No.

In the Supreme Court of the United States

Wilhemena J. Beary, personal representative of the Estate of Joshua J. Johnson,
Plaintiff—Appellant,

versus

Harris County; Tu Tran, Deputy Sheriff for the Harris County Sheriff Department; Shaun O'Bannion, Deputy Sheriff for the Harris County Sheriff Department; United States of America,
Defendants—Appellees.

MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 13.5 of the Rules of this Court, Petitioner Wilhemena J. Beary respectfully request a 60-day extension of time, or the time this Honorable Court will allow, to and including January 16, 2025, within which to file a petition for a writ of certiorari in this matter.

The United State Fifth Circuit issued its opinion on June 4, 2025, the Petition of En Banc Consideration was denied on August 18, 2025. The petition for writ is currently due on November 17, 2025. This is Petitioners' first request for an extension of time.

The requested extension is necessary to finalize the petition, prepare the appendix, and address complex issues involving fourth, and fourteenth amendment protections, Bivens and Federal Tort Claims Act.

The undersigned counsel conferred by email with, counsel for Respondents and none of the Respondents have responded this request.

WHEREFORE, Petitioners respectfully request that the time to file a petition for a writ of certiorari in this matter be extended by 60 days, to and including January 16, 2025.

Respectfully submitted,
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APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2025, I caused copies of this Motion for Extension to file the Petition for a Writ of Certiorari and one electronic copy in compliance with Supreme Court Rule 29.3 to be served by first-class mail, postage prepaid, on the following:

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 4, 2025
Lyle W. Cayce
Clerk

No. 24-20371

WILHEMENA J. BEARY, *personal representative of the Estate of Joshua J. Johnson*,

Plaintiff—Appellant,

versus

HARRIS COUNTY; TU TRAN, *Deputy Sheriff for the Harris County Sheriff Department*; SHAUN O'BANNION, *Deputy Sheriff for the Harris County Sheriff Department*; UNITED STATES OF AMERICA,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CV-1249

Before STEWART, DENNIS, and HAYNES, *Circuit Judges*.

PER CURIAM:[*]

This case arises from the fatal shooting of Joshua Johnson by Harris County Sheriff's Office ("HCSO") Deputy Tu Tran. Johnson's mother, Wilhemena Beary, brought various claims under 42 U.S.C. § 1983 against Harris County and Deputies Tran and Shaun O'Bannion in their individual

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

capacities, among others. After nearly two years of litigation, the United States certified the deputies as federal officers, prompting substitution and dismissal under the Federal Tort Claims Act ("FTCA"). The district court accepted the certification, dismissed all claims against the United States for failure to exhaust administrative remedies, and dismissed the claims against Harris County on the ground that it could not be liable for acts of federal officers. For the reasons that follow, we AFFIRM.

I

On the morning of April 22, 2020, Deputy Tran shot and killed Johnson—a thirty-five-year-old Navy veteran who was house-sitting for his hospitalized neighbor—while Deputy Tran conducted unrelated surveillance for the federal Gulf Coast Violent Offenders Task Force.[1] Beary alleges that Deputy Tran, clad in plain clothes and sitting in an unmarked police cruiser, stalked the unarmed Johnson, fired two rounds into his chest and side, and then drove away without summoning aid. Deputy O'Bannion, also assigned to the task force, arrived at the scene shortly after the shooting. His body-worn camera recorded the immediate aftermath, including Johnson lying wounded on the ground and officers securing the area, but it did not capture the shooting itself. Johnson died at the scene.

In April 2022, Beary, individually and on behalf of Johnson's estate, sued Harris County and HCSO Sheriff Ed Gonzalez, Deputies Tran and O'Bannion, and Senior Investigator Allen B. Beall. Beary's operative complaint asserted excessive-force, equal-protection, deliberate-indifference, First and Fourteenth Amendment familial-association, and

[1] The Gulf Coast Violent Offenders Fugitive Task Force is a United States Marshall Service task force responsible for joint federal-state fugitive apprehension operations within the State of Texas.

Monell[2] claims through 42 U.S.C. § 1983; a 42 U.S.C. § 1985 civil-conspiracy claim; and Texas wrongful-death and survivorship claims. Although Beary's operative complaint acknowledged that Deputy Tran was "a Harris County Sheriff Deputy assigned to the Gulf Coast Violent Task Force Unit," the introductory paragraph alleged that all "defendants acted under color of state law." The complaint otherwise alleged each individual defendant "acted under the color of law." The defendants answered by denying the former allegation but admitting the latter "as they related to the identities and color of law status of each defendant[.]" The defendants' answers also asserted that Deputies Tran and O'Bannion were on duty as members of the federal Gulf Coast Violent Offenders Task Force.

