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 REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

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Officer Weyker claims her actions were "exclusively federal" once she was cross-deputized (at 9–10), and that Ms. Mohamud's proposed amended complaint is therefore futile. But Officer Weyker is incorrect on both the law and the facts:

On the law, cross-deputized officers can act under state color. The Supreme Court and multiple circuit courts have held that federal officers with far more federal authority than a cross-deputized city police officer can act under color of state law, subjecting them to Section 1983 liability. Several circuits have applied this standard to task force officers. *See infra* Part I.

On the facts, Officer Weyker acted under color of state law because she exercised state privileges and is a state actor. This is established by the allegations in Ms. Mohamud's proposed amended complaint, SAC ¶¶ 36–51, as well as three task force agreements Ms. Mohamud has uncovered, SAC Exs. 1–3. These documents are evidence that the St. Paul Police Department and federal government understood Officer Weyker to be acting under color of state law—even after she was cross-deputized with limited federal authority. The proposed amended complaint thus

presents a dramatically different factual scenario than the one addressed in *Yassin*. *See infra* Part II.

Ms. Mohamud's proposed amended complaint provides allegations and evidence that, if viewed in her favor, demonstrate Officer Weyker acted under color of state law. Because justice so requires, this Court should freely give Ms. Mohamud leave to amend her complaint. Fed. R. Civ. P. 15(a)(2).[1]

I. As a cross-deputized St. Paul officer, Weyker could act under color of both state and federal law.

Officer Weyker argues (at 17–19) that an officer cannot act under color of state and federal law simultaneously. Officer Weyker's argument fails for two reasons. *First*, color of state law depends on the relationship of state law to the conduct at issue. And the courts—including the Supreme Court—have repeatedly held that color of state law is not exclusive of federal authority. Thus, officials with significantly more federal authority than Officer Weyker have been found to act under color of state

[1] Officer Weyker repeatedly references her pending dismissal memorandum. To the extent the Court considers the arguments in that memorandum, Dkt. 67, Ms. Mohamud invites the Court to consider her opposition memorandum and supporting documents. Dkts. 80–81.

law. *Second*, simultaneous state and federal authority is the premise of cross-deputization. Consistent with the dual authority of cross-deputization, Officer Weyker (accurately) described herself as an "FBI TFO/ST PAUL PD" officer in the actions she took to frame Ms. Mohamud. SAC ¶ 31. Thus, although cross-deputized when she violated Ms. Mohamud's rights, Officer Weyker was acting under color of state law.

A. The courts have consistently held that federal authority does not exclude color of state law.

Color of state law can coincide with other sources of authority—including federal authority. *See generally* Dkt. 80 at 29–44. As the Eighth Circuit explained in *Yassin v. Weyker*, assessing color of law requires a fact-bound analysis that examines the source of authority and asks whether conduct is "fairly attributable to the State." *Yassin v. Weyker*, 39 F.4th 1086, 1090 (8th Cir. 2022) (citing among others *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982)). In *Lugar,* the Supreme Court provided two factors to consider:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted

> together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Lugar, 457 U.S. at 937.[2]

1. The Supreme Court and multiple circuit courts have held that federal officials can act under color of state law.

Relying in large part on the *Lugar* factors, the circuit courts have repeatedly held that federal officers, like private persons, can act under color of state law.[3] For instance, in *Kletschka v. Driver*, 411 F.2d 436, 448–49 (2d Cir. 1969), the court explained: "We can see no reason why a joint conspiracy between federal and state officials should not carry the same consequences under § 1983 as does joint action by state officials and private persons." *See also NeSmith v. Fulton*, 615 F.2d 196, 199 (5th Cir.

[2] In her opposition to dismissal, Ms. Mohamud explains how Officer Weyker's conduct satisfies these factors. Dkt. 80 at 29–51. *See also infra* Part II.

