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)

PLAINTIFF'S MEMORANDUM OPPOSING DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

AND

PLAINTIFF'S REQUEST FOR DISCOVERY UNDER RULE 56(d)

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Introduction

Officer Weyker's motion to dismiss or for summary judgment boils down to one question: Was Officer Weyker acting "under color of any statute, ordinance, regulation, custom, or usage, of any State" when she framed Ms. Mohamud? *See* 42 U.S.C. § 1983. Under the allegations in Ms. Mohamud's first amended complaint, the answer is yes. This Court should deny Officer Weyker's motion for that reason alone.

But even if this Court disagrees, it should defer its decision on Officer Weyker's motion for two reasons:

First, Ms. Mohamud has a pending motion for leave to file a second amended complaint, Dkt. 74, which provides new documentary evidence—never provided to this Court or the Eighth Circuit—and which, if granted, would moot Officer Weyker's motion.

Second, Ms. Mohamud should be permitted to engage in limited discovery under Rule 56(d) to figure out whether Officer Weyker's unconstitutional conduct is "fairly attributable to the state," especially in light of this new evidence. *Yassin v. Weyker*, 39 F.4th 1086, 1090 (8th Cir. 2022) (citation omitted). For instance, Ms. Mohamud has uncovered agreements between the St. Paul Police Department and FBI declaring that

cross-deputized officers like Officer Weyker act under color of state law and are, therefore, liable under Section 1983. *E.g.*:

> Bivens Actions. Liability for violations of federal constitutional law rests with the individual Federal agent or officer, or employee, pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) or pursuant to 42 U.S.C. § 1983 for State and local officers or cross-deputized Federal officers.

See **Exhibit 1**, Rule 56(d) Decl., Ex. 3; *see also generally* Dkts. 74–76. Further, Ms. Mohamud should be permitted discovery to address Officer Weyker's assertion that she did not cause Ms. Mohamud's injuries.

Governing Standards

Officer Weyker's motion to dismiss must be denied if the first amended complaint supports a reasonable inference she is liable. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court must accept as true the well-pled factual allegations and draw all reasonable inferences in Ms. Mohamud's favor, considering "only the complaint and materials that are 'necessarily embraced by the pleadings'" or attached as exhibits. *Meardon v. Register*, 994 F.3d 927, 934 (8th Cir. 2021) (quoting *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n.4 (8th Cir. 2003)).

Ms. Mohamud's first amended complaint has no exhibits. Officer Weyker's motion has 19. If the Court does not exclude the materials Officer Weyker has heaped onto the docket from outside the pleadings, the

motion to dismiss must be treated as one for summary judgment. Fed. R. Civ. P. 12(d). In that case, summary judgment is improper unless "the nonmovant has had adequate time for discovery." *Ray v. Am. Airlines, Inc.*, 609 F.3d 917, 923 (8th Cir. 2010) (quoting *In re TMJ Litig.*, 113 F.3d 1484, 1490 (8th Cir. 1997)). Because Ms. Mohamud has had *no* time for discovery (and has given the Court a concrete sampling of supporting evidence she anticipates discovery will unveil), "summary judgment is not proper[.]" *Iverson v. Johnson Gas Appliance Co.*, 172 F.3d 524, 530 (8th Cir. 1999).

Officer Weyker's opening brief relies on her preferred interpretation of material she cherry-picked from outside the pleadings—not Ms. Mohamud's allegations. This Court previously rejected Officer Weyker's attempts to invert the standard of review in her substantially similar motion to dismiss, Dkt. 17. Order, Dkt. 27 at 8 ("The parties presented matters outside the pleadings in connection with Weyker's motions to dismiss. The Court excludes them."). It should do so again, "accept[ing] the well-pled allegations in the complaint as true and draw[ing] all reasonable inferences in the plaintiff's favor." *Meardon*, 994 F.3d at 934. To the extent the Court is inclined to consider Officer Weyker's motion as

one for summary judgment, before Ms. Mohamud has had any opportunity for discovery, it should defer its decision until limited discovery can be conducted. *See infra* at 55 (Rule 56(d) Request); Rule 56(d) Decl.

Summary of Argument Opposing Officer Weyker's Motion

The allegations in Ms. Mohamud's first amended complaint state a claim that Officer Weyker violated the Constitution under color of Minnesota law because they show state authority was the backbone of Officer Weyker's conduct. *See* Dkt. 11, FAC ¶¶ 2, 4, 10–11, 19, 20, 23–25, 27, 28(b)(ii)–(v), 42; *infra* Argument I.B.5. Taken together, the allegations establish that Officer Weyker framed Ms. Mohamud to protect a years-long investigation intended to combat human trafficking in Minnesota; Officer Weyker's investigation began and grew from her work as a St. Paul officer; and federal involvement (including cross-deputization) supported Officer Weyker's Minnesota-centric goals. *Id.*; *see also* note 1 *infra*; *United States v. Fahra*, 643 F. App'x 480, 482 (6th Cir. 2016) (noting "the lead agent [Officer Weyker]," the "principal victim-witness," and "all but a few of the 30 defendants reside in Minnesota, and an overwhelming portion of the events at issue occurred in Minnesota[.]").

According to Officer Weyker, these facts don't matter. In her view, two others sweep Section 1983 off the table: Officer Weyker was cross-deputized as a Special Deputy U.S. Marshal when she carried out her misdeeds; and, by that late stage, the state investigation had developed a federal dimension. She is wrong. Even federal officers who, unlike Officer Weyker, are not employed by a state agency and are not performing state-assigned duties can and do act under color of state law. *See infra* Argument I.B.2.

That's what happened here. Officer Weyker leveraged her St. Paul authority to orchestrate Ms. Mohamud's detention and prosecution. True, the investigation Officer Weyker was trying to protect garnered federal reinforcements, including limited federal authority conferred to Officer Weyker. But that did not strip state authority from her post; it did not stop her from exercising the resources and privileges given to her by the state; and it did not erase the investigation's distinctly Minnesotan origin and character. Officer Weyker was a state actor whose state duties had a "sufficient nexus"—indeed, an overwhelming one—to her unconstitutional conduct. *See infra* Argument I.A.–I.B.4.

In her motion, Officer Weyker makes two arguments collateral to the question of whether she was acting under color of state law. Neither has merit.

First, she contends Ms. Mohamud is precluded from arguing Officer Weyker operated under color of state law. Officer Weyker reasons that because Ms. Mohamud's friend Ifrah Yassin lost on the color-of-state-law question in *her* case against Officer Weyker and Ms. Mohamud joined motions to stay her case while Ms. Yassin's was resolved, Ms. Mohamud cannot make independent arguments about Officer Weyker's authority. But the principles of preclusion do not apply just because plaintiffs in separate lawsuits are friends or because a plaintiff moves to stay her case pending an appellate decision in another. Ms. Mohamud has the right to litigate her own case against Officer Weyker. Moreover, Ms. Mohamud's case against Officer Weyker is different from Ms. Yassin's in key ways. To start, the factual picture in *Yassin* conflicts with Ms. Mohamud's allegations. *See infra* Argument I.B.5. Next, Ms. Mohamud seeks limited discovery after uncovering documents never presented to this Court or the Eighth Circuit. These documents reveal that both the St. Paul Police Department and FBI believed Officer Weyker's conduct as a cross-

deputized officer was actionable under Section 1983. *See infra* at 55–57 (Rule 56(d) Request); Rule 56(d) Decl. Finally, unlike Ms. Yassin, Ms. Mohamud argues that the doctrines of joint action and pervasive entwinement each compel a finding that Officer Weyker was acting under color of state law. *See infra* Argument I.B.2–3. This case is not a mere replay of *Yassin*.

Second, Officer Weyker (re)asserts qualified immunity. Yet she has given this Court no reason to depart from its prior decision denying qualified immunity on the pleadings. Nothing relevant has changed. She presents virtually the same arguments she made in her prior motion, accompanied by virtually the same set of exhibits outside the pleadings. Also, all the relevant facts are the same as those in *Farah v. Weyker*, where the Eighth Circuit affirmed this Court's denial of qualified immunity to Officer Weyker because "a reasonable officer would know that deliberately misleading another officer into arresting an innocent individual to protect a sham investigation is unlawful." 926 F.3d 492, 503 (8th Cir. 2019). Officer Weyker (still) is not entitled to qualified immunity.

This Court should deny Officer Weyker's motion or at least defer it.

