omitted).

Determining whether an implied cause of action is available under *Bivens* involves two steps. First, we must determine whether the cases before us present one of "the three *Bivens* claims the Court has approved in the past" or whether, instead, allowing the plaintiffs to sue would require us to extend *Bivens* to a "new context." *Id.* at 1859–60. If there is a previously recognized *Bivens* claim alleged, then the cases may proceed. If not, then we advance to the second step and ask whether any "special factors counsel[] hesitation" before implying a new cause of action "in the absence of affirmative action by Congress." *Id.* at 1857 (citation omitted). Only if we are confident that "the Judiciary is well suited . . . to consider and weigh the costs and benefits of allowing a damages action" will we take it upon ourselves to do so. *Id.* at 1858. Otherwise, we will leave the balancing to Congress.

A.

No Supreme Court case exactly mirrors the facts and legal issues presented here. *See id.* at 1859–60

(explaining that the comparison is to Supreme Court cases). The one that comes closest is *Bivens* itself. *See Bivens*, 403 U.S. at 389–90; *cf. Carlson*, 446 U.S. at 16 n.1, 18–23 (allowing a claim against federal prison officials who failed to treat a prisoner's asthma); *Davis*, 442 U.S. at 230, 236–48 (permitting a congressman's administrative assistant to sue after he fired her). *Bivens* involved a claim against federal agents for an illegal arrest and warrantless search. *See* 403 U.S. at 389. Here, the allegations are that a federally deputized officer duped prosecutors and a grand jury into believing that the plaintiffs were part of a multi-state sex-trafficking conspiracy.

To determine whether the differences "are meaningful enough to make [this] context a new one," the Supreme Court has instructed us to consider several factors, including:

> 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; [and] the presence of potential special factors that previous *Bivens* cases did not consider.

Abbasi, 137 S. Ct. at 1859–60 (emphasizing that this list is illustrative, not "exhaustive"). The cases before us are meaningfully different from *Bivens* in three ways.

First, Weyker's alleged misdeeds are different from those in *Bivens*, even if the "constitutional right at issue" is the same. *Id.* at 1860. The agents in *Bivens* handcuffed and strip-searched the plaintiff and combed through his apartment, all without a warrant. *See* 403 U.S. at 389. Weyker did none of these things, nor anything similar. She spoke to witnesses, drafted reports, and shared information with prosecutors and other investigators. These information-gathering and case-building activities are a different part of police work than the apprehension, detention, and physical searches at issue in *Bivens*.

Second, the mechanism of injury is different. In *Bivens*, the plaintiff's injuries—"humiliation, embarrassment, and mental suffering"—were directly caused by the officers' conduct. *Id.* at 389–90. Here, by contrast, Weyker's actions injured the plaintiffs through a series of intervening steps. And those intervening steps involved decisions by independent legal actors—the prosecutors who chose to pursue charges against the plaintiffs, the grand jury that voted to indict them, and the judges and magistrates who approved their continued detention. This indirect mechanism of injury bears little resemblance to the straightforward claims from *Bivens*.

Third, recognizing an implied cause of action here would pose a greater risk of interference with the other branches of government than it did in *Bivens*. *See Abbasi*, 137 S. Ct. at 1860. Probing the causal chain in cases like these would involve delving into the evidence before numerous decisionmakers, including federal investigators, prosecutors, and the grand jury. The initial step would be to discover what Weyker said, to whom she said it, and when. The information Weyker provided to investigators, prosecutors, and the grand jury would then need to undergo examination for its truth or falsity. For any false information she provided, the question would be whether the evidence was material. The determination would center on whether other evidence available to investigators and prosecutors would have independently led them to charge or detain the plaintiffs. *Cf. Williams v. City of Alexander*, 772 F.3d 1307, 1311 (8th Cir. 2014) (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). Only then, after probing executive charging decisions and peeking behind the curtain of customarily secret grand-jury proceedings, would the plaintiffs be able to prove their cases. Nothing so intrusive was required to prove the claims in *Bivens*.