[3] *E.g.*, *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 869–70 (10th Cir. 2016); *Hindes v. FDIC*, 137 F.3d 148, 158 (3d Cir. 1998); *Strickland v. Shalala*, 123 F.3d 863, 866 (6th Cir. 1997); *Cabrera v. Martin*, 973 F.2d 735, 742–44 (9th Cir. 1992); *Olson v. Norman*, 830 F.2d 811, 821 (8th Cir. 1987); *Knights of the Ku Klux Klan v. East Baton Rouge Par. Sch. Bd.*, 735 F.2d 895, 899–900 (5th Cir. 1984); *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979), *overruled in part on other grounds*, 446 U.S. 754 (1980); *Kletschka v. Driver*, 411 F.2d 436, 448–49 (2d Cir. 1969).

1980) ("It is true that a[national guard] adjutant general is *at least in part* a state officer" but that "does not preclude his simultaneously being a federal agency." (emphasis added)).

The Supreme Court has similarly indicated that federal officials can act under color of state law. Take for instance *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399–400 (1979). There, Lake Tahoe property owners brought claims under Section 1983 and *Bivens* against officers of the Tahoe Regional Planning Agency—a body created by congressional compact. *Lake Country*, 440 U.S. at 393–94. The officers argued that congressional approval precluded their acts from being under color of state law, and the Ninth Circuit agreed. *See id.* at 396.

But the Supreme Court rejected the Ninth Circuit's conclusion "that the requirement of federal approval of [an] interstate Compact foreclosed the possibility that . . . officers could be found to be 'under color of state law[.]'" *Lake Country*, 440 U.S. at 399. The Court added, "[e]ven if it were not well settled that § 1983 must be given a liberal construction, these facts adequately characterize the alleged actions of the respondents as 'under color of state law' within the meaning of that statute." *Id.* at 399–

400 (footnote omitted). Of particular relevance to cross-deputized officers, *Lake Country* recognizes that, regardless of whether a *Bivens* remedy is available, Section 1983 provides a remedy when state and federal color are implicated. *See id.* at 400 (noting "no need to address the question whether there is an implied remedy [under *Bivens*]" because color of state law permitted claims under Section 1983).

Officer Weyker contends (at 20–21) none of these first principles matter because the caselaw "say[s] nothing about whether *federally deputized state officers* simultaneously act under color of both state and federal law." (Emphasis added.) True, the cases above did not involve cross-deputized task force officers who were temporarily granted federal authority drastically limited in both scope and time. But if an official acting under a federal compact can simultaneously act under color of state and federal law, so too can a cross-deputized St. Paul police officer. After all, a compact approved by a majority of Congress (*Lake Country*) affords more federal imprimatur than a one-page form approved by the sponsorship of a single FBI agent (this case).

2. Several circuits have indicated that state officers working on task forces can act under color of state law.

Officer Weyker (at 17–18) dismisses Ms. Mohamud's argument that cross-deputized officers can and do act under color of both state and federal law as "little more than a creative thought experiment."[4] Relying on three district court decisions, Officer Weyker contends "a defendant must be either a state or a federal actor – he cannot be both." *Id.* (citing *Glennie v. Garland*, No. CV 21-231JJM, 2023 WL 2265247, at *16 (D.R.I. Feb. 28,

[4] Officer Weyker also claims (at 19) that Ms. Mohamud has "forfeited the chance to make arguments" about Officer Weyker's overlapping authority because Ms. Mohamud "cites not a single case" in her opening memorandum (citing D. Minn. LR 7.1(c)(3)(B); *Redking Foods LLC v. Minn Assocs. LP*, No. 13-CV-0002, 2014 WL 754686, at *4 & nn. 4–5 (D. Minn. Feb. 26, 2014)). But Officer Weyker's argument is disproven by both authorities she cites. *First*, Local Rule 7.1(c) applies only to *dispositive* motions, and motions to amend pleadings are nondispositive. D. Minn. LR 7.1(b)(4)(A)(i). Indeed, *Redking* and all the cases it collects address dispositive motions. *Second,* even were that not the case, Ms. Mohamud repeatedly argued in her opening memorandum (Dkt. 75 at 7; *id.* at 20, 27–34; *see also* SAC ¶¶ 36–51 & Exs. 1–3) that Officer Weyker "was simultaneously acting under color of both state and federal law when she violated Ms. Mohamud's clearly established rights." Moreover, this Court has explained "arguments that *are* related to the opposing party's response are appropriate material for a reply brief." *ARA, Inc. v. Barnes Pers. Mgmt., Inc.*, No. 12-CV-2812, 2014 WL 3748633, at *7 n.9 (D. Minn. July 30, 2014). *Finally*, applying Officer Weyker's rule would require amending plaintiffs to both predict and preemptively rebut with comprehensive legal citation all possible futility arguments.