For nearly two years, the litigation proceeded in the ordinary course.[3] That trajectory changed on January 10, 2024, when the United States successfully moved to quash the deputies' imminent depositions so that it could determine whether Deputies Tran and O'Bannion—both credentialed as Special Deputy United States Marshals (SpDUSMs)—had acted within the scope of their duties as members of the federal task force. The United States concluded they had and filed a certification under the Westfall Act[4] stating that the deputies "were at all pertinent times acting within the scope

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[2] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

[3] Over this period, Beary's claims against all defendants except for Harris County and Deputies Tran and O'Bannion were dismissed. Beary does not appeal the dismissal of those other claims.

[4] 28 U.S.C. § 2679(d)(1). Under that provision, "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant." This is commonly referred to as a "Westfall Act certification."

of their employment on a federal task force with the United States Marshall Service . . . .” The United States moved to substitute counsel and substitute itself as defendant in their stead. Harris County likewise moved to withdraw as counsel for Deputies Tran and O’Bannion. The district court granted the motions, noting that Beary “did not respond to any of the Defendants’ motions,” which it took “as a representation of no opposition.”

The United States then moved to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, contending that Beary had never presented an administrative tort claim to the U.S. Marshals Service as required by the FTCA, 28 U.S.C. § 2675(a). Harris County filed its own Rule 12(b)(6) and 12(c) motion—or, in the alternative, a motion for summary judgment—arguing that once the deputies were deemed federal actors, no viable claim remained against it. Beary opposed the motions and alternatively sought discovery or leave to amend.

On May 28, 2024, the district court granted the motions to dismiss. In doing so, the district court construed Beary’s complaint as raising an FTCA claim against the United States and Deputies Tran and O’Bannion, and a *Bivens*[5] claim against Deputies Tran and O’Bannion in their individual capacities. The district court dismissed all claims against the United States for want of jurisdiction because Beary had not first presented her federal claims to the appropriate federal agency as required by the FTCA; dismissed all claims against Harris County, reasoning that the County could not be liable for acts performed by deputies acting solely under federal authority; denied Harris County’s alternative motion for summary judgment as moot; and dismissed the claims against the deputies in their individual capacities

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

for failure to state a claim under *Bivens*. This timely appeal followed.

II

Beary raises three issues on appeal.[6] She first argues that the district court erred by dismissing her suit because any FTCA presentment defect should be excused by equitable tolling. She next maintains that the Government's Westfall Act certification lacks sufficient factual support, that the district court improperly denied the discovery necessary to contest it, and that the district court erred by dismissing the claims before such discovery. She finally contends that Harris County's Rule 12(b)(6) and 12(c) motion was untimely. We address each argument in turn.

A

We begin with the district court's dismissal of Beary's FTCA claims for lack of subject matter jurisdiction on account of her failure to satisfy the FTCA's presentment requirement, which we review de novo. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Under the FTCA, a plaintiff must present their claims to the appropriate federal agency prior to filing suit. 28 U.S.C. § 2675(a). "We have recognized that presentment is a jurisdictional prerequisite." *Spriggs v. United States*, 132 F.4th 376, 379 (5th

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[6] Several aspects of the district court's judgment are inadequately addressed or absent from Beary's briefing on appeal. Beary does not contest the district court's ruling that the Supreme Court has not extended *Bivens* to the excessive-force context involving federal task force officers nor does she argue for extending *Bivens* to this context. She does not challenge the district court's conclusion that no claims can survive as to Harris County as a matter of law if the United States was properly substituted as a defendant. Nor does Beary contest the denial of her motion for reconsideration under Federal Rules of Civil Procedure 59(e) and 60(b)(6). Finally, Beary's briefing only makes a single, passing claim that Harris County "waived" the arguments made in its dispositive motion by failing to raise them in its earlier answer or responsive pleadings. Accordingly, these issues are forfeited, and we do not address them further. *See Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 397 & n.1 (5th Cir. 2021).

Cir. 2025) (citing *Cook v. United States*, 978 F.2d 164, 165–66 (5th Cir. 1992)). Beary concedes that she "fail[ed] to provide timely notice under the [FTCA]," but argues that equitable tolling of its limitations period is warranted here because the Government's delayed Westfall Act certification—filed nearly two years after she initiated suit and four years after Johnson's death—constitutes an extraordinary circumstance sufficient to justify tolling. *See United States v. Wong*, 575 U.S. 402, 412 (2015).

Assuming that equitable tolling would be appropriate under these circumstances, it would not retroactively cure the jurisdictional defect caused by the failure to present her federal claim before filing *this* suit. We have long held that the FTCA's presentment requirement "is more than a mere statement of procedural niceties," but "requires that jurisdiction must exist *at the time the complaint is filed*." *Gregory v. Mitchell*, 634 F.2d 199, 204 (5th Cir. 1981) (emphasis added). That the jurisdictional defect may later be cured does not permit the district court to retain jurisdiction. *McNeil v. United States*, 508 U.S. 106, 111–12 (1993) (affirming dismissal of FTCA claim for lack of subject matter jurisdiction where plaintiff filed suit after presenting administrative claim but before its denial); *Gregory*, 634 F.2d at 204 (affirming dismissal of FTCA claim for lack of subject matter jurisdiction notwithstanding that sixth months had passed since presenting administrative claim but not at the time of filing suit). Accordingly, "the district court was required to dismiss [this] suit against the United States." *Gregory*, 634 F.2d at 204 (citation omitted).[7]