Factual Background

I. As a St. Paul police officer, Officer Weyker developed a Minnesota-centric investigation.

Before Officer Weyker was cross-deputized with any federal authority, she was a St. Paul police officer on a St. Paul assignment: She led a criminal investigation targeting a group of thirty people—nearly all Minnesota residents—for the alleged trafficking of other Minnesota residents (the "*Adan* cases"). FAC ¶ 2; *Ahmed v. Weyker*, 984 F.3d 564, 565 (8th Cir. 2020); *Fahra*, 643 F. App'x at 481–83. Officer Weyker had been developing her investigation since 2008, when she started cultivating witnesses to concoct a crime ring for her to bust. *See Fahra*, 643 F. App'x at 481–82. Officer Weyker's investigation resulted in thirty indictments. *Id.* at 481.

Eventually, Officer Weyker was cross-deputized as a Special Deputy U.S. Marshal, sponsored by the FBI. Under federal law, Officer Weyker was eligible for cross-deputization only because she was a local law-enforcement officer. 28 C.F.R. § 0.112. She remained a St. Paul police officer employed by the City of St. Paul, not any federal agency. FAC ¶¶ 10, 11. Naturally, after Officer Weyker was cross-deputized, the St. Paul

Police Department maintained its interest and involvement in the *Adan* investigation.

Officer Weyker's cross-deputization gave her narrow federal authority, but it did not displace her state authority. No one thought it did. Her mission remained the same before and after her cross-deputization: lead the *Adan* investigation to combat human trafficking in Minnesota.

II. Officer Weyker framed Ms. Mohamud to protect a witness Officer Weyker had long been cultivating for her Minnesota investigation.

Ms. Mohamud—along with her friends Hawo Ahmed and Ifrah Yassin—were "[p]erhaps the most accidental of participants" in Officer Weyker's investigation. *Yassin*, 39 F.4th at 1088. On July 16, 2011, the girls had the misfortune of being attacked by Muna Abdulkadir, a key witness Officer Weyker had been cultivating for years (and long before Officer Weyker was cross-deputized). FAC ¶ 13. Following the attack, the girls called 911 for help. FAC ¶ 16.

Meanwhile, Ms. Abdulkadir fled and made a call of her own to Officer Weyker, telling Officer Weyker that she had been in a fight, had attacked Ms. Mohamud and her friends with a knife, was hiding in a neighbor's apartment, and feared she would be arrested. FAC ¶ 17.

"Worried about the possibility of losing a witness, Weyker sprang into action."[1] *Ahmed*, 984 F.3d at 566.

Using her Minnesota credentials and specialized knowledge of local policing, Officer Weyker quickly involved herself in the state-law investigation and shifted its target from Ms. Abdulkadir to Ms. Mohamud and her friends. FAC ¶¶ 19–21. She first contacted Minneapolis Police Officer Anthijuan Beeks, who responded to the 911 call. FAC ¶¶ 19–20. When Officer Beeks arrived on the scene, he regarded Ms. Mohamud and her friends as the victims of a local crime. FAC ¶ 18. He had no reason to suspect that Ms. Mohamud or her friends had sought to harm, threaten, or intimidate Abdulkadir because she was a witness in a federal case.

[1] *See also* FAC ¶¶ 17, 23. It is reasonable to infer from these allegations that Ms. Abdulkadir and Officer Weyker met one another and developed a relationship—long before the knife attack or Officer Weyker's cross-deputization—because Officer Weyker was a St. Paul police officer. Ms. Abdulkadir was in the St. Paul-Minneapolis region when she phoned Officer Weyker. The two had a close enough relationship for Ms. Abdulkadir to contact Officer Weyker immediately in a bind. Officer Weyker knew enough about Ms. Abdulkadir to quickly convince her and her mother to concoct tales protecting the *Adan* investigation. Officer Weyker also had strong enough faith in Ms. Abdulkadir's potential support for the *Adan* cases that Officer Weyker was willing to lie to fellow officers and orchestrate the arrest, prosecution, and imprisonment of innocent girls to shield Ms. Abdulkadir from criminal consequences.

FAC ¶¶ 22–23, 27. Nor did he have any reason to suspect Ms. Mohamud had committed any crime at all. *Id*. He regarded her as a mere bystander to the scuffle between her friends and Ms. Abdulkadir and as a passive victim of Ms. Abdulkadir's knife attack. FAC ¶¶ 13–16, 18.

Officer Weyker changed the scenario by reaching out and lying to Officer Beeks. FAC ¶ 27. She used her status as a St. Paul officer to connect with him on the scene of the attack, where he received a message through the computer in his patrol vehicle that he should contact "Officer Heather Weyker out of St. Paul" before proceeding with his investigation. *See* FAC ¶ 19. Officer Beeks called Officer Weyker, who told him that she had "information and documentation" that Ms. Mohamud and her friends "had been actively seeking out Abdulkadir and attempting to intimidate [her] and cause bodily harm" for cooperating in a federal investigation, and that one of the girls was dating a suspect in the investigation. FAC ¶ 20. Officer Weyker made similar remarks to another Minneapolis police officer, Sergeant Gary Manty, who was also on the scene. FAC ¶ 24.

But Officer Weyker was lying. She "had no 'information' or 'documentation'"; she just wanted to shield Ms. Abdulkadir from arrest to encourage her continued participation in the investigation. FAC ¶¶ 21, 25.

Officer Weyker's plan worked—at least as far as she sought to have Ms. Mohamud and her friends locked up. Based on Officer Weyker's intentional misrepresentations, Officer Beeks arrested Ms. Mohamud and her friends for witness tampering under Minnesota law. FAC ¶ 26.

Officer Weyker did not stop there. The next day, she swore out a federal criminal complaint and supporting affidavit against Ms. Mohamud and her friends for tampering with a federal witness and obstructing Officer Weyker's investigation into the *Adan* cases. FAC ¶ 28. In her affidavit, Officer Weyker merely repeated the same lies she had told Minneapolis police. *Id.* With the criminal complaint, Officer Weyker's frame-up was accomplished: Ms. Mohamud, a minor at the time, spent just short of 25 months in federal custody before the government dismissed the case against her. FAC ¶ 31. A jury acquitted both of Ms. Mohamud's friends at trial. *Yassin*, 39 F.4th at 1088; *Ahmed*, 984 F.3d at 566.

Ultimately, Officer Weyker's investigation into the *Adan* cases also crumbled under the weight of her dishonesty. "[P]lagued with problems from the start," only nine of the 30 people indicted were tried. *Ahmed*, 984 F.3d at 565. Each was acquitted. *Id.* And after a "painstaking review of the record," the Sixth Circuit concluded that Officer Weyker's tale "of

sex trafficking and prostitution" was "likely a fictitious story" that Officer Weyker advanced through a campaign of lies and deceit. *Fahra*, 643 F. App'x at 482, 484.

Procedural History

Following Ms. Mohamud's release from federal prison, the collapse of Officer Weyker's investigation, and multiple federal courts noting Officer Weyker's troubled relationship with the truth, Ms. Mohamud filed her complaint against Officer Weyker on June 15, 2017. Since that day, Ms. Mohamud has been "trying to hold a rogue law-enforcement officer responsible for landing [her] in jail through lies and manipulation." *Ahmed*, 984 F.3d at 565. By stipulation, she filed her first amended complaint on September 20, 2017. Dkt. 11. In it, she asserted two claims for damages based on Fourth Amendment violations: one under 42 U.S.C. § 1983 for Officer Weyker's actions under color of state law and one under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for Officer Weyker's actions under color of federal law.

I. Officer Weyker has never answered Ms. Mohamud's complaint, and this Court has already denied Officer Weyker's request for pre-discovery qualified immunity.

This case remains at its inception. This Court has not set discovery deadlines or entered a scheduling order under Rule 16(b). The parties have not participated in a Rule 26(f) conference, exchanged initial disclosures, or engaged in any other discovery. Because no Rule 26(f) conference has taken place, Ms. Mohamud is precluded from conducting any discovery without a court order or Officer Weyker's stipulation. *See* Fed. R. Civ. P. 26(d)(1).

On October 20, 2017, Officer Weyker responded to the first amended complaint with a consolidated motion to dismiss in this and a related case brought by one of Ms. Mohamud's friends, Hawo Ahmed, *Ahmed v. Weyker*, No. 17-CV-2070. Officer Weyker argued that probable cause existed to arrest and prosecute Ms. Mohamud and her friends, that Officer Weyker is entitled to qualified immunity, and that no cause of action exists under Section 1983 or *Bivens* to sue Officer Weyker. Dkt. 17.