2023) (R. & R.); *Amoakohene v. Bobko*, 792 F. Supp. 605, 608 (N.D. Ill. 1992); *West v. City of Mesa*, No. CV-12-657, 2015 WL 1959467, at *8 n.7 (D. Ariz. Apr. 29, 2015)). But *Glennie* and *West* simply cite to *Amoakohene*, and *Amoakohene* provides no argument or authority to support its statement that officers "cannot be both" "state actors [and] federal actors." 792 F. Supp. at 608. In any case, all three decisions are directly contrary to the foregoing circuit and Supreme Court precedent, and, confusingly, Officer Weyker later concedes (at 21) that "a federal officer can act under color of state law"—at least under certain circumstances.

Consistent with the *Lake Country* line of cases, at least two circuits have held that cross-deputized task force officers may act under state law, federal law, or both. *Couden v. Duffy*, 446 F.3d 483 (3d Cir. 2006); *Askew v. Bloemker*, 548 F.2d 673 (7th Cir. 1976); *accord Lackey v. County of Bernalillo*, 166 F.3d 1221, 1999 WL 2461 (10th Cir. Jan. 5, 1999) (table);[5] *Bressi v. Ford*, 575 F.3d 891 (9th Cir. 2009) (tribal law).[6] These

[5] Though it did not address the issue directly, the Tenth Circuit dismissed Section 1983 claims against a cross-deputized task force officer on the basis of qualified immunity, tacitly accepting that he could act under color of state law. *Lackey*, 1999 WL 2461, at *3–5.

[6] In *Bressi*, the Ninth Circuit noted that "tribal officers who are authorized to enforce state as well as tribal law, and proceed to exercise both

circuits look beyond the label and consider the circumstances of a task force officer's conduct to determine her source of authority.

In *Couden v. Duffy*, for instance, the Third Circuit held that Delaware police officers working on a task force were acting under color of state, not federal, law because the fugitive they arrested was wanted by local police and—as here—the investigation was initiated locally. 446 F.3d 483, 489, 499 (3d Cir. 2006). Accordingly, the task force officers were subject to claims under Section 1983. *Id.* at 499. *Accord Johnson v. Orr*, 780 F.2d 386, 390 (3d Cir. 1986).

In the Seventh Circuit, too, "the totality of the circumstances surrounding the alleged" actions governs the analysis of whether task force members act "pursuant to federal authority [or] under color of any state law." *Askew*, 548 F.2d at 677. In *Askew*, the court considered whether St. Louis, Missouri, police officers could be sued under Section 1983 for their raid of a home in Illinois as members of a state-federal task force. Although the court concluded that the officers were acting under color of federal law, it did not apply the blanket rule Officer Weyker urges here.

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powers . . . will be held to constitutional standards [under Section 1983.]" 575 F.3d at 897–98.

It considered instead the undisputed facts in the pleadings and those elicited through discovery. The Seventh Circuit emphasized that the actions of the state officers were taken "pursuant solely to federal authority" because—unlike Officer Weyker in Minnesota—the officers in *Askew* had no authority under color of Missouri law to raid a home in Illinois. *Id.* at 677.

3. Other circuits are wrong to have applied a categorical rule that cross-deputized officers act only under color of federal law.

Other circuits have come out the other way, adopting Officer Weyker's blanket rule of task-force immunity.[7] In these courts, all that matters is whether a state officer is cross-deputized for task force work. If so, she acts exclusively under color of federal law no matter the circumstances. Of the circuit decisions, Officer Weyker cites (at 17–18) only the Sixth Circuit's decision in *King v. United States* for the proposition that

[7] *King v. United States*, 917 F.3d 409, 433 (6th Cir. 2019), *rev'd on other grounds sub nom. Brownback v. King*, 141 S. Ct. 740 (2021); *DeMayo v. Nugent*, 517 F.3d 11, 14 n.5 (1st Cir. 2008); *Guerrero v. Scarazzini*, 274 F. App'x 11, 12 n.1 (2d Cir. 2008) (summary order).