To be sure, similarities exist. *Bivens* involved alleged violations of the Fourth Amendment's prohibition on "unreasonable searches and seizures," and so do these cases. 403 U.S. at 389 (quoting U.S. Const. amend. IV); *see also Abbasi*, 137 S. Ct. at 1856 (stressing "the continued force . . . of *Bivens* in the

search-and-seizure context in which it arose"). But treating all search-and-seizure cases the same would contradict the Supreme Court's direction that a context can be new even if it involves the same constitutional right as an existing case. *See Abbasi*, 137 S. Ct. at 1859.

Nor is the context the same just because Weyker and the agents in *Bivens* were "street-level" investigators whose alleged misconduct only impacted a single investigation, rather than senior officers engaged in policymaking activities. It is true, as Osman and Farah point out, that the Supreme Court emphasized "the rank of the officers involved" and "the generality or specificity of the official action" in its most recent refusal to extend *Bivens*. *See id.* at 1860–61 (addressing claims against Justice Department officials and prison wardens based on post-9/11 detention policies and conditions). Even so, the Court left no doubt that these were just two features among many that could meaningfully differentiate potential causes of action. *See id.* at 1859–60.

The three differences we have identified—the sorts of actions being challenged, the mechanism of injury, and the kinds of proof those injuries would require—are "meaningful enough" that we cannot simply assume that the same reasons that justified permitting the plaintiff to recover damages in *Bivens* apply equally here. *Id.* at 1859. Allowing the plaintiffs to pursue damages claims in this context would mean extending *Bivens*, no matter how "modest" the extension

may be, *id.* at 1864, so we must decide whether this is one of the unusual situations in which we are "well suited . . . to consider and weigh the costs and benefits of allowing a damages action to proceed," *id.* at 1858.

B.

According to the Supreme Court, we must now determine at the second step whether anything about these cases "causes [us] to pause before acting without express congressional authorization." *Id.* It does not take much to make us pause, because "[i]n most instances, . . . [Congress] is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Id.* at 1857 (internal quotation marks and citation omitted). Indeed, recognizing the Court's "caution" in this regard, we have adopted a "presumption against judicial recognition of direct actions for violations of the Constitution by federal officials." *Neb. Beef*, 398 F.3d at 1084 (citation omitted).

Among the "special factors" that have been decisive in the past, *Abbasi*, 137 S. Ct. at 1857–58, the most relevant here are whether a *Bivens* action "would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch," *id.* at 1861; whether Congress has taken other action in the area without authorizing a damages remedy, *see id.* at 1862; and whether a "remedial structure" is already in place to address constitutional violations, even if it does not

go as far as a *Bivens* remedy would, *id.* at 1858, 1862–63. *See also id.* at 1858, 1861 (identifying additional "special factors"). When factors like these are present, the Supreme Court has explained, it is "less probable that Congress would want the Judiciary to entertain a damages suit." *Id.* at 1858.

1.

The first special factor present here is a variation on one the Supreme Court has already identified: the risk of burdening and interfering with the executive branch's investigative and prosecutorial functions. *Cf. id.* at 1861; *see also id.* at 1858 (recognizing that other special factors will appear in future cases, but that they are "difficult to predict in advance"). As we explain above, for these plaintiffs to prevail, they would need to show that Weyker's allegedly false information was what established probable cause for their arrests and detention. *Cf. Williams*, 772 F.3d at 1311 (explaining that to succeed on a false-arrest claim against an officer who has lied in a warrant application, a plaintiff must prove that "[o]nce the purportedly false statements are removed, the affidavit's remaining content does not support a finding of probable cause").

This type of showing would invite a wide-ranging inquiry into the evidence available to investigators, prosecutors, and the grand jury. It would not just be limited to the theories *actually* pursued by the prosecutors, because the question is not whether their

theories had support. Rather, it would focus on whether there was probable cause to charge the plaintiffs with a crime that would have justified their detention pending trial. *See Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) ("The Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent [of the officials involved]." (brackets omitted) (quoting *Whren v. United States*, 517 U.S. 806, 814 (1996))); *Keil v. Triveline*, 661 F.3d 981, 986 (8th Cir. 2011). Reconstructing the record before the grand jury, contemplating a panoply of federal crimes, and determining whether it would have been reasonable to think that the plaintiffs committed any of them would be among the likely steps in the analysis.