This Court denied Officer Weyker's motion. Without deciding whether Section 1983 or *Bivens* is the proper vehicle for Ms. Mohamud's

claims, this Court denied Officer Weyker qualified immunity. Dkt. 27 at 9–12. The Court reasoned the law is clearly established that "a seizure without 'a truthful factual showing sufficient to constitute probable cause' violates the Fourth Amendment," *id.* at 10 (quoting *Livers v. Schenck*, 700 F.3d 340, 357 (8th Cir. 2012)), and nothing in Officer Beeks's 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," *id.* at 11.

II. On appeal, the Eighth Circuit held that Officer Weyker could not be sued under *Bivens* but remanded for this Court to consider whether she can be sued under Section 1983.

Officer Weyker filed an interlocutory appeal. The Eighth Circuit did not disturb this Court's qualified-immunity holding. After all, the circuit court had already decided in Ms. Yassin's case that Weyker is not shielded by qualified immunity because "a reasonable officer would know that deliberately misleading another officer into arresting an innocent individual to protect a sham investigation is unlawful." *Farah*, 926 F.3d at 503. Instead, the Eighth Circuit held that Ms. Mohamud could not sue Officer Weyker under *Bivens*. *Ahmed*, 984 F.3d at 568–69.

The Eighth Circuit vacated and remanded for this Court to dismiss Ms. Mohamud's *Bivens* claim but specified that Ms. Mohamud may be able to proceed under Section 1983. *Ahmed*, 984 F.3d at 571. As the Eighth Circuit put it: "Just because a *Bivens* remedy is off the table does not mean [Ms. Mohamud's case is] over. If the district court determines on remand that Weyker was acting under color of *state* law," Ms. Mohamud's Section 1983 claim may proceed. *Id*.

III. When Ms. Mohamud petitioned the Supreme Court, the U.S. Solicitor General persuaded the Court not to hear the case because Ms. Mohamud might be able to proceed under Section 1983.

Before litigating the Section 1983 issue on remand, Ms. Mohamud petitioned the Supreme Court for certiorari on the *Bivens* issue. *See generally* Pet. for Cert., *Mohamud v. Weyker*, 142 S. Ct. 2833 (2022) (No. 21-187). The U.S. Solicitor General, however, persuaded the Court not to hear the case in an interlocutory posture, explaining that the Eighth Circuit "remanded the case to permit the district court to determine whether respondent was acting under color of state law, which might permit petitioner's constitutional claim to proceed under Section 1983." Gov't Br. in Opp., *Mohamud v. Weyker*, 142 S. Ct. 2833 (2022) (No. 21-187), at 20. On

that basis, the Solicitor General urged the Supreme Court to wait before deciding whether to review the Eighth Circuit's *Bivens* decision:

> If the district court finds that petitioner's Fourth Amendment claim cannot proceed under Section 1983, and that determination is upheld in any subsequent appeal, petitioner will be able to raise her [*Bivens*] claim, together with any other claims that may arise in those subsequent proceedings, in a single petition for certiorari.

Id. at 21.[2]

By that time, the parties had already filed a joint motion to stay proceedings pending the Eighth Circuit's decision in *Yassin*.[3] In other words, it was the Solicitor General's implicit representation to the Supreme Court that nothing—including the joint motion to stay—prevents Ms. Mohamud from arguing that her case may proceed under Section 1983 and nothing prevents this Court from addressing that argument on its merits.

Although *Yassin* arose from the same incidents underlying Ms. Mohamud's case, *Yassin* was based on a different complaint, Ms. Yassin was

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[2] Ms. Mohamud preserves her *Bivens* claim for appeal.

[3] The parties moved to stay the case on March 25, 2021. The Solicitor General filed her brief opposing certiorari on November 19, 2021.

represented by different counsel, and *Yassin* lived a separate procedural life. Ms. Mohamud has never been a party to Ms. Yassin's case; never agreed to be bound by a judgment in *Yassin*; has no legal relationship to Ms. Yassin; and has never been represented by Ms. Yassin or vice versa.

Still, it made sense as a matter of judicial economy to wait for the Eighth Circuit to resolve the legal question in *Yassin* before addressing the related issue here. Otherwise, this Court might have issued a decision that required unnecessary relitigation. After all, the Eighth Circuit's determinations on matters of law—such as the proper framework to evaluate whether Officer Weyker was operating under color of state law—control in this Court. This Court may not depart from that legal framework, even while it must decide for itself how the facts of each case apply.

The Eighth Circuit decided *Yassin* on July 14, 2022. A few months later, the parties jointly moved to stay again, mirroring their prior motion. This time, the stay was sought pending the Supreme Court's decision on Ms. Yassin's petition for a writ of certiorari. The Solicitor General did not weigh in on Ms. Yassin's case, and the Supreme Court denied certiorari on February 21, 2023. *Yassin v. Weyker*, 143 S. Ct. 779 (2023) (mem.).

The parties' counsel then conferred, appeared at a status conference before Magistrate Judge Leung, and stipulated to a briefing schedule, which the Court adopted. Dkt. 64.

On the Solicitor General's and Eighth Circuit's invitations, Ms. Mohamud returns to this Court and asks it to address whether Officer Weyker was acting under color of state law based on the facts and arguments her case presents. To be sure, the legal framework in the Eighth Circuit's *Yassin* decision governs, but Ms. Mohamud's case makes different factual allegations and different legal arguments in support of her Section 1983 claim.

IV. Ms. Mohamud moved the Court for leave to amend her complaint to better address the legal contours of Section 1983 that the Eighth Circuit expressed in *Yassin*.

Under the Court's briefing schedule, Ms. Mohamud moved for leave to file a second amended complaint on June 5, 2023. Dkts. 74–75. She did so to better address the legal issues as clarified by the Eighth Circuit in *Yassin* and to introduce salient, newly discovered evidence pertaining to those issues. The same day, Officer Weyker filed her motion.

Argument Opposing Officer Weyker's Motion

Officer Weyker makes three arguments in support of her motion: (1) Officer Weyker was not acting under color of state law, (2) Ms. Mohamud is precluded from arguing otherwise, and (3) Officer Weyker is entitled to qualified immunity. The Court should reject all three. The rest of this brief refutes each argument before discussing why the Court should at least defer considering summary judgment until Ms. Mohamud has had an opportunity for limited discovery. Recall, however, that Officer Weyker's motion is moot if Ms. Mohamud's pending motion for leave to amend is granted. *See Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 956 (8th Cir. 2002); *Arcaro v. City of Anoka*, No. 13-CV-2772, 2014 WL 12605451, at *3 (D. Minn. July 16, 2014) (Ericksen, J.).

I. Officer Weyker acted under color of state law.

Section 1983 provides liability against "[e]very person" who violates the Constitution "under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. The statute is not limited to violations committed "under the *exclusive* color" of state law or even "under the *primary* color" of state law. That's because Section 1983 is a remedial statute passed "in the aid of preservation of human liberty and

human rights." *Lake Country Estates, Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 399–400 & n.17 (1979) (quotation omitted). It is, therefore, "well settled that § 1983 must be given a liberal construction." *Id.*

Trying to circumvent Section 1983's broad reach, Officer Weyker first argues she "was acting under color of federal, not state, law at the time of the alleged conduct." Dkt. 67 at 23. In her view—although she was simultaneously a St. Paul police officer and federal marshal—she could not act under color of both state and federal law while working on the *Adan* investigation. Building on this premise, she reasons that she acted under color of federal law because she was deputized as a federal agent, working on a federal investigation, trying to protect a witness in that investigation, and preparing a criminal complaint and affidavit supporting federal charges. So, by her logic, she could not have been acting under color of state law at all.

This argument, though seductively simple, is fatally flawed. Cross-deputization as a concept anticipates an officer can and will act under color of both federal and state law at once. So the viability of Ms. Mohamud's Section 1983 claim does not depend on whether Officer Weyker

acted under color of federal law. It depends on whether Officer Weyker was acting under color of state law. And she was.

Whether a person acts under color of state law is ultimately a question of law, but it is "necessarily [a] fact-bound inquiry" with the jury often playing a role. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982); *see, e.g.*, *Meier v. City of St. Louis*, 934 F.3d 824, 829–30 (8th Cir. 2019). A person acts under color of state law when her conduct is "fairly attributable to the state," *Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir. 2007) (cleaned up)—that is, when she "exercised power 'possessed by virtue of state law and made possible only because [she] is clothed with state authority.'" *Yassin*, 39 F.4th at 1090 (quoting *West v. Atkins*, 487 U.S. 42, 49 (1988)).