"[f]ederally-deputized local officers" act under the exclusive color of federal law.[8]

In *King*, the Sixth Circuit held that a cross-deputized state officer "carrie[s] federal authority and act[s] under color of that authority rather than under any state authority[.]" 917 F.3d at 433. There, a Grand Rapids detective cross-deputized as a Special Deputy U.S. Marshal for work on a fugitive task force was spared liability under Section 1983 for brutally beating an innocent college student. Although the beating resulted from the Michigan detective's misidentification of the student as a man wanted under a Michigan warrant for a Michigan crime and for whom the detective was searching in Michigan, the Sixth Circuit concluded that the detective had not acted under color of state law. *King*, 917 F.3d at 416–418, 433; *see also id.* at 434 ("Plaintiff's claims against [the detective] are *Bivens* claims and not § 1983 claims.").

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[8] Ms. Mohamud focuses her response on *King*, but to the extent the district decisions Officer Weyker cites adopt her categorical rule, they are wrong for the reasons above. *See Love v. Mosley*, No. 1:14-CV-281, 2015 WL 5749517, at *6 (W.D. Mich. Mar. 30, 2015); *Polak v. City of Omaha*, No. 8:18-CV-358, 2019 WL 1331912, at *5 (D. Neb. Mar 25, 2019); *Harris v. Gadd*, No. 4:06-CV-1510, 2008 WL 176384, at *3 n.7 (E.D. Ark. Jan. 16, 2008).

Even so, the Sixth Circuit issued *King* before the Supreme Court severely restricted the availability of *Bivens* claims for conduct under color of federal law in *Egbert v. Boule*, 142 S. Ct. 1793 (2022). And *King* explicitly noted, therefore, that the distinction between Section 1983 and *Bivens* was immaterial: "Detective Allen's potential liability is unchanged by whether Plaintiff's claims properly arise under *Bivens* or § 1983." 917 F.3d at 433 n.10. Accordingly, the Sixth Circuit treated the Section 1983 question as inconsequential. But in this case, the question is dispositive because the Eighth Circuit has already held that Officer Weyker has federal immunity under *Bivens*. *Ahmed v. Weyker*, 984 F.3d 564 (8th Cir. 2020).

4. The Eighth Circuit's decision in *Yassin* rests on various facts beyond Officer Weyker's cross-deputization.

While the Eighth Circuit's decision in *Yassin* cites *King* with approval, 39 F.4th at 1091, *Yassin* nowhere holds that a cross-deputized officer cannot act under color of state and federal law simultaneously. Officer Weyker insists (at 18–19) that *Yassin* adopts a categorical rule under which only one fact matters: whether an official was cross-deputized. Perhaps. But if that is the rule the panel intended to embrace, it

could have resolved the issue in a sentence. Instead, it weighed various facts as alleged by Ms. Yassin's complaint.

For instance, the panel saw no "actual or purported relationship between [Weyker's] conduct and [her] duties as a [St. Paul] police officer." *Yassin*, 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. In other words, the Eighth Circuit's reasoning acknowledges that a cross-deputized officer can act under color of state law. But when looking at the circumstances through the allegations of Ms. Yassin's complaint, the court did not see the relationship between state authority and Officer Weyker's conduct.

As explained below, *see* Part II, Ms. Mohamud's proposed amended complaint paints a dramatically different picture than the one the Eighth Circuit addressed in *Yassin*.

B. The concept of cross-deputization demonstrates state and federal authority are not mutually exclusive.

State and federal agencies come together on joint task forces to pursue goals that further both state and federal interests. Cross-deputization recognizes the common benefit of pooling state and federal authority. Thus, the very concept of cross-deputization illustrates that state and federal color are not mutually exclusive. As Officer Weyker explained in her affidavit charging Ms. Mohamud: "Your affiant is a Police Officer with the St. Paul Police Department and has been employed there for the last 12 years *and is also* a Federal Bureau of Investigation Task Force Officer." SAC ¶ 50 (emphasis added); *see also id.* ¶ 31.