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[7] To be sure, this does not foreclose Beary's ability to timely present her claim and seek relief under the FTCA. The Government stresses that the Westfall Act provides an exception to the FTCA's limitations period "[w]henever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim . . . ." § 2675(d)(5). Under this exception, "such a claim shall be deemed to be timely presented" where "(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and (B) the claim is presented to the appropriate Federal agency within

B

Beary relatedly contends that the Government's certification that Deputies Tran and O'Bannion were acting within the scope of their federal employment lacks sufficient factual support, and the district court erred by declining to allow her to conduct discovery prior to dismissal to determine whether the deputies were acting within the scope of their purported federal authority at the time of Johnson's death. We review the former issue de novo and the latter for abuse of discretion. *Counts v. Guevara*, 328 F.3d 212, 214 (5th Cir. 2003); *Bolton v. United States*, 946 F.3d 256, 260 (5th Cir. 2019).

Under the Westfall Act, the United States may be substituted as the sole defendant in a tort action where the Attorney General certifies that the allegedly tortious conduct was committed by a federal employee "acting within the scope of his office or employment." 28 U.S.C. § 2679(d)(1). Certification is not conclusive evidence and "[a] plaintiff may request judicial review of the Attorney General's scope-of-employment determination[.]" *Osborn v. Haley*, 549 U.S. 225, 246 (2007); *Bolton*, 946 F.3d at 260. "If the certification is disputed," the burden then shifts to the plaintiff to show that the defendant-employee's conduct was not within the scope of his or her federal authority. *Williams v. Brooks*, 862 F. Supp. 151, 152 (S.D. Tex. 1994), *aff'd sub nom. Williams v. United States*, 71 F.3d 502 (5th Cir. 1995); *Bolton*, 946 F.3d at 260. A plaintiff may satisfy their burden by alleging "in either the complaint or a subsequent filing, specific facts that, taken as true, would establish that the defendant's actions exceeded the scope of his employment." *Bolton*, 946 F.3d at 260 (quoting *Jacobs v. Vrobel*, 724 F.3d

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60 days after dismissal of the civil action." § 2675(d)(5)(A)–(B). The district court entered final judgment dismissing Beary's claims on May 28, 2024, and the Government concedes that Beary presented her administrative claim on July 18, 2024. The Government concedes that Beary "may file a new lawsuit and attempt to rely on that submission, in conjunction with section 2679(d)(5), to establish that she has satisfied the administrative exhaustion requirement."

217, 220 (D.C. Cir. 2013)).

Although Beary asserts that the Government's certification lacks sufficient factual support, she failed to raise this argument in opposition to the Government's various motions to quash, substitute, and certify Deputies Tran and O'Bannion as federal officers.[8] The district court's order granting substitution under the Westfall Act noted that Beary "did not respond" to the Government's motion and considered her "[f]ailure to respond . . . as a representation of no opposition" under Southern District of Texas Local Rule 7.4.[9] Beary admits the Government's motion to substitute "was uncontested" and that she raised her scope-of-employment objection for the first time in response to the Defendants-Appellees' dispositive motions.

Because the Government's certification triggered automatic substitution under the Westfall Act, the burden shifted to Beary to affirmatively contest the certification's validity if she wished to prevent substitution. *See Bolton*, 946 F.3d at 260; *Brooks*, 862 F. Supp. at 152. By failing to do so, she forfeited the opportunity to contest the scope-of-employment question. *See Law Funder, L.L.C. v. Munoz*, 924 F.3d 753, 759 (5th Cir. 2019) ("[I]n failing to oppose" an adversary's motion, a plaintiff

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[8] We have "characteriz[ed] the certification process as a motion to substitute." *See Mitchell v. Bailey*, 982 F.3d 937, 941 (5th Cir. 2020), *as revised* (Dec. 30, 2020) (citing *Moncrief v. Moncrief*, No. 4:98-CV-528-E, 1998 WL 567988, at *5 (N.D. Tex. Aug. 3, 1998), *aff'd*, 194 F.3d 1309 (5th Cir. 1999)).

[9] Southern District of Texas Local Rule 7.4 provides that "[f]ailure to respond to a motion will be taken as a representation of no opposition." We have long recognized "the power of district courts to 'adopt local rules requiring parties who oppose motions to file statements of opposition.'" *Johnson v. Pettiford*, 442 F.3d 917, 918 (5th Cir. 2006) (quoting *John v. La.*, 757 F.2d 698, 708 (5th Cir. 1985)). And that "[l]ocal rules generally have the force of law 'as long as they do not conflict with a rule prescribed by the Supreme Court, Congress, or the Constitution.'" *Darouiche v. Fid. Nat'l Ins. Co.*, 415 F. App'x 548, 552 (5th Cir. 2011) (unpublished) (internal citation omitted) (quoting *Contino v. United States*, 535 F.3d 124, 126 (2d Cir. 2008)).