In some cases, courts must determine whether the conduct was carried out in a "purely private capacit[y]" or fairly attributable to the state. *Dossett v. First State Bank*, 399 F.3d 940, 947 (8th Cir. 2005); *see Wickersham*, 481 F.3d at 597. The Court here faces an analogous question: whether Officer Weyker's conduct was carried out in a "purely [federal] capacity" or fairly attributable to the state. Two intermediate questions guide the analysis: (1) Did the injury "result[] from the exercise of a right

or privilege having its source in state authority"? And (2) may the defendant "be appropriately characterized as a state actor"? *Wickersham*, 481 F.3d at 597 (cleaned up). The answer to each here is "yes," making Officer Weyker's conduct fairly attributable to the state.

A. Ms. Mohamud's injury resulted from Officer Weyker's exercise of a right or privilege sourced in state authority.

A state police officer like Officer Weyker exercises a right or privilege sourced in state authority when there is a "sufficient nexus" between her state duties and harmful conduct. *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009). Considerations include whether the officer was on duty and in uniform, the motivation behind her actions, and whether she had access to the victim because of her position. *United States v. Colbert*, 172 F.3d 594 (8th Cir. 1999).

There can be little doubt that Officer Weyker's state assignment was sufficiently connected to her injurious conduct here. By framing Ms. Mohamud and her friends, Officer Weyker believed she was furthering the investigation the St. Paul Police Department had assigned her to develop. FAC ¶¶ 2, 4, 23–28. She was eligible for her cross-deputized role only because she was a St. Paul police officer, 28 C.F.R. § 0.112, and she

was selected to the task force because she had been developing the *Adan* investigation as a St. Paul officer, FAC ¶ 42. Officer Weyker also had access to Ms. Mohamud because she had developed a relationship with Ms. Abdulkadir since 2008, as a St. Paul police officer. FAC ¶¶ 23–25.

Officer Weyker's cross-deputization did not strip away any of her state-law powers. It merely supplemented them with limited federal authority. Officer Weyker continued to exercise her powers as a St. Paul police officer and continued to pursue the same goals—the same investigation—to which the St. Paul Police Department assigned her. Before she was cross-deputized, Weyker was conducting a human-trafficking investigation as a St. Paul police officer. After she was cross-deputized, she continued to do exactly that. The state character of her investigation of the *Adan* cases did not change simply because federal reinforcements arrived.

Work born in state authority does not easily mature out of its state character. For example, in *Smith v. Insley's, Inc.*, a company towed and stored a vehicle at the behest of the sheriff's office as part of a criminal investigation. 499 F.3d 875 (8th Cir. 2007). The company later sold the vehicle and argued it was not a state actor when making the sale. The

Eighth Circuit disagreed. The company's possession and sale of the vehicle, the Court explained, "was as a result of the initial criminal investigation tow," so the character of the whole tow job, including selling the vehicle, "did not change." *Id.* at 880; *see also Lake Country*, 440 U.S. at 399 (citing as evidence of state character that "[t]he [Congressionally approved interstate] Compact had its genesis in the actions of the compacting States"). Likewise, Officer Weyker's work furthering the *Adan* investigation—including framing Ms. Mohamud to protect a witness—resulted from Officer Weyker's St. Paul authority. The state character of her job did not evaporate.

Rather, Officer Weyker abused her state authority (and her federal authority) to frame and jail Ms. Mohamud. As a St. Paul police officer, Officer Weyker met and started cultivating Muna Abdulkadir before the investigation took on a federal angle. Without the relationship the two developed because Officer Weyker was a St. Paul police officer, Ms. Abdulkadir would not have phoned Officer Weyker while hiding from Minneapolis police. *See supra* note 1.

Officer Weyker then used her knowledge of local police practices and her St. Paul credentials to reach Officer Beeks and persuade him to

drop everything and call her before continuing his investigation. Officer Beeks received a message to call "Officer Heather Weyker out of St. Paul." *See* FAC ¶ 19. When he did, Officer Weyker used her authority as a St. Paul officer to deceive Officer Beeks, ensure Ms. Mohamud's arrest instead of the woman who attacked her, and thereby cover for the St. Paul-cultivated witness Weyker had spent years developing her investigation around. Officer Weyker "put the weight of the State behind" her gambit to remove Ms. Mohamud from the picture, thus protecting the *Adan* investigation. *Lugar*, 457 U.S. at 940.

But for Officer Weyker's abuse of her state authority, Ms. Abdulkadir would have been arrested while Ms. Mohamud would have been free to leave the scene as the victim of a knife attack. But that is not what happened. Officer Weyker used her Minnesota law-enforcement credentials, her knowledge of local police practices, and her connection to Ms. Abdulkadir—forged through her St. Paul police work—to jump into the local officers' investigation, reverse its course, and doom Ms. Mohamud and her friends to an awful fate. Thus, Officer Weyker used state color to frame the girls, hoping to protect the *Adan* investigation. *Lugar*, 457 U.S. at 940. She did so by exercising power "possessed by virtue of state law

and made possible only because [she was] clothed with the authority of state law." *West*, 487 U.S. at 49 (citing *United States v. Classic*, 313 U.S. 299, 326 (1941)).

B. Officer Weyker is a state actor thrice over.

The second requirement—that a party is appropriately characterized as a state actor—is met in at least three circumstances: (1) the party performs a traditional, exclusive public function, using a power traditionally reserved to the state; (2) the party participates in a joint activity with the state or its agents; and (3) there is "pervasive entwinement" between the party and the state. *Wickersham*, 481 F.3d at 597; *see also Roberson v. Dakota Boys & Girls Ranch*, 42 F.4th 924, 929 (8th Cir. 2022). While only one of these circumstances is required, all three exist for Officer Weyker.

1. Officer Weyker exercised power traditionally reserved to the state.

Officer Weyker exercised two powers traditionally reserved to the state. First, she exercised the power to investigate state crimes and decide whether a person will be detained for them. *See Doe v. N. Homes, Inc.*, 11 F.4th 633, 637 (8th Cir. 2021). She injected herself into a state-law investigation and persuaded on-scene local officers to arrest Ms.

Mohamud for the Minnesota crime of witness tampering. True, the federal government has power to investigate federal crimes. But the investigation Officer Weyker injected herself into was not federal. It was a state-law investigation into a knife attack by Ms. Abdulkadir. Officer Weyker fed Minneapolis officers information that would persuade them to arrest Ms. Mohamud and her friends for violating state law—something both Officer Weyker and the on-scene officers could do as local police officers. Sure enough, Officer Beeks arrested the girls for the state-law crime of witness tampering. FAC ¶ 26.

Second, Officer Weyker used communication systems generally reserved for state law-enforcement officers. *See* FAC ¶¶ 19–21. People who are not state police officers cannot generally use local departments' internal communications systems to connect with local law enforcement officers at an active crime scene. But Officer Weyker could and did just that, leveraging her position as a police officer "out of St. Paul" to swiftly intercede in the Minneapolis officers' investigation. FAC ¶ 19.

Thus, Officer Weyker "abuse[d] the position given to [her] by the State." *Ramirez-Peyro*, 574 F.3d at 900 (quotation omitted); *cf. Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621–22 (listing factors

establishing state-actor status, including "whether the injury caused is aggravated in a unique way by the incidents of governmental authority").

2. Officer Weyker's investigation into the *Adan* cases was a joint activity between the FBI and St. Paul Police Department.

A second reason Officer Weyker is appropriately characterized as a state actor is that she was "a willful participant in joint activity with the State or its agents." *Murray v. Wal-Mart, Inc.*, 874 F.2d 555, 558–59 (8th Cir. 1989). Joint activity rests on a "symbiotic relationship" between the state and another entity. *Cabrera v. Martin*, 973 F.2d 735, 742 (9th Cir. 1992). The test "is whether the state or its officials played a 'significant' role" in the injury. *Kletschka v. Driver*, 411 F.2d 436, 449 (2d Cir. 1969); *see also Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722–26 (1961) (public building, private restaurant). For example, private businesses and their employees act under color of state law when police detain accused shoplifters without making an independent investigation or when an accused shoplifter is detained based on a customary plan between the store and the police department. *See Murray*, 874 F.2d at 559. Similarly, a federal Veterans Affairs hospital is a state actor when it works "in close

cooperation" with a state medical school to violate someone's rights. *Kletschka*, 411 F.2d at 440.

Cases addressing joint action often involve agents who are strictly state actors working in concert with strictly private or strictly federal actors. That was the case in *Martinez v. Winner*, 771 F.2d 424 (10th Cir. 1985). Exclusively federal prosecutors conspired with exclusively state officers to subject a man to rigged criminal process. In doing so, the federal agents opened themselves up to liability under Section 1983; they were appropriately characterized as state actors in their conspiratorial acts. *See id.* at 441.