Newly discovered agreements between the St. Paul Police Department and federal government, *see infra* Part II.C, as well as the new allegations in Ms. Mohamud's proposed amended complaint, SAC ¶¶ 36–51, demonstrate the same principle and confirm that Officer Weyker was a state actor exercising state authority when she framed Ms. Mohamud. As Ms. Mohamud noted (Dkt. 75 at 34), "Officer Weyker, St. Paul, and the federal government all believed Officer Weyker, as a cross-deputized officer, was acting under color of state law and subject to liability under Section 1983 when she framed Ms. Mohamud." SAC ¶¶ 11, 43, 45–47.

II. Under the facts of Ms. Mohamud's proposed amended complaint, Officer Weyker was acting under color of state law.

Contrary to Officer Weyker's claim (at 9–10) that she acted exclusively under color of federal law, the facts alleged and evidence provided in Ms. Mohamud's proposed amended complaint establish that—at a minimum—Officer Weyker acted under color of state law too. Unlike the factual situation presented to the Eighth Circuit in *Yassin,* Ms. Mohamud's complaint establishes that Officer Weyker's "local practices" did not just "creep into her federal activities." 39 F.4th at 1091. Her "federal activities" existed only to support the local investigation she was running through the Vick Task Force.

Simply put, unlike in *Yassin*:

- "State law had [almost everything] to do with 'the nature and circumstances of Weyker's conduct." *Compare* 39 F.4th at 1090, *with* SAC ¶¶ 36–51 & Exs. 1–3 (tracing Officer Weyker's state investigation from the Vick Task Force through Ms. Mohamud's framing); *infra*, Part II.A.
- "[T]he witness [Officer Weyker] was trying to protect, Muna Abdulkadir, was only on her radar because she was assigned to a [state investigation with the Vick Task Force]." *Compare*

39 F.4th at 1090, *with* SAC ¶¶ 40, 43 ("Through her Vick Task Force investigation, Weyker met Muna Abdulkadir in 2009 [more than a year before her cross-deputization] and began to cultivate her as a witness for the St. Paul Police Department.").

- And Officer Weyker "stray[ed] from the 'performance of [her] official [cross-deputized] duties' when she spoke to Officer Beeks and his supervising officer." *Compare* 39 F.4th at 1090, *with* SAC ¶ 45 ("Weyker's deputization form made clear" her authority was limited to "seek[ing] and execut[ing] arrest and search warrants supporting a federal task force." (quotation omitted)); *infra*, Part II.B.

This case is not a rehashing of *Yassin*.

A. Officer Weyker's state work on the Vick Task Force continued after she was cross-deputized.

Ms. Mohamud alleges that the project Officer Weyker was trying to protect was not a federal investigation first and a state investigation second. It was the other way around with federal resources reinforcing a once-and-always state investigation that ultimately gained a federal dimension. SAC ¶¶ 36–51. Officer Weyker's cross-deputization served only

to supplement the assistance the federal government was already lending to St. Paul. *Id.*

To summarize, in 2008 Officer Weyker began her investigation into the *Adan* cases as a member of the Vick Human Trafficking Task Force of Minnesota, a state-federal task force for which "[t]he St. Paul Police Department (SPPD) is the lead agency[.]" SAC ¶ 37 & Ex. 1. The Vick Task Force's mission is to "combat . . . human trafficking *when it appears in Minnesota*":

> **Gerald D. Vick Human Trafficking Task Force**
>
> **Memorandum of Understanding**
>
> **Mission Statement: The goals of the Gerald D. Vick Human Trafficking Task Force (Task Force) of Minnesota are to foster communication among local, state and federal law enforcement agencies working together with organizations providing comprehensive services to trafficking victims; identify and rescue victims of human trafficking; and combat domestic and international human trafficking when it appears in Minnesota.**

SAC ¶ 38 (emphasis added). Officer Weyker and St. Paul Sergeant John Bandemer were supported in their state work by two rotating federal officers. SAC ¶ 39; Mara H. Gottfried, *How 2 St. Paul cops helped crack alleged sex-trafficking ring*, St. Paul Pioneer Press (Nov. 13, 2010) (Dkt. 81 (Rule 56(d) Decl.) ¶ 9(e)(i)–(ii) & Ex. 6).