"forfeit[s] any argument that the district court's . . . order was improper."); *Vander Zee v. Reno*, 100 F.3d 952, 1996 WL 625346 at *3 (5th Cir. 1996) (unpublished table decision) ("We agree with the district court that having failed to oppose the notice of substitution [the plaintiff] necessarily waived any challenge to it and failed to carry his burden of showing the certification was erroneous."). For the same reason, the district court did not abuse its discretion in declining to allow Beary to conduct discovery on the scope-of-employment issue. *Bolton*, 946 F.3d at 260 ("[T]here is no right to even 'limited discovery' unless a plaintiff has made allegations sufficient to rebut the Government's certification." (alteration in original) (quoting *Wuterich v. Murtha*, 562 F.3d 375, 386 (D.C. Cir. 2009))).

C

Beary's final argument is that she was prejudiced by the district court's consideration of Harris County's Rule 12(b)(6) and 12(c) motion because it was untimely under the court-imposed dispositive motions deadline. "We review a district court's decision to allow an untimely filing for abuse of discretion." *U.S. ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 275 (5th Cir. 2015). District courts enjoy broad discretion to consider motions filed after the expiration of scheduling order deadlines where good cause exists. *See Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 367 (5th Cir. 1995) (citations omitted); *Argo v. Woods*, 399 F. App'x 1, 2 (5th Cir. 2010) (unpublished). Moreover, Rule 12(c) motions "may be filed at any time after the pleadings are closed so long as filing them does not delay trial . . . ." *Long*, 798 F.3d at 275.

The district court's scheduling order set the dispositive motion deadline as February 6, 2024. The district court granted the Government's Westfall Act certification and substituted the United States as defendant in place of Deputies Tran and O'Bannion on March 5, 2024. Harris County

filed the at-issue dispositive motion sixteen days later, on March 21, 2024, and detailed this chain of events as the basis for dismissal. The district court concluded the motion was timely because the Government's certification and substitution gave rise to new grounds for dismissal previously unavailable to Harris County as it had no authority to make that certification itself. *See* 28 U.S.C. § 2679. The district court also emphasized that Beary was not prejudiced by the belated filing because she had alleged that the deputies were serving on a federal task force "from the onset of th[e] case." Under these circumstances, we cannot say that the district court abused its discretion in entertaining Harris County's motion.

III

For the foregoing reasons, we AFFIRM the judgment of the district court.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 18, 2025
Lyle W. Cayce
Clerk

No. 24-20371

WILHEMENA J. BEARY, *personal representative of* THE ESTATE OF JOSHUA J. JOHNSON,

Plaintiff—Appellant,

versus

HARRIS COUNTY; TU TRAN, *Deputy Sheriff for the Harris County Sheriff Department*; SHAUN O'BANNION, *Deputy Sheriff for the Harris County Sheriff Department*; UNITED STATES OF AMERICA,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CV-1249

ON PETITION FOR REHEARING EN BANC

Before STEWART, DENNIS, and HAYNES, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R.40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R.

APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WILHEMINA J. BEARY *and* RICHARD BEARY,	§	
Plaintiffs,	§	
v.	§	Civil Action No. H-22-1249
HARRIS COUNTY, *et al.*,	§	
Defendants.	§	

ORDER

Pending before this Court are Defendant Harris County's Motion to Dismiss and/or for Summary Judgment (Document No. 96), Defendant United States, Tran, and O'Bannion's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Document No. 97), and Plaintiffs' Response to the Defendants' Motions to Dismiss and Request for Leave to Amend the Complaint (Document No. 107). Having considered the motions, submissions, and applicable law, the Court determines Harris County's motion should be partially granted and partially denied. The Court further determines that the United States motion should be granted and the Plaintiff's motion should be denied.

I. BACKGROUND

This is a civil rights case arising out of a fatal police shooting. In the early morning of April 22, 2020, Joshua Johnson (the "Decedent"), a veteran of the United

States Navy, was shot and killed by Harris County Sheriff Deputy Tu Tran ("Tran"). Plaintiffs allege security footage from the neighborhood shows Tran following the Decedent, who appears to be unarmed, on foot before shooting him several times, then returning to his vehicle and driving away from the scene. Tran alleges the Decedent approached Tran's unmarked car with a weapon while Tran was conducting surveillance for a fugitive task force[1], and Tran reacted by shooting the Decedent at least twice in the chest. Body camera footage from another officer only captured the events following the shooting, not the events leading up to the shooting or the shooting itself. Tran was not wearing a body camera, nor was he in uniform, at the time of the shooting. The Decedent died at the scene from blood loss resulting from the gunshot wounds to his chest.

On April 20, 2022, the Decedent's parents, Plaintiffs Wilhemena Beary and Richard Beary (collectively, "Plaintiffs"), both individually and as personal representatives of the Decedent's estate, brought this action against Defendants Harris County ("Harris County"), Sheriff Ed Gonzalez ("Sheriff Gonzalez"), Tran, Deputy Shaun O'Bannion ("O'Bannion"), and Investigator Allen B. Beall ("Beall") asserting claims: (1) under the Texas Constitution, Article I, § 19 against Harris

[1] The Individual Defendants were assigned to the Gulf Coast Violent Offender Task Force which is a federal task force responsible for apprehending fugitives and is under the purview of The United States Marshals Service ("USMS").