Sometimes, though, the ingredients of joint action are less well delineated, making state action even more likely to exist. That was the situation in *Murray v. Wal-Mart*. Wal-Mart's private security guard called police after detaining a shoplifter. Police took the suspect into custody, and the prosecuting attorney pressed charges based on the security guard's "incomplete version of the facts." 874 F.2d at 559. Though a private employee for Wal-Mart, the security guard was also employed by the local police department and, as a result, had a close relationship with the

prosecutor. The Eighth Circuit had little trouble concluding that Wal-Mart was a state actor based on joint action. *Id.*

Officer Weyker similarly embodied joint action. The St. Paul Police Department and the FBI entered a "'symbiotic' venture" through task-force collaboration and in cross-deputizing Officer Weyker. *See Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 869–71 (10th Cir. 2016). Not only did state and federal officers come together to further the *Adan* cases; Officer Weyker was joint action personified. Equipped with both state and federal privileges, she carried out an unconstitutional plan to frame Ms. Mohamud and her friends to protect the *Adan* cases, which were furthered through the cooperation of state and federal officers.

To be clear, this is not a case in which joint action exists because a federal officer (*i.e.*, Officer Weyker) conspired with a state officer (*i.e.,* Officer Beeks). Officer Weyker was not *just* a federal officer. Consistent with the very premise of cross-deputization, Officer Weyker was both a state and federal officer who could (and did) carry out joint state-federal action all on her own. For that reason alone, any color of federal law cannot eclipse the color of state law under which Officer Weyker simultaneously acted. *Accord Lake Country*, 440 U.S. at 399–400 (instructing that

Section 1983 liability should be the default for an official acting under color of both state and federal law); *Johnson v. Orr*, 780 F.2d 386, 392 (3d Cir. 1986) ("[W]hile the adjutant general acted as a federal agent in [the injurious conduct], it does not follow that his actions were done exclusively under color of federal law." (citation omitted)).

3. The state-federal task force pervasively entwined Officer Weyker's work on the *Adan* cases with the state.

The third reason Officer Weyker is appropriately characterized as a state actor is that the state was pervasively entwined with Officer Weyker's task-force work. The pervasive-entwinement doctrine recognizes that the state is responsible for unconstitutional actions when the state has played a large enough role in the "composition and workings" of an actor. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001).

In one iteration of the doctrine, "[c]onduct that is formally 'private' may become . . . so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton*, 382 U.S. 296, 299 (1966). Thus, the Supreme Court determined that a nonprofit athletic association was a state actor because

it drew many of its members from public schools and many of its employees were treated as state employees, eligible to enroll in the state retirement system. *Brentwood*, 531 U.S. at 298. Similarly, the Court determined that private trustees of a park were state actors because the park had a history of municipal control and it maintained many of the public features it had before passing into private hands. *Evans*, 382 U.S. at 299. The Court reasoned that it "cannot take judicial notice that the mere substitution of trustees [from public to private] instantly transferred this park from the public to the private sector." *Id.*

The pervasive-entwinement doctrine applies also to an actor who is—to some degree—federal but whose activities are intertwined with state law. For example, courts confronted a situation in which a statute made National Guard technicians federal employees. *See Johnson*, 780 F.2d at 391. The courts agreed with one another that the technicians' federal dimension did not prevent liability under Section 1983. *Id.* (collecting cases). As the Third Circuit explained, the statute did not render technician supervisors and the adjutant general "more federal in character to the point where [they] can no longer be considered as acting under color of state law when participating in personnel decisions resulting in

the discharge of [] technicians." *Id.*; *cf. Kletschka*, 411 F.2d at 449 (paraphrasing *Burton*, 365 U.S. at 725, to hold that "[t]he State (medical center) has so far insinuated itself into a position of interdependence with * * * (the Syracuse V.A. hospital) that it . . . cannot be considered to have been so * * * ('purely federal') as to fall without the scope of the Fourteenth Amendment.").

So too here. Officer Weyker did not cease to be a state actor when she gained federal authority to support the state-federal task-force's work. Nor did her investigation—which maintained a predominantly Minnesota focus—transform into a purely federal endeavor when federal criminal charges eventually emerged. To emphasize the point, federal prosecutors in Minnesota "curious[ly]" did not bring charges despite the overwhelmingly Minnesota-centric aspects of Weyker's investigation. *Fahra*, 643 F. App'x at 482.

The state's continued interest in the investigation after Officer Weyker was cross-deputized is not speculative. The state endorsed Officer Weyker's cross-deputization and assigned her—as a St. Paul police officer—to the task force. The task force itself furthered the Minnesota investigation she had been leading. *Id.* at 481. Stated another way,

Officer Weyker's deputization and the federal government's participation in the task force did not "instantly transfer[]" the state's historical and continuing control over Officer Weyker (or her investigation) to the federal government. *Evans*, 382 U.S. at 299. So the state cannot escape responsibility for her conduct by tapping the federal government for reinforcements and cross-deputization.

Thus, Officer Weyker is appropriately characterized as a state actor in three independent ways. Because she also exercised privileges given to her by the state when she framed Ms. Mohamud, she was acting under color of state law for purposes of Section 1983.

4. Officer Weyker's argument is flawed as a matter of law and of fact.

Officer Weyker's argument that she was not acting under color of state law rests on errors both legal and factual.

As a matter of law, it is incorrect that Section 1983 claims are barred when an officer acts under color of federal authority. Nowhere in the text of Section 1983 has Congress required exclusive color of state law. To the contrary, "[e]very person" is liable for constitutional violations committed "under color of any statute, ordinance, regulation,

custom, or usage, of any State[.]" 42 U.S.C. § 1983. The courts have long recognized that officers may act under color of both state and federal law, and that Section 1983 applies when they do. *See supra* Argument I.B.2–3. As this case illustrates, cross-deputization can and does create situations where officers act under color of both federal and state law. Officer Weyker did just that when she framed Ms. Mohamud. *See supra*, Argument I.B.1–3.

As a matter of fact, Officer Weyker builds her arguments atop a mound of exhibits and factual assertions outside the complaint, outside the discovery process, and out of line with Ms. Mohamud's well-pled allegations. None of those facts should be considered at this stage of the proceedings before Ms. Mohamud has had a chance to conduct at least some discovery. But, as Ms. Mohamud's request for discovery under Rule 56(d) (and accompanying declaration) demonstrates, Officer Weyker's rendition of facts is way off the beam:

- Officer Weyker asserts Muna Abdulkadir was on her radar only because Officer Weyker was assigned to a federal investigation. Dkt. 67 at 24 (citing *Yassin*, 39 F.4th at 1090). But discovery would reveal Officer Weyker met Ms. Abdulkadir

and began cultivating her as a witness in 2009, when Officer Weyker was working exclusively as a St. Paul police officer on a St. Paul-led task force called the Vick Task Force. Rule 56(d) Decl. ¶ 9(d)–(e) & Exs. 5–7.

- Officer Weyker asserts she stayed within the limits of her federal duties. Dkt. 67 at 23–24. But discovery would reveal she was not performing any functions permitted by her limited federal authority as a cross-deputized officer when she injected herself into the state investigation of Ms. Abdulkadir's knife attack. Rule 56(d) Decl. ¶ 9.
- Officer Weyker asserts there was no "actual or purported relationship between [Weyker's] conduct and [her] duties as a [St. Paul] police officer." Dkt. 67 at 24 (quoting *Yassin*, 39 F.4th at 1091). But discovery would reveal Officer Weyker's task-force work grew out of her work exclusively as a St. Paul police officer on the Vick Task Force. Her task force assignment was part of, not independent from, her duties as a St. Paul police officer. And her conduct in framing Ms. Mohamud served the purpose of protecting an investigation she had

begun and continued to pursue through her St. Paul duties. Rule 56(d) Decl. ¶ 9.

- Officer Weyker asserts she merely "let her local practices creep into her federal activities" when she framed Ms. Mohamud and that there was no relationship between her conduct and her St. Paul duties. Dkt. 67 at 24 (quoting *Yassin*, 39 F.4th at 1091). But discovery would reveal that Officer Weyker's St. Paul authority, credentials, and resources are the very things that provided her the motive, means, and opportunity to insert herself into the state investigation and turn its victims into suspects. Rule 56(d) Decl. ¶ 9.

Officer Weyker's factual inaccuracies highlight why Ms. Mohamud's case must come out differently from *Yassin*.

5. The *Yassin* framework governs, but this case diverges from *Yassin* on the arguments and facts.

The Eighth Circuit's decision in *Yassin v. Weyker* sets forth the controlling legal framework for determining whether Officer Weyker acted under color of state law. 39 F.4th 1086 (8th Cir. 2022). *Yassin* explains that "[c]olor of law is rooted in authority," such that a defendant "must have exercised powers possessed by virtue of state law and made possible

only because the wrongdoer is clothed with state authority." *Id.* at 1090 (cleaned up). Thus, the legal question is "whether the conduct is fairly attributable to the state," as determined by "the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of official duties." *Id.* (cleaned up).