In 2009, Officer Weyker met Muna Abdulkadir through her work on the Vick Task Force and began cultivating her as a witness for the St. Paul Police Department. SAC ¶ 40. Even then, a federal officer was present to support Officer Weyker's state work. Dkt. 81-2 (Exs. to Rule 56(d) Decl.) at 89 (Officer Weyker noting in her SPPD incident report: "On 10-26-09, I, Ofcr Heather Weyker, Sgt John Bandemer, FBI S/A Nick Pottratz responded . . . to speak with Muna Mohamud Abdulkadir."). The same year, the Vick Task Force asked the Minnesota U.S. Attorney to bring charges in the *Adan* cases, but he declined because the evidence "supported a state prosecution, but not a federal case." James Walsh & David Chanen, *Unlikely pair pursue sex-ring case*, Star Tribune (Jan. 1, 2011) (Dkt. 81 (Rule 56(d) Decl.) ¶ 9(e)(iv) & Ex. 7).

Officer Weyker—still not cross-deputized—continued leading the state investigation into the *Adan* cases. Eventually it grew to the point where, as Officer Weyker put it, the Vick Task Force "required a lot more resources and hence the dual-state effort." SAC ¶ 42; Gottfried, *supra*. So another group of state and federal agencies joined the Vick Task Force to support its work and continue Officer Weyker's state investigation, SAC ¶ 42, and Officer Weyker was sponsored by the FBI and cross-deputized

on August 24, 2010. SAC ¶ 43. Even so, Officer Weyker remained a St. Paul officer and continued leading the very same state investigation. SAC ¶ 49–51. In fact, St. Paul Sergeant Bandemer supervised Officer Weyker on the Vick Task Force both before and after she was cross-deputized, including when Officer Weyker framed Ms. Mohamud on July 16, 2011. Gottfried, *supra*.

Officer Weyker acknowledged that her work began as a state investigation and continued as one through the Vick Task Force in her affidavit charging Ms. Mohamud with trumped up federal crimes:

> Your affiant is a Police Officer with the St. Paul Police Department and has been employed there for the last 12 years and is also a Federal Bureau of Investigation Task Force Officer. Your affiant is currently assigned to the Vice Unit [of the St. Paul Police Department] and is part of a federally funded human trafficking task force [the Vick Task Force] which investigates human trafficking crimes and other related crimes such as drugs, fraud and smuggling.

SAC ¶ 50; see also Dkt. 81 ¶ 9 (b)–(c), (f) & Ex. 4 (establishing that the Vick Task Force is the "federally funded human trafficking task force" to which Officer Weyker referred).

Beginning, middle, and end; cross-deputized or not; support from two federal officers or multiple federal agencies: Officer Weyker's work

on the *Adan* cases furthered the state interest to address the crime ring Officer Weyker had been concocting as a St. Paul officer in Minnesota. Officer Weyker was acting under color of state law, even if she was also acting under limited color of federal law.

B. Officer Weyker's cross-deputization cannot render her actions exclusively federal.

Officer Weyker's theory (at 9–10) that "[o]nce she was federally deputized . . . her actions . . . were carried out under color of federal law" falls apart under minimal scrutiny for two reasons. *First*, federal involvement alone could not render Officer Weyker's conduct exclusively federal. To the contrary, although Officer Weyker worked side-by-side with federal officers for years during her work on the *Adan* cases (SAC ¶ 39; Gottfried, *supra*), she has never argued that federal involvement converted her state investigation into a federal one. That is no small thing. Indeed, an FBI agent was with Weyker when she first met Ms. Abdulkadir and began cultivating her as a St. Paul witness. SAC ¶ 40; Dkt. 81-2 (Exs. to Rule 56(d) Decl.) at 89. Yet when Officer Weyker tried to bring the *Adan* cases to the Minnesota U.S. Attorney, he rejected them because—despite all the federal involvement—they were state cases. Walsh & Chanen, *supra*.