County and Sheriff Gonzalez; (2) for excessive force claim under 42 U.S.C. § 1983 against Tran, Harris County, and Sheriff Gonzalez; (3) for equal protection violations under 42 U.S.C. § 1983 against Harris County, Sheriff Gonzalez, Tran, and O'Bannion; (4) failure to provide medical care and delaying medical care under 42 U.S.C. § 1983 against Tran and O'Bannion; (5) under *Monell* for deliberate indifference, failure to supervise, and ratification against Harris County; (6) civil conspiracy under 42 U.S.C. § 1985 against Sheriff Gonzalez, Tran, O'Bannion, and Beall; (7) for loss of consortium and interference with familial relationships under the First and Fourteenth Amendments against all the Defendants; and (8) for wrongful death under Tex. Civ. Prac. & Rem. Code § 71.0004(a) against Tran and O'Bannion.

On November 14, 2022, Plaintiffs amended their complaint for the second time after the Court granted leave to do so. On November 17, 2022, Harris County and Sheriff Gonzalez moved to dismiss the second amended complaint. All the Defendants besides Harris County, Tran, and O'Bannion have been terminated from this case. On January 10, 2024, the United States of America filed an emergency motion to quash the scheduled depositions of the Defendant sheriff deputies in this case. The government represented that The United States Marshals Service ("USMS") had determined the Defendants may have been acting within the course

and scope of a federal task force.[2] It was ultimately determined that Tran and O'Bannion ("Individual Defendants") were serving as Special Deputy United States Marshals ("spDUSM"). Accordingly, the United States of America ("United States") became a defendant in this case, and the United States Attorney's Office took over the representation of the Individual Defendants.

II. STANDARD OF REVIEW

A. 12(b)(1)

Motions made pursuant to Federal Rule of Civil Procedure 12(c) are "designed to dispose of cases where the material facts are not in dispute, and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002) (citations and internal quotation marks omitted). "A motion for judgment on the pleadings under Rule 12(c) is subject to the same standard as a motion to dismiss under Rule 12(b)(6)." *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008). Therefore, like a motion under Rule 12(b)(6), Rule 12(c) allows dismissal if a plaintiff fails to state a claim upon which relief may be granted. *Id.* Under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.

[2] *Emergency Motion to Quash Defendant's Depositions*, Document No. 82 at 1.

8(a)(2). Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' it demands more than 'labels and conclusions.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* (quoting *Twombly*, 550 U.S. at 555).

In deciding a Rule 12(c) motion, "[t]he 'court accepts all well-pleaded facts as true, viewing them in the light most favorable to the [non-movant].' " *In re Katrina Canal Breeches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). As with a Rule 12(b)(6) motion, the Court is permitted to consider "the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters which a court may take judicial notice." *Wolcott v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011). The motion "should be granted if there is no issue of material fact and if the pleadings show that the moving party is entitled to judgment as a matter of law." *Van Duzer v. U.S. Bank Nat'l Ass'n*, 995 F. Supp. 2d 673, 683 (S.D. Tex. 2014) (Lake, J.) (citing *Greenberg v. Gen. Mills Fun Grp., Inc.*, 478 F.2d 254, 256 (5th Cir. 1973)).

B. 12(b)(6)

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Under Rule 8(a)(2), a pleading must

contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' . . . it demands more than . . . 'labels and conclusions.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* (quoting *Twombly*, 550 U.S. at 555).

In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, "[t]he 'court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.' " *In re Katrina Canal Breeches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). To survive the motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "Conversely, 'when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.' " *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 558).

C. 12(c)

Motions made pursuant to Federal Rule of Civil Procedure 12(c) are "designed to dispose of cases where the material facts are not in dispute, and a judgment on the merits can be rendered by looking to the substance of the pleadings

and any judicially noticed facts." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002) (citations and internal quotation marks omitted). "A motion for judgment on the pleadings under Rule 12(c) is subject to the same standard as a motion to dismiss under Rule 12(b)(6)." *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008). Therefore, like a motion under Rule 12(b)(6), Rule 12(c) allows dismissal if a plaintiff fails to state a claim upon which relief may be granted. *Id.* Under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' it demands more than 'labels and conclusions.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* (quoting *Twombly*, 550 U.S. at 555).

In deciding a Rule 12(c) motion, "[t]he 'court accepts all well-pleaded facts as true, viewing them in the light most favorable to the [non-movant].' " *In re Katrina Canal Breeches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). As with a Rule 12(b)(6) motion, the Court is permitted to consider "the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters which a court may take judicial notice." *Wolcott v. Sebelius*, 635 F.3d 757,

763 (5th Cir. 2011). The motion "should be granted if there is no issue of material fact and if the pleadings show that the moving party is entitled to judgment as a matter of law." *Van Duzer v. U.S. Bank Nat'l Ass'n*, 995 F. Supp. 2d 673, 683 (S.D. Tex. 2014) (Lake, J.) (citing *Greenberg v. Gen. Mills Fun Grp., Inc.*, 478 F.2d 254, 256 (5th Cir. 1973)).