Applying this legal framework, the *Yassin* panel concluded Officer Weyker was not acting under color of state law when she framed Ifrah Yassin. But there are critical legal and factual differences between *Yassin* and Ms. Mohamud's case.

First, Ms. Mohamud makes different legal arguments from those addressed in *Yassin.* As outlined above, Ms. Mohamud advances arguments of joint action and pervasive entwinement to establish that Officer Weyker was acting under color of state law when she framed Ms. Mohamud. Argument I.B.2–3. *Yassin* addressed neither doctrine. *See* 39 F.4th at 1091.

Second, Ms. Mohamud's factual allegations contrast with those on which the panel based its decision in *Yassin*. In *Yassin*, the panel saw no "actual or purported relationship between [Weyker's] conduct and [her] duties as a [St. Paul] police officer." 39 F.4th at 1091. The Court reasoned

that "[s]tate law had nothing to do with 'the nature and circumstances' of Weyker's conduct"; that "the witness she was trying to protect, Muna Abdulkadir, was only on her radar because she was assigned to a federal investigation"; that Officer Weyker "did not stray from the 'performance of [her] official duties' when she spoke to Officer Beeks and his supervising officer"; and that Officer Weyker's "local practices" played a minor role in her conduct. *Id.* at 1090–91.

But as explained above, Ms. Mohamud's complaint paints a dramatically different picture. As alleged by Ms. Mohamud, the facts show that state law had almost everything to do with the nature and circumstances of Officer Weyker's unconstitutional conduct:

- Officer Weyker began her work on the *Adan* cases as a St. Paul police officer, acting exclusively under color of state law. FAC ¶ 2.
- Officer Weyker framed Ms. Mohamud to protect the *Adan* cases. FAC ¶¶ 4, 23–25, 28. In particular, Officer Weyker sought to prevent criminal prosecution of a key witness, Muna Abdulkadir, whom Officer Weyker had long been cultivating for fabricated evidence. FAC ¶¶ 23–25, 28(b)(ii)–(v).

- When Officer Weyker framed Ms. Mohamud, Officer Weyker was working as a St. Paul police officer serving a Minnesota interest in the *Adan* cases, notwithstanding her cross-deputization as a Special Deputy U.S. Marshal. FAC ¶ 11.
- When Officer Weyker framed Ms. Mohamud, Officer Weyker was on a St. Paul Police Department assignment to the state-federal task force working on the *Adan* cases. FAC ¶ 19.
- From the *Adan* investigation's inception, it focused chiefly on Minnesotans, and it served a state-oriented mission to combat human trafficking in Minnesota. FAC ¶¶ 10, 18–20; *see also Fahra*, 643 F. App'x at 482.
- Officer Weyker's eligibility and selection for cross-deputization were based on her position as a St. Paul police officer, 28 C.F.R. § 0.112, and the fact that she had been developing the *Adan* investigation as a St. Paul police officer. FAC ¶ 42.
- In her cross-deputized role, Officer Weyker used the authority, access, and resources given to her by the state of Minnesota—supplemented by lies, deceit, and federal

reinforcements—to secure Ms. Mohamud's detention. FAC ¶¶ 20, 24, 27.[4]

Thus, while the legal framework of *Yassin* controls, the differences between that case and Ms. Mohamud's compel a different result. When Ms. Mohamud's arguments and allegations are applied to the *Yassin* framework, it is clear Officer Weyker was acting under color of state law.

II. Preclusion does not apply to the Section 1983 issue remanded to this Court.

Given the material differences between Ms. Mohamud's and Ms. Yassin's cases, Officer Weyker resorts to a jarring alternative assertion: Ms. Mohamud is precluded from making her own arguments because she joined motions to stay her case while the Eighth Circuit and Supreme Court resolved *Yassin*. But Ms. Mohamud is entitled to her own day in court as a matter of basic due process. None of the discrete and limited exceptions to the bedrock rule against nonparty preclusion apply here. In their place, Officer Weyker attempts to revive the sort of "virtual

[4] Ms. Mohamud's proposed second amended complaint and recently uncovered evidence further expand the gulf between this case and *Yassin*. *See* Dkt. 76 (Proposed SAC); *infra* at 57 (Rule 56(d) Request); Rule 56(d) Declaration.

representation" the Supreme Court rejected in *Taylor v. Sturgell*, 553 U.S. 880 (2008).

Taylor reinforced the "general rule that one is not bound by a judgment *in personam* in litigation in which he is not designated as a party or to which he has not been made a party by service of process." 553 U.S. at 893 (cleaned up). The "discrete exceptions" to this rule apply only in "limited circumstances." *Id.* at 898 (quotations omitted). Officer Weyker asks this Court to construe those limitations broadly, which is "at odds with the constrained approach to nonparty preclusion." *See id.*

Ms. Mohamud was neither "in privity" with nor represented (adequately or otherwise) by Ms. Yassin. Dkt. 67 at 25–26. Ms. Mohamud has no legal relationship to Ms. Yassin, never assumed any control over the *Yassin* litigation, and never had the opportunity to litigate any issues in *Yassin*.

Unlike the plaintiff in *Elbert v. Carter*, 903 F.3d 779 (8th Cir. 2018), Ms. Mohamud has not brought multiple, sequential actions and tried to repeat her prior claims by adding new defendants to her later action. Indeed, she has brought only one case; she is a "plaintiff who was not a party to a first action." *Id.* at 784.

Ms. Yassin did not represent Ms. Mohamud's interests because *Yassin* was not a class action or other "representative" suit and Ms. Mohamud did not exercise control over *Yassin*. *See Richards v. Jefferson County*, 517 U.S. 793, 798–99 (1996). From both a factual and legal standpoint, Ms. Yassin did not represent Ms. Mohamud at all. Nothing in the record supports a finding that Ms. Yassin understood herself to be acting in a representative capacity or that the courts in *Yassin* believed Ms. Yassin was acting as Ms. Mohamud's representative. *See* Dkt. 67 at 26.

Officer Weyker reasons that this Court and the Eighth Circuit in *Yassin* "necessarily accounted for Mohamud's identical interest when it held that Weyker acted as a federal officer during the incident." *Id.* But the relevant interest is not a shared interest in the answer to a particular legal question. It is the interest of the nonparty (here, Ms. Mohamud) in litigating her own claim.

Indeed, the Supreme Court has already rejected the argument that preclusion should apply when there are shared "interests and some kind of relationship between parties and nonparties." *Taylor*, 553 U.S. at 901. The opposite rule, advocated here by Officer Weyker, would deprive nonparty plaintiffs like Ms. Mohamud of required procedural protections and

allow courts to "create *de facto* class actions at will." *Id.* (quoting *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 973 (7th Cir. 1998)). Thus, "due process prevents [Ms. Mohamud] from being bound by [Ms. Yassin's] judgment." *Richards*, 517 U.S. at 802.

In one last attempt to circumvent these due process requirements, Officer Weyker argues that Ms. Mohamud agreed to be bound by the outcome in *Yassin* by joining the motions to stay this case while *Yassin* was resolved. Dkt. 67 at 27–28. The joint motions nowhere suggest this. The motions to stay recognized that this Court would be bound by the Eighth Circuit's and Supreme Court's legal pronouncements in *Yassin*. That's why it made perfect sense to stay the case as a matter of judicial efficiency. But, as the Solicitor General apparently appreciated in her arguments to the Supreme Court, *see supra* Procedural History III, the motions do not go so far as to overcome the rule against nonparty preclusion and make Ms. Yassin's judgment binding on Ms. Mohamud. *See S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999).

In other words, even though Ms. Mohamud "may well have expected that the rule of law announced in [*Yassin*] would bind [her] in the same way that a decided case binds every citizen," this recognition in the

joint motions in no way demonstrates that Ms. Mohamud expected *Yassin* to have preclusive effect as a matter of res judicata. *S. Cent. Bell*, 526 U.S. at 168. This is why, for instance, the motions specifically provided that *Yassin* would be "controlling" but only "*potentially* dispositive." Dkts. 38, 45 (emphasis added). Ms. Mohamud retains her right to litigate her own case, subject to the controlling legal framework announced in *Yassin*. Preclusion does not apply.