Take Farah's case, for example. He assures us that there would be no need to look at "the great bulk" of the grand-jury evidence, because Weyker was his only point of contact with investigators, so any possible support for the charges must have come from her. But to verify this assertion, the factfinder still has to know what was in the grand-jury record. Only if there really is nothing implicating Farah—or at least nothing that could have supported probable cause—in the police reports, witness statements, transcripts, and other materials will the factfinder be able to determine that Weyker's alleged misdeeds caused his injuries.

To be sure, sometimes courts must undertake this sort of review. Indeed, if the plaintiffs' section 1983 claims turn out to be viable, *see infra* Part II.C, the

district court may have to do so in these cases. But such after-the-fact inquiries still pose a risk of intrusion on executive-branch authority to enforce the law and prosecute crimes, not to mention encroach on the usual secrecy of charging decisions and grand-jury proceedings. That some section 1983 cases pose similar risks just reflects that *Congress* has balanced the costs and benefits and decided that the potential encroachment is worth it. The fact that recognizing the plaintiffs' claims in these cases would require us to make this determination on our own, without any congressional guidance, is reason enough "to pause before acting." *Abbasi*, 137 S. Ct. at 1858.

2.

Another "special factor counselling hesitation" is what Congress has already done to address injuries of the sort the plaintiffs have allegedly suffered. *Id.* The so-called Hyde Amendment allows courts to award attorney fees to criminal defendants who prevail against "vexatious, frivolous, or . . . bad[-]faith" positions taken by the government. Act of Nov. 26, 1997, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (codified at 18 U.S.C. § 3006A note). And those who are wrongly convicted and sentenced may seek release under 28 U.S.C. § 2255 or sue the government for damages, *see* 28 U.S.C. § 1495 (creating a cause of action for damages "by any person unjustly convicted of an offense against the United States and imprisoned"); *see also id.* § 2513(e)

(capping the damages available for wrongful imprisonment).

Understandably, the plaintiffs are not satisfied with these options, which are unavailable to them. They cannot recover attorney fees, for example, because they were represented by appointed counsel. *See* § 617, 111 Stat. at 2519 (excepting "case[s] in which the defendant [was] represented by assigned counsel paid for by the public"). Nor can they seek release or damages because they were never convicted. *See* 28 U.S.C. § 2255(a) (limiting relief to "prisoner[s] in custody under sentence of a [federal] court"); *id.* § 1495 (requiring "convict[ion]" and "imprison[ment]"). But far from supporting their position, the plaintiffs' ineligibility for these remedies actually cuts against recognizing a new cause of action.

The reason is that it would upset the existing "remedial structure." *Abbasi*, 137 S. Ct. at 1858. These plaintiffs are ineligible for relief under the unjust-conviction statute precisely because they were acquitted or had their charges dropped before trial. But had they been convicted and imprisoned, they would be eligible to seek damages under the unjust-conviction statute. The fact that Congress has expressly provided a damages remedy for some victims of this particular type of injury, but not for others, suggests that it considered the issue and made a deliberate choice. This is a "convincing reason" not to imply a second, distinct "freestanding remedy in damages." *Id.* (citation omitted).

The plaintiffs complain that these alternatives would not have offered them "roughly similar compensation" or provided "roughly similar incentives" to deter officers from violating the law. *Minneci v. Pollard*, 565 U.S. 118, 130 (2012). They forget, however, that *Bivens* remedies are the exception, and if they were available every time "roughly similar" remedies are not, then *Bivens* would become the rule, available in all but the most unusual constitutional cases. To be sure, the availability of "roughly similar" remedies was discussed in one Supreme Court decision, *see id.*, but since then, no case has mentioned it, much less relied on it. *See Abbasi*, 137 S. Ct. at 1858, 1862–63 (saying nothing about similarity or comparability, despite addressing alternative remedies in depth). To the contrary, the Court has since made clear that even remedies that provide *no* compensation for victims and little deterrence for violators, such as injunctions and writs of habeas corpus, trigger the general rule that, "when alternative methods of relief are available, a *Bivens* remedy usually is not." *Id.* at 1863 (citing several cases, including *Minneci*, 565 U.S. at 124–26).