III. LAW & ANALYSIS

Harris County contends that because the Individual Defendants were spDUSMs and acting under the color of federal law rather than state law, any claim against Harris County must fail. The United States contends that this Court does not have jurisdiction over the Plaintiffs' claims arising from the Federal Tort Claims Act ("FTCA") because the Plaintiffs did not exhaust available administrative remedies. The Individual Defendants contend that the Plaintiff's claims fail because they may only be sued in their individual capacities under a *Bivens* action, and the Court does not recognize *Bivens* claims in the context of federally mandated task force members.[3] The Plaintiffs contend dismissal is improper, and in the alternative, a

[3] A plaintiff may maintain a claim against a federal employee accused of violating his federal constitutional rights by asserting what is generally referred to as a *Bivens* action. *Witherspoon v. White*, 111 F.3d 399, 400 n.1 (5th Cir. 1997) (citing *Stephenson v. Reno*, 28 F.3d 26, 26 n.1 (5th Cir. 1994)). A *Bivens* action, however, is available only against government officers in their individual capacities in order to deter future civil rights violations by such individuals. *Williamson v. U.S. Dept. of Agriculture*, 815 F.2d 368, 380 (5th Cir. 1987).

continuance for discovery should be granted, or they should be allowed to amend their complaint for the third time. The Court first addresses Harris County's motion.

A. Harris County's Motion to Dismiss

Harris County contends that now that it has been confirmed that the Individual Defendants were acting as spDUSM under the control of the USMS and the federal government, there is no actionable claim against it. Therefore, the Plaintiff's claims fail under Rule 12(b)(6) or 12(c).[4] the Plaintiffs contend that Harris County's motion is untimely and that there are questions of material facts that make dismissal inappropriate.

1. Timeliness

The plaintiffs contend that Harris County's motion is not timely, and Harris County did not have leave to file the motion. Harris County contends its motion is timely in the context of the disclosure by the United States that the Individual Defendants were indeed spDUSMs acting under federal law and control.

[4] The Court notes that Harris County alternatively seeks summary judgment contending the evidence is clear that Harris County was not acting under the color of state law. Based on the United States substitution in this case Harris County's contentions likely succeed. However, based on the Court's decision regarding Harris County's motion for judgment on the pleadings it need not reach the summary judgment argument.

On February 9, 2024, the United States certified that the Individual Defendants were spDUSMs serving on a federal task force.[5] On March 5, 2024, the Court accepted the certification that the Individual Defendants were spDUSMs and granted the United States substitution in this case.[6] The Court notes that the Plaintiffs did not file any responses or objections to the United States' various motions that allowed the United States to intervene, substitute, and certify the Individual Defendants as federal officers. *Smith v. Carvajal*, 558 F.Supp.3d 340, 347 (N.D. Tex. 2021) (Boyle, J.) (Holding that the plaintiff must provide specific facts to challenge the certification of federal authority at the time of the government motion to certify and substitute). On March 21, 2024, sixteen days after the United States certified the Individual Defendants' statuses, Harris County filed its motion to dismiss or for judgment on the pleadings. Harris County has no authority to certify that any individual is a federal agent. That authority lies solely with the United States. *See* 28 U.S.C. §2679, 28 C.F.R. §§15.3, 15.4, 50.15. Accordingly, Harris Count filed the instant motion to dismiss as soon as the United States officially certified that the Individual Defendants were operating under federal authority. Additionally, Harris County contend the Plaintiffs are not prejudiced by the motion

[5] *Supplement to Defendants' Opposed Motion to Substitute*, Document No. 93 at 1–4.

[6] *Court's Order*, Document No.95 at 1–4.

to dismiss because the Plaintiffs have asserted that the Individual Defendants were serving on a federal task force from the onset of this case.[7] Accordingly, the Court finds that Harris County's motion to dismiss is proper based on the Court's rulings regarding the United States substitution in this case. The Court now turns to the merits of Harris County's motion to dismiss.

2. Merits of Harris County's Motion

Harris County contends now that the United States has substituted and it is undisputed that the Individual Defendants were spDUSMs, there are no claims that can survive as a matter of law against Harris County. The plaintiffs contend there are still questions of material fact that should bar dismissal.

The Plaintiffs contend there is no evidence that the Individual Defendants were sworn federal officers. However, as noted above, the Plaintiffs have asserted that the Individual Defendants were federal task force officers from the beginning of this case.[8] Further, the Plaintiffs did not offer any opposition while the United States certified that the Individual Defendants were spDUSMs and moved to substitute in this case. The substitution was granted after the United States made

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[7] *Plaintiff's Original* Complaint, Document No. 1 at 2 and *Plaintiff's Amended* Complaint, Document No. 19 at 2.