III. Officer Weyker is still not entitled to qualified immunity.

The last time Officer Weyker moved to dismiss the case on qualified immunity grounds, she made the same arguments she now makes again, and she tried to support them with virtually the same set of exhibits she has again submitted outside the pleadings. *Compare* Dkt. 17 at 22–44, *and* Dkts. 18, 18-1 (exhibits), *with* Dkt. 67 at 28–46, *and* Dkts. 68 through 70-1 (exhibits and declarations).[5]

This Court was correct to exclude those materials when considering Officer Weyker's prior motion, *see* Dkt. 27 at 8, and this Court should again exclude them or defer ruling on the motion as one for summary

[5] Thirteen of Officer Weyker's 19 exhibits were also exhibits to her prior motion to dismiss.

judgment until Ms. Mohamud has had an opportunity to conduct limited discovery.

This Court was also correct before to deny Officer Weyker qualified immunity at this stage of the proceedings. *See* Dkt. 27 at 11. To be sure, although the Eighth Circuit resolved Officer Weyker's interlocutory appeal of that prior order, this case is otherwise exactly where it was the last time this Court denied Officer Weyker qualified immunity. Officer Weyker's submission of another round of arguments and pre-discovery materials does not change that. Nor has the complaint changed either. As a result, this Court need not decide anything new to reject Officer Weyker's trio of qualified immunity arguments again.[6]

A. Officer Weyker caused Ms. Mohamud's arrest.

Officer Weyker contends she was not the proximate cause of Ms. Mohamud's arrest.[7] Dkt. 67 at 29–35; *cf.* Dkt. 17 at 25–29. Instead,

[6] Given Officer Weyker's previous, unsuccessful attempt to invoke qualified immunity, Dkts. 15, 17, Ms. Mohamud questions whether her successive motion is frivolous under Rule 12(g)(2). Although Officer Weyker's motion now invokes summary judgment, the case still operates on the same complaint and has had no factual development. *Accord Daywitt v. Minn. Dep't of Hum. Servs.*, No. 16-CV-2541, 2017 WL 3432034, at *4–5 (D. Minn. June 6, 2017).

[7] Proximate cause is a question of fact for a jury unless only one conclusion is reasonable. *Ricketts v. City of Columbia*, 36 F.3d 775, 779 (8th Cir.

Officer Weyker reasons that Officer Beeks supplied a supervening, intervening cause. This argument fails for two reasons.

First, Officer Weyker has not explained how Officer Beeks's arrest of Ms. Mohamud satisfies each of the four required elements for a superseding cause. *See Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 113 (Minn. 1992) (outlining four elements); *Hackenmueller v. Fadden*, 196 F. Supp. 3d 992, 999 (D. Minn. 2016) ("Causation issues under § 1983 are analyzed under the common law."). In any case, she could not satisfy those elements.

Second, Officer Weyker cannot win on this argument because, as this Court already recognized, the operative complaint plausibly alleges that Officer Weyker's lies, alone, were the reason for Ms. Mohamud's arrest. As this Court observed in response to Officer Weyker's previous motion to dismiss:

> According to . . . Mohamud's amended complaint[], Beeks regarded [Hawo] 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

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1994). A defendant's conduct proximately caused the harm if it was a "substantial factor in bringing about the injury," in the absence of a superseding, intervening event. *DeLuna v. Mower County*, 936 F.3d 711, 717 (8th Cir. 2019).

> the allegedly false information conveyed to him by Weyker, led him to believe that Ahmed or Mohamud had engaged in any criminal activity.

Dkt. 27 at 11. In other words, Officer Beeks did not "conduct an independent investigation." Dkt. 67 at 32.

No case Officer Weyker cites says otherwise. Consider *James v. Woods*, 899 F.3d 404 (5th Cir. 2018). There, the arresting officer "did not rely on [the defendant's] . . . information." *Id.* at 410. But here, Officer Beeks arrested Ms. Mohamud and her friends "because of the assertions Weyker had made about them." FAC ¶ 26. That makes *Green v. Nocciero* distinguishable too, because in that case—unlike here—the arresting officers had at least arguable probable cause to arrest the plaintiff for refusing their direct command. 676 F.3d 748, 755 (8th Cir. 2012). Ms. Mohamud's complaint contains no such allegation.

Similarly, *King v. Crossland Savings Bank* is distinguishable because Officer Weyker "intended [and] instigated" Ms. Mohamud's confinement; she did not merely identify a potential culprit and "in no other way instigate[] the arrest." 111 F.3d 251, 257 (2d Cir. 1997). Officer Weyker instead concocted a tale of witness intimidation and lied to on-scene

officers to instigate Ms. Mohamud's arrest and its consequences. Dkt. 27 at 11; FAC ¶20–28.

And *Hackenmueller v. Fadden* doesn't support Officer Weyker's argument either. Unlike the prosecutor in that case, Officer Beeks did not have "access to 'all of the underlying evidence,'" Dkt. 67 at 32 (quoting *Hackenmueller*, 196 F. Supp. 3d at 1001), to which Officer Weyker referred when she said she had "information and documentation" that Ms. Mohamud and her friends had been trying to intimidate a federal witness. FAC ¶ 20. Neither did Officer Weyker—because that "information and documentation" did not exist. FAC ¶¶ 20–21.

Thus, Officer Weyker's conduct is precisely the kind of "presentation of false evidence or the withholding of evidence" that keeps the chain of causation intact. *Ames v. United States*, 600 F.2d 183, 185 (8th Cir. 1979). *Cf. Marvaso v. Sanchez*, 971 F.3d 599, 606–07 (6th Cir. 2020) (holding that fire marshals' alleged false report that a fire's cause was "incendiary" was the proximate cause of search warrants relying on that report); *Williams v. Aguirre*, 965 F.3d 1147, 1167-68 (11th Cir. 2020) (holding that officers who lied to obtain arrest warrant proximately caused plaintiff's continued detention).

B. Officer Weyker's misinformation was material.

Officer Weyker argues that the information she gave other officers "was not material" to Ms. Mohamud's arrest because "there was arguable probable cause for Mohamud's arrest even if the alleged false information is not considered"—whether for witness tampering or some other unspecified crime. Dkt. 67 at 36, 41, 42–44; *cf.* Dkt. 17 at 29–30.

This argument again relies on matters outside the pleadings to fight the key allegations in the complaint. But as explained above, in the complaint itself, and in this Court's prior order, nothing in Officer Beeks's 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." Dkt. 27 at 11. After all, Ms. Mohamud was a mere bystander to a scuffle between her friends and Ms. Abdulkadir, and she was a passive victim of Ms. Abdulkadir's knife attack. FAC ¶¶ 13–18. *See also Farah*, 926 F.3d at 503 (holding that a constitutional violation was adequately alleged where "[a]ccording to [the] complaint, the officer who arrested her had no reason to suspect her of a crime until Weyker lied to him" and "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").

C. Officer Weyker's conduct violated clearly established law.

Finally, Officer Weyker argues that the alleged constitutional violation was not "clearly established," Dkt. 67 at 44, in the absence of a prior case involving "an officer who 1) learns that a witness in a case has been assaulted, and 2) conveys information to the officer on the scene investigating the matter." Dkt. 67 at 45–46.

This frames the qualified immunity inquiry incorrectly in at least two ways. *First*, on the facts, Officer Weyker did not learn that Ms. Abdulkadir had been assaulted; she learned that Ms. Abdulkadir had assaulted three other people. *Second*, even correcting that misstatement of the alleged facts, Officer Weyker is not entitled to qualified immunity in the absence of a near-identical case. *See, e.g.*, *Stanton v. Sims*, 571 U.S. 3, 6 (2013) ("We do not require a case directly on point before concluding that the law is clearly established[.]" (quotation omitted)). And the Eighth Circuit has already instructed that the analysis, properly framed, asks whether "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." *Farah*, 926 F.3d at 503. To ask the question is to answer it. Further

still, the point is obvious. *See Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020); *Rosales v. Bradshaw*, ___ F.4th ___, 2023 WL 4341269, at *8 (10th Cir. July 5, 2023) ("[Q]ualified immunity does not protect an officer where the constitutional violation was so obvious under general well-established constitutional principles that any reasonable officer would have known the conduct was unconstitutional.").