* * *

The bottom line is that a balance must be struck between the costs and benefits of allowing plaintiffs who have been wrongfully charged and detained based on allegedly fabricated evidence to sue for damages. The costs of implying a cause of action include exposing federal officials to "the complex sphere of litigation," *id.* at 1858, and intruding on prosecutorial

functions. Among the benefits, however, are deterring misconduct, protecting the integrity of the criminal adjudicatory process, and preventing innocent people from being illegally detained. It is not our place to weigh these competing policy concerns. Rather, having identified "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy," we "must refrain from creating [one]" ourselves. *Id.*

C.

Declining to extend *Bivens* does not necessarily end these five cases, however, because the plaintiffs also brought section 1983 claims against Weyker. Before the district court, Weyker argued that she was not acting under color of state law when she committed her alleged misdeeds, because she had been deputized as a federal officer by the time the plaintiffs were indicted. *See Magee v. Trs. of Hamline Univ.*, 747 F.3d 532, 535 (8th Cir. 2014). This argument, which the district court did not address, potentially requires a fact-intensive analysis of "the nature and circumstances" of Weyker's alleged misconduct and its "relationship . . . to the performance of [her] official [state] duties." *Id.* (citation omitted); *see also 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.'" (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941))). For

this reason, and because the parties have not fully briefed this question on appeal, we remand for the district court to consider the applicability of section 1983 in the first instance.[1]

III.

Yassin's case is different. Her primary theory is that she was unlawfully arrested because Weyker falsely told another police officer that she was trying to intimidate a federal witness. We need not decide whether this theory of liability would require us to extend *Bivens*, because Weyker has not meaningfully briefed the point on appeal. *See White v. Jackson*, 865 F.3d 1064, 1075 (8th Cir. 2017).

Even if we assume that Yassin's unlawful-arrest claim is viable under *Bivens*,[2] however, Weyker still claims that she is entitled to qualified immunity for every action she took during the investigation. So we must address the two familiar qualified-immunity questions: assuming Yassin's allegations are true, did Weyker violate her constitutional rights? And if so, were those rights clearly established? *See Hager v. Ark. Dep't of Health*, 735 F.3d 1009, 1013 (8th Cir. 2013).

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[1] We decline Weyker's invitation to skip over the under-color-of-state-law element to decide her claim to qualified immunity.

[2] To the extent Yassin is also suing for damages arising out of her post-arrest indictment, the claim must proceed, if at all, under section 1983. *See supra* Part II.C.

On both points, our review is de novo, *see id.*, and our answer is yes.

First, Yassin alleged a constitutional violation. According to her complaint, the officer who arrested her had no reason to suspect her of a crime until Weyker lied to him. In fact, the complaint suggests that the facts known to the officer led him to treat her as a victim, at least until he heard from Weyker. These allegations, if true, would establish an unlawful-arrest claim under the Fourth Amendment. *See Williams*, 772 F.3d at 1310; *cf. Small v. McCrystal*, 708 F.3d 997, 1006 (8th Cir. 2013) ("Officers remain liable . . . for the reasonably foreseeable acts of actors they deceive.").

Second, the right Weyker allegedly violated was clearly established. It is true, as Weyker explains, that sexual-abuse and sex-trafficking cases often put investigators in difficult positions, particularly when there are minors involved. *Cf. Myers v. Morris*, 810 F.2d 1437, 1459 (8th Cir. 1987) (noting "[t]he uncertainty surrounding acceptable investigative techniques for suspected child sexual abuse"). But even so, a reasonable officer would know that deliberately misleading another officer into arresting an innocent individual to protect a sham investigation is unlawful, regardless of the difficulties presented by the case. *See, e.g.*, *Williams*, 772 F.3d at 1313; *Small*, 708 F.3d at 1006.

Appendix E

IV.

We accordingly vacate the denial of Weyker's motions to dismiss Ahmad's, Amalle's, Farah's, Osman's, and Mohamud's complaints. We instruct the district court on remand to dismiss their *Bivens* claims and determine whether their cases may proceed under section 1983. We also affirm the denial of Weyker's motion to dismiss Yassin's unlawful-arrest claim and remand her case for further proceedings consistent with this opinion.

Appendix F

List of Cases Resulting from Respondent's Task-Force Investigation

Yassin v. *Weyker*, No. 16-CV-2580, 2020 WL 6438892 (D. Minn. Sept. 30, 2020) (on remand from *Farah* v. *Weyker*, 926 F.3d 492 (8th Cir. 2019)), appeal pending, No. 20-3299 (docketed Nov. 2, 2020).