[8] The Court Notes the Plaintiffs contend they at no time referred to the officers as "federal" actors or acting under federal authority in their complaint. However, the Court notes that the Plaintiffs do acknowledge the officers were assigned to the Fugitive Task Force, which is under the purview of the USMS.

declarations that the Individual Defendants were indeed federal officers and after the Plaintiffs made no opposition or arguments against the certification. Accordingly, the Court is not persuaded that there is a remaining question of fact as to whether the Individual Defendants were spDUSMs.

Further, the Plaintiffs contend dismissal is improper because there could be evidence that the Individual Defendants had a dual role, i.e., both state and federal responsibilities.[9] The Plaintiffs use the *Luna* case for the proposition that the Individual Defendants could be found to have a dual role. *U.S. v. Luna*, 649 F.3d 91 (2011) (finding that an officer was still a federal officer even when he was assaulted while carrying out duties for his local police department employer). Harris County contends this case is distinguishable from *Luna* because this case involves the U.S. Attorney's certification of federal employment pursuant to 28 U.S.C. §2679 in the context of a civil claim.[10] Accordingly, there is no dispute in the instant case that the United States has certified that the Individual Defendants were federal officers performing duties with a federal task force. Federal courts around the country have generally held that officers cannot simultaneously act under state and federal law. See, e.g., *Guerrero v. Scarazzini*, 274 F. App'x 11, 12 n.1 (2d Cir. 2008); *Majors v.*

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[9] *Plaintiff's Response to the Defendant United States Motion to Dismiss,[Dkt. 97] Defendant Harris County's Motion to Dismiss,[Dkt. 96] and Request for Leave to Amend the Complaint*, Document No. 107 at 25.

[10] *Defendant Harris County's Reply to Docket Entry 107*, Document No. 110 at 8.

City of Clarksville, 113 F. App'x 659, 659 (6th Cir. 2004); *Pike v. United States*, 868 F. Supp. 2d 667, 677-78 (M.D. Tenn. 2012) (Trauger, J.). Therefore, the Court finds that the Plaintiff's claims against Harris County fail as a matter of law now that the United States has been substituted as a party in this case.[11] Thus, Harris County's motion to dismiss should be granted. The Court now turns to the United States Motion to Dismiss.

B. The United States

The United States contends this Court does not have jurisdiction over the Plaintiffs' tort claim because they have failed to exhaust their administrative remedies.[12] The Plaintiffs contend dismissal on jurisdictional grounds would be improper because there are factual questions to address.[13]

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[11] The Court notes the Plaintiffs seek a continuance to conduct discovery on issues of facts related to the Individual Defendants' scope of federal authority. Harris County contends this is a question of law, not fact, and one that this Court has already decided and that the Plaintiffs did not oppose. *See Defendant Harris County Reply to Docket Entry* 107, Document No. 110 at 6. Accordingly, the Court finds that continuance is not necessary before ruling on the instant motions to dismiss.

[12] The Court notes that the Federal Tort Claim Act ("FTCA") is the appropriate cause of action when seeking damages from the federal government. *See In re Supreme Beef Processors, Inc.*, 468 F. 3d 248. 252 (5th Cir. 2006) (describing the FTCA as "an exclusive vehicle for the assertion of tort claims for damages against the federal government.").

[13] *Plaintiff's Response to the Defendant United States Motion to Dismiss,[Dkt. 97] Defendant Harris County's Motion to Dismiss,[Dkt. 96] and Request for Leave to Amend the Complaint*, Document No. 107 at 4–6.

"The United States is sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued." *Hebert v. United States*, 438 F.3d 483, 487-88 (5th Cir. 2006). Congress passed the Federal Tort Claim Act ("FTCA") which waives sovereign immunity and consented to suit against the Government "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment[.]" 28 U.S.C. § 1346(b)(1); *see Life Partners Inc. v. United States*, 650 F.3d 1026, 1030-31 (5th Cir. 2011). However, in order to establish jurisdiction in federal court under the FTCA, plaintiffs must exhaust their administrative remedies, generally, by presenting their claim to the federal agency involved in the controversy. 28 U.S.C. § 2675(a); *see Life Partners*, 650 F.3d at 1029-30.

The Plaintiffs asserted from the start of their lawsuit that the Individual Defendants were on a federal task force. However, the Plaintiffs chose to sue Harris County and avoided suing the United States or notifying the USMS of their pending claims. Plaintiffs contend that there are questions of facts that should be decided before a jurisdictional decision is made. However, the Plaintiffs conceded from the start of their case that the Individual Defendants were on a federal task force and still chose not to notify the USMS of a pending claim or seek any administrative remedy. Additionally, as mentioned above, the Plaintiffs did not respond to or oppose the

United States' Motion while it was moving to certify the Individual Defendants' scope of authority and substitute in this case. The Plaintiffs also offered no argument or authority to oppose the fact that they must exhaust all administrative remedies before filing a claim against the United States. Accordingly, the Plaintiffs have not exhausted available administrative remedies as required to bring an FTCA claim. Therefore, the Court finds that it does not have jurisdiction over the FTCA claims against the United States. Thus, the United States motion to dismiss should be granted. The Court now turns to the Individual Defendants' motion to dismiss.