Second, even if Officer Weyker's cross-deputization could displace the state character of some of Weyker's actions going forward, *but see Lake Country*, 440 U.S. at 399, that does not mean everything Officer Weyker did while cross-deputized was exclusively federal. If, for example, Officer Weyker had deceived a St. Paul man to search his apartment without a warrant because he was wanted for a Minnesota crime, *Elgersma v. City of St. Paul*, No. 21-CV-1792, 2023 WL 359600 (D. Minn. Jan. 23, 2023) (granting summary judgment against Officer Weyker), the government concedes (at 10) it would not argue Officer Weyker was acting under color of federal law when she did it. That's because the scope of her cross-deputization matters, and Officer Weyker exceeded it.

As Ms. Mohamud explained: "Weyker's deputization form made clear that her federal authority was narrow. Of six checkboxes available to grant her specific federal authority as a cross-deputized officer, only one was checked: 'To seek and execute arrest and search warrants supporting a federal task force.'" SAC ¶ 45; *see also* Dkt. 69-1 (Deputization Form). Neither Officer Weyker's lies to Officer Beeks and Sergeant Manty, nor her lies in support of the federal criminal affidavit, were directed at seeking or executing arrest or search warrants. Thus, Officer

Weyker's cross-deputization could not possibly cancel out her state authority because her actions exceeded her federal authority.

C. The FBI and St. Paul Police Department believe cross-deputized officers act under color of state law.

Without any discovery, Ms. Mohamud has found not one but three separate task force agreements indicating that Officer Weyker was acting under color of state law. Along with the Vick Task Force MOU addressed above, Ms. Mohamud provides two others governing other St. Paul-FBI task forces. SAC ¶ 48 & Exs. 2–3.

2005 Joint Terrorism Task Force

> 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.

2011 Cyber Crime Task Force

> 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.

Officer Weyker offers three reasons (at 12–17) why these documents are "irrelevant." None is persuasive.

1. The MOUs establish that both Officer Weyker's employer (SPPD) and her sponsor for cross-deputization (FBI) understood her to be acting under color of state law.

According to Officer Weyker (at 12–13), Ms. Mohamud "baldly asserts that the . . . MOUs between FBI and the St. Paul Police Department formed a 'custom[],' without alleging a single fact to show that is so." But the MOUs themselves are the "facts" establishing the custom. *See* SAC ¶¶ 47–48. Indeed, Officer Weyker concedes this point (at 15): "[T]he true function of these documents [is] 'set[ting] forth a common understanding of the policies which the [St. Paul Police Department] and FBI will follow.'" The word for such a common understanding is "custom." *Webster's New World College Dictionary* (5th ed. 2018) (defining "custom" as "a usual practice or habitual way of behaving").

Officer Weyker similarly argues (at 12) that the "MOUs are unrelated to the incident at issue here." According to Officer Weyker, the MOUs "are for *Terrorism* and *Cyber Crime* task forces," whereas the *Adan* cases "involved human trafficking." That is true, but the fact that two agreements, entered six years apart, and addressing wildly different task-force subjects both include identical language stating that cross-deputized officers act under color of state law underscores the persistence

of the understanding. When Officer Weyker framed Ms. Mohamud, everyone—including the St. Paul Police Department and FBI—believed Officer Weyker was acting under color of state law.[9]

Even ignoring this observation, Officer Weyker's demand that Ms. Mohamud point to an MOU for a "human trafficking" task force is absurd for two reasons. *First,* the Vick Task Force *is* a human trafficking task force, and, as explained above, *supra* Part II.A, its MOU makes plain that it was state-led with a state-oriented mission. The proposed amended complaint further shows that Officer Weyker's work on the *Adan* cases was accomplished through the Vick Task Force. *Second*, the St. Paul Police Department has in its possession an MOU for an "FBI/Minneapolis Child Exploitation and Human Trafficking Task Force," but has refused to produce it in response to Ms. Mohamud's public records request because, "[p]er the FBI, all MOUs and their contents are property of the

[9] The evidence suggests that one MOU was entered a few years before Officer Weyker began the *Adan* investigation and the other less than two months after Officer Weyker framed Ms. Mohamud. Thus, the St. Paul Police Department and FBI understood cross-deputized officers to act under color of state law both before and after Officer Weyker's unconstitutional conduct.