Ms. Mohamud's complaint alleges Officer Weyker deliberately misled Officer Beeks into arresting Ms. Mohamud, an innocent individual, to protect a sham investigation. Officer Weyker is not entitled to qualified immunity, and this Court should deny it to her. Again. *See* Dkt. 27 at 10–11; *cf. Farah*, 926 F.3d at 503.[8]

[8] Even if Officer Weyker's claim of qualified immunity did not fail under the controlling standards above, Officer Weyker should not be entitled to qualified immunity because the defense is incompatible with the text, purpose, and history of Section 1983 and should be abolished. Recent scholarship proves that "the Supreme Court's original justification for qualified immunity—that Congress wouldn't have abrogated common-law immunities absent explicit language—is faulty because the 1871 Civil Rights Act *expressly included such language*," specifying that liability under Section 1983 exists "notwithstanding" "any such law, statute, ordinance, regulation, custom, or usage of the State to contrary." *Rogers v. Jarrett*, 63 F.4th 971, 979–80 (5th Cir. 2023) (Willett, J., concurring). *See also* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201 (2023). *Accord Price v. Montgomery County*, ___ F.4th ___, 2023 WL 4346954, at *10 n.1 (6th Cir. July 5, 2023)

IV. Officer Weyker's reliance on documents outside the pleadings is inappropriate.

As explained above, the Court may not treat Officer Weyker's motion as one to dismiss, rather than as one for summary judgment, unless the Court (again) excludes Officer Weyker's voluminous submissions outside the pleadings. *See* Dkt. 27 at 8. That's because Officer Weyker's submissions are not "embraced by the pleadings and exhibits attached to the complaint." *Meardon*, 994 F.3d at 934.

If the Court does not exclude those materials, the motion must be treated as one for summary judgment. Fed. R. Civ. P. 12(d). In that case, summary judgment is improper until Ms. Mohamud "has had adequate time for discovery." *Ray*, 609 F.3d at 923 (quotation omitted). Here, she has had no time for any discovery, as the parties have not even engaged in a Rule 26(f) conference or exchanged initial disclosures. As a result, and because Ms. Mohamud provides in her Rule 56(d) declaration ample reason to believe discovery will reveal supporting evidence, denying Ms. Mohamud at least limited discovery would "deprive[] [her] of a fair

(Nalbandian, J., concurring). Ms. Mohamud preserves this alternative argument for appeal.

chance to respond to the motion." *Iverson*, 172 F.3d at 530. The effect is that summary judgment at this procedural stage is improper. *Id.*

For this reason, Ms. Mohamud submits the following request for discovery under Rule 56(d), should the Court choose to consider the materials Officer Weyker has submitted outside the pleadings.

<u>Rule 56(d) Request for Discovery</u>

If this Court does not grant Ms. Mohamud's pending motion for leave to amend her complaint (mooting Officer Weyker's present motion), and if the Court does not again exclude Officer Weyker's submissions outside the pleadings, the Court should defer ruling on Officer Weyker's motion for summary judgment until Ms. Mohamud has had an opportunity to engage in discovery. *Cf. Smith v. OSF HealthCare Sys.*, 933 F.3d 859, 865–66 (7th Cir. 2019) (observing that "[a]ppellate courts often remand a denial of additional time for discovery when the motion for summary judgment is filed before the close of discovery, especially if there are pending discovery disputes" and collecting cases).

As outlined in the accompanying Rule 56(d) declaration, Ms. Mohamud has uncovered telling evidence—in the form of contemporaneous task-force agreements between the St. Paul Police Department and

federal agencies, as well as news articles covering and quoting Officer Weyker for her work investigating the *Adan* cases. Particularly salient to the legal question here, Ms. Mohamud has identified two separate agreements between the St. Paul Police Department and FBI that explicitly recognize cross-deputized officers like Officer Weyker are subject to liability under Section 1983:

> Liability for violations of federal constitutional law rests with the individual federal agent or officer pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) or pursuant to 42 U.S.C. Section 1983 for state and local officers or cross-deputized federal officers.

Rule 56(d) Decl., Ex. 2 (2005).

> Bivens Actions. Liability for violations of federal constitutional law rests with the individual Federal agent or officer, or employee, pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) or pursuant to 42 U.S.C. § 1983 for State and local officers or cross-deputized Federal officers.

Id. at Ex. 3 (2011). The latter agreement was dated less than two months after Officer Weyker framed Ms. Mohamud. *Id.* ¶ 9(j).

Officer Weyker has never disclosed these conspicuous agreements to opposing counsel, this Court, or the Eighth Circuit. Not in this case, not in *Ahmed v. Weyker*, not in *Yassin v. Weyker*, and not in any case brought by the many other plaintiffs caught up by Officer Weyker's dishonesty in the *Adan* cases. Nor has Officer Weyker disclosed what these

agreements reveal: that her St. Paul employer and the federal agency that sponsored her cross-deputization for task-force work both acknowledged—before and during her cross-deputization—that cross-deputized officers like Officer Weyker continue to act under color of state law in their cross-deputized task-force roles, subjecting them to liability under Section 1983.

This evidence by itself—if it does not confirm Officer Weyker acted under color of state law—at least creates a question of material fact on the extent to which Officer Weyker's work on the task force was infused with and influenced by state authority. *See Johnson*, 780 F.2d at 390 ("All of the circumstances must be examined to consider whether the actions complained of were sufficiently linked to the state."). And if this evidence does not do that on its own, it gives plenty of reason to believe discovery would uncover more evidence that Officer Weyker continued to be imbued with color of state law when she framed Ms. Mohamud. Ms. Mohamud thus requests limited discovery into the relationship of state law to the nature and circumstances of Officer Weyker's conduct orchestrating Ms. Mohamud's arrest and continued detention on criminal charges.

Ms. Mohamud also requests limited discovery into the genuine disputes of material facts that Officer Weyker has raised concerning the proximate cause of Ms. Mohamud's arrest and probable cause. Dkt. 67 at 38–44 and Dkt. 68 (Beeks Decl.). Officer Weyker's submissions almost entirely consist of testimony and other statements by individuals whose credibility is disputed. *Partridge v. City of Benton*, 70 F.4th 489, 491 (8th Cir. 2023) (quoting *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011), for the proposition that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge").

Not only have Officer Weyker and Ms. Abdulkadir developed reputations for their lack of credibility. *See Fahra*, 643 F. App'x at 482, 484. The reliability of Officer Beeks's testimony and his report are also suspect. Rule 56(d) Decl. ¶ 9(m)–(p). And, in any case, Ms. Mohamud has had no opportunity to cross-examine them or anyone else. Her criminal case was dismissed, and she was not a party to either of the criminal prosecutions against her friends. Thus, it would be inappropriate for this Court to treat Officer Weyker's submissions as gospel. If, for example, Officer Weyker thinks Officer Beeks's testimony is important enough to

submit as a declaration, Ms. Mohamud is owed the opportunity to depose Officer Beeks.

Ms. Mohamud respectfully requests permission to conduct the discovery specified in her accompanying declaration.[9] Rule 56(d) Decl. ¶ 11.

But, to be clear, this Court need not consider Ms. Mohamud's Rule 56(d) request if it instead grants her pending motion for leave to amend the complaint, which would moot Officer Weyker's motion. *See Pure Country*, 312 F.3d at 956. Ms. Mohamud's counsel submits that is the most appropriate course. Her proposed amended complaint alleges specific facts that her counsel hopes to prove through discovery, and the proposed amended complaint makes clear that Officer Weyker's conduct in orchestrating Ms. Mohamud's seizure caused that seizure and is fairly attributable to the state of Minnesota.

Conclusion

This Court should deny Officer Weyker's motion as moot if the Court grants—as it should—Ms. Mohamud's pending motion for leave to

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[9] Although the Eighth Circuit in *Yassin* affirmed this Court's denial of Ms. Yassin's request for discovery, 39 F.4th 1086, Ms. Yassin's declaration lacked the concrete sampling of anticipated evidence Ms. Mohamud has supplied.

amend her complaint. If it does not, the Court should (1) exclude Officer Weyker's submissions outside the pleadings and (2) deny Officer Weyker's instant motion as one to dismiss. If the Court treats Officer Weyker's motion as one for summary judgment, however, the Court should defer ruling on the motion until Ms. Mohamud has had an opportunity to conduct adequate discovery and grant Ms. Mohamud's request under Rule 56(d).

Respectfully submitted on July 17, 2023,

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Certificate of Compliance

Under Local Rule 7.1(f)(2), the undersigned counsel for Plaintiff Hamdi Mohamud certifies that Plaintiff's Memorandum Opposing Defendant's Motion to Dismiss or for Summary Judgment and Plaintiff's Request for Discovery Under Rule 56(d) satisfies the requirements of Local Rules 7.1(f) and 7.1(h). The memorandum is typewritten in double-spaced, 14-point, Century Schoolbook font, with the exception of footnotes and block quotes, which are typewritten in single-spaced 14-point Century School font. As calculated using the word-count function of Microsoft Word 365, the memorandum contains 11,977 words, including all text, headings, footnotes, and quotations.

/s/ Patrick Jaicomo
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