C. The Individual Defendants

The Individual Defendants contend that as federal officers, they may only be sued in their individual capacity under a *Bivens* action. The Individual Defendants further contend courts have held a *Bivens* action cannot be brought in the context of federal task force members and that the fact that alternative remedies exist should bar a *Bivens* action. The Plaintiffs contend a *Bivens* action may be brought in the instant circumstances.

Bivens claims generally are limited to the circumstances of the Supreme Court's trilogy of cases in this area: (1) manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment, *see Bivens*, 403 U.S. at 389–90; (2) discrimination on the basis of sex by a congressman against a staff person in violation of the Fifth Amendment, *see Davis v. Passman*,

442 U.S. 228 (1979); and (3) failure to provide medical attention to an asthmatic prisoner in federal custody in violation of the Eighth Amendment, *see Carlson v. Green*, 446 U.S. 14 (1980). *Oliva v. Nivar*, 973 F.3d 438, 442 (5th Cir. 2020). Generelly, all other fact patterns are considered a "new context" related to *Bivens*. *Ziglar v. Abbasi*, 582 U.S. 120, (2017) (holding judicial precedent urges caution before extending *Bivens* remedies into any new context and that a *Bivens* remedy will not be available if there are special factors counseling hesitation in the absence of affirmative action by Congress). While precedent does not fully define special factors, there are some recognized special factors, such as alternative administrative remedies being available to a plaintiff. *Egbert v. Boule*, 596 U.S. 482, 492 (2022). Because recognizing a *Bivens* cause of action is an extraordinary act that places great stress on the separation of powers, a court has a concomitant responsibility to evaluate any grounds that counsel against *Bivens* relief. *Id*

Here, the Individual Defendants contend that a *Bivens* action is improper because of alternative administrative remedies available to the Plaintiff. The USMS is a part of the Department of Justice and, as such, has a robust investigation and grievance process.[14] There are statutes in place that discuss the grievance process

[14] *Defendants United States, tran, and O'Bannion's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6)*, Document No, 97 at 14.

and investigation of alleged misconduct in the USMS.[15] Courts have held that these remedies are appropriate and adequate alternatives for plaintiffs. *Logsdon v. U.S. Marshal Serv.*, 91 F.4th 1352, 1357-58 (10th Cir. 2024) (stating that it is not the judiciary's function to assess the adequacy of executive orders or legislative remedies in deterring constitutional violations that might be remedied through a *Bivens*-type suit.).[16] The Plaintiffs do not fully respond to the Individual Defendants' arguments regarding a *Bivens* claim and instead assert a theory of dual state and federal authority. As discussed above, court precedent forecloses on that theory. Accordingly, the Court finds the Plaintiffs have other available remedies through the USMS which forecloses on their *Bivens* action against the Individual Defendants. Therefore, the Court finds the Plaintiffs' claims against the Individual Defendants should be dismissed.[17]

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[15] "The Director of the USMS shall supervise and direct the [USMS]," *see* 28 U.S.C. § 561(g), including by investigating "alleged improper conduct on the part of [USMS] personnel," 28 C.F.R. § 0.111(n).

[16] The Court also notes that the Individual Defendants contend that other courts have not extended *Bivens* actions to cover officers in the context of fugitive task force members. *See Logsdon v. U.S. Marshal Serv.*, 91 F.4th 1352, 1357-58 (10th Cir. 2024) (holding that extending *Bivens* to a fugitive task force members would potentially hinder their duties). Accordingly, extending *Bivens* to the Individual Defendant is not proper in this instance.

[17] The Court notes that the Plaintiffs contend in their response they should be granted leave to amend their complaint. The Defendants contend allowing the Plaintiffs to amend their complaint would be futile. Based on the Court's forgoing analysis, the Court finds that an amended complaint would not cure the jurisdiction and legal defects which make dismissal appropriate.

IV. CONCLUSION

Accordingly, the Court hereby

ORDERS that Defendant Harris County's Motion to Dismiss and/or for Summary Judgment (Document No. 96) is **PARTIALLY GRANTED** and **PARTIALLY DENIED**. The motion is Granted as to the motion to dismiss and denied as to the motion for summary judgment. The Court further

ORDERS Defendant United States, Tran, and O'Bannion's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Document No. 97) is **GRANTED.** The Court further

ORDERS that Plaintiffs' Response to the Defendants' Motions to Dismiss and Request for Leave to Amend the Complaint (Document No. 107) is **DENIED.**

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 28 day of May, 2024.

DAVID HITTNER
United States District Judge

Constitutional and Statutory Provisions Involved

a. U.S. Const. amend. IV

b. 42 U.S.C. § 1983

c. 42 U.S.C. § 12132

d. Federal Tort Claims Act