Mohamud v. *Weyker*, No. 17-CV-2069, 2018 WL 4469251 (D. Minn. Sept. 18, 2018), vacated and remanded *sub nom. Ahmed* v. *Weyker*, 984 F.3d 564 (8th Cir. 2020), reh'g & reh'g en banc denied (Mar. 16, 2021).

Adan v. *Weyker*, No. 16-CV-1235, 2017 WL 3421388 (D. Minn. Aug. 9, 2017).

Afyare v. *Weyker*, No. 16-CV-1758, 2017 WL 3421390 (D. Minn. Aug. 9, 2017).

Ahmad v. *Weyker*, No. 16-CV-1902, 2017 WL 3425685 (D. Minn. Aug. 9, 2017), vacated and remanded *sub nom. Farah* v. *Weyker*, 926 F.3d 492 (8th Cir. 2019).

Ali v. *Weyker*, No. 16-CV-1241, 2017 WL 3425667 (D. Minn. Aug. 9, 2017).

Amalle v. *Weyker*, No. 16-CV-1898, 2017 WL 3425683 (D. Minn. Aug. 9, 2017), vacated and remanded *sub nom. Farah* v. *Weyker*, 926 F.3d 492 (8th Cir. 2019).

Fahra v. *Weyker*, No. 16-CV-1146, 2017 WL 3421387 (D. Minn. Aug. 9, 2017).

Faduma Farah v. *Weyker*, No. 16-CV-1175, 2017 WL 3425662 (D. Minn. Aug. 9, 2017).

Appendix F

Yasin Farah v. *Weyker*, No. 16-CV-1289, 2017 WL 3425676 (D. Minn. Aug. 9, 2017), vacated and remanded, 926 F.3d 492 (8th Cir. 2019).

Hassan v. *Weyker*, No. 16-CV-1911, 2017 WL 3425687 (D. Minn. Aug. 9, 2017).

Hersi v. *Weyker*, No. 16-CV-3714, 2017 WL 3425694 (D. Minn. Aug. 9, 2017).

Ibrahim v. *Weyker*, No. 16-CV-1865, 2017 WL 3425678 (D. Minn. Aug. 9, 2017).

Jama v. *Weyker*, No. 16-CV-1230, 2017 WL 3425665 (D. Minn. Aug. 9, 2017).

Khalif v. *Weyker*, No. 16-CV-1237, 2017 WL 3425666 (D. Minn. Aug. 9, 2017).

Mohamud v. *Weyker*, No. 16-CV-1894, 2017 WL 3425681 (D. Minn. Aug. 9, 2017), vacated and remanded *sub nom. Farah* v. *Weyker*, 926 F.3d 492 (8th Cir. 2019).

Abdifatah Omar v. *Weyker*, No. 16-CV-1243, 2017 WL 3425672 (D. Minn. Aug. 9, 2017).

Liban Omar v. *Weyker*, No. 16-CV-1113, 2017 WL 3425654 (D. Minn. Aug. 9, 2017).

Mohamed Omar v. *Weyker*, No. 16-CV-1166, 2017 WL 3425656 (D. Minn. Aug. 9, 2017).

Osman v. *Weyker*, No. 16-CV-908, 2017 WL 3425647 (D. Minn. Aug. 9, 2017), vacated and remanded *sub nom. Farah* v. *Weyker*, 926 F.3d 492 (8th Cir. 2019).

Salad v. *Weyker*, No. 16-CV-1242, 2017 WL 3425671 (D. Minn. Aug. 9, 2017).

Appendix F

Yusuf v. *Weyker*, No. 16-CV-1012, 2017 WL 3425649 (D. Minn. Aug. 9, 2017).

United States v. *Afyare*, No. 3:10-CR-00260, 2013 WL 2643408 (M.D. Tenn. June 12, 2013), aff'd in part, rev'd in part, 632 Fed. Appx. 272 (6th Cir. 2016).

United States v. *Adan*, 913 F. Supp. 2d 555 (M.D. Tenn. 2012), aff'd *sub nom. United States* v. *Fahra*, 643 Fed. Appx. 480 (6th Cir. 2016).