FBI and can only be released by the FBI." Dkt. 81 (Rule 56(d) Declaration) ¶ 9(l) & Ex. 8:

> Allisia
> The Saint Paul Police Department has located the following MOUs responsive to your request:
> - United States Secret Service
> - Immigration and Customs Enforcement (ICE)
> - FBI/Minneapolis Joint Terrorism Task Force
> - FBI/Minneapolis Child Exploitation and Human Trafficking Task Force
>
> I have included the MOUs for the Secret Service and ICE. Per the FBI, all MOUs and their contents are property of the FBI and can only be released by the FBI.
>
> Thank you
> Molly

So discovery is the answer to Officer Weyker's objection here.

2. The MOUs do not control the question of law, but they raise questions of material fact.

Ms. Mohamud agrees with Officer Weyker (at 15) that the MOUs cannot establish the law. But "the under-color-of-law determination [is] quite 'fact[ ]bound.'" *Yassin*, 39 F.4th at 1090 (quoting *Lugar*, 457 U.S. at 939). Here, the fact that both the St. Paul Police Department (Officer Weyker's employer) and the FBI (her sponsor for cross-deputization) understood the source of her authority was state, not federal, law, is evidence that is centrally relevant to the analysis.[10]

[10] Ms. Mohamud has thoroughly explained this in her Rule 56(d) request and declaration opposing Officer Weyker's motion to dismiss. Dkt. 80 at 64–68 (Rule 56(d) Request), Dkt. 81 (Rule 56(d) Declaration) ¶¶ 9(h)–(k).

Remarkably, Officer Weyker separately argues (at 13) that "Plaintiff does not allege any context for the MOUs such as when they were made or whether they were in force during the events of this case." That's a peculiar critique, given Officer Weyker's argument that the MOUs are irrelevant. But it is also nonsensical because Ms. Mohamud has had no opportunity for discovery. As she explains in her pending Rule 56 Request and supporting declaration, Ms. Mohamud would be happy to do discovery and provide Officer Weyker the context she demands. Dkt. 80 at 64–68 (Rule 56(d) Request), Dkt. 81 (Rule 56(d) Declaration) ¶¶ 7(b)–(e), (h) (noting task-force issues as matters on which discovery is needed), 9(h)–(k) (identifying what is known and unknown about the MOUs), 11 (requesting production of final executed task force agreements and for interrogatories and discovery to address the MOUs). As with her previous complaint about the MOUs, this can also be addressed through discovery.

3. The language of the MOUs applies to cross-deputized local officers like Weyker.

Finally, Officer Weyker attempts (at 15–17) to elide two wholly separate lines of legal authority and muddy the definition of "cross-deputized federal officer" in the MOUs. Ignoring their plain text, Officer Weyker offers (at 16) a fine-spun definition of "cross-deputized federal officer"

that would apply, by Officer Weyker's own admission, almost nowhere: "[C]ross-deputized Federal officers' are *Federal* officers who have been 'cross-deputized' 'as state peace officers with state law enforcement authority.'"[11] (Citations omitted.) To get there, Officer Weyker cites (at 15–16) language in one MOU, but not the other, she contends offers this esoteric understanding of "cross-deputized federal officers."

Setting aside that the definitions in one MOU would not carry over to the other, Officer Weyker is way off the mark. Weyker relies on section VIII.C of the Cyber Crime MOU, SAC Ex. 3 SOP: "Those State and local law enforcement officers who have been federally deputized . . . may be considered an 'employee' of the United States as defined in 28 U.S.C. § 2671." But this MOU language does not purport to define *anything*; it merely refers to the statutory definition applicable for claims brought against the United States under the Federal Tort Claims Act. (Section

[11] Not only does the MOU itself note that such a scenario would only occur under "limited circumstances," it is wholly unnecessary under Minnesota law (among others), where federal officers already have the power to act as peace officers. *See* Minn. Stat. § 626.8453(2) ("A qualified federal law enforcement officer assigned to a special purpose task force . . . shall possess the authority of the peace officers . . . ."); *see also* Mich. Comp. Laws § 764.15d; Cal. Penal Code § 830.8.

2671 is the FTCA's "Definitions" provision.) This is why the cited language provides only that the officers "may" be an "employee" for FTCA purposes.[12] *See* SAC Ex. 3, SOP VIII.B–C:

> B. Federal Tort Claims Act. Congress has provided that the exclusive remedy for the negligent or wrongful act or omission of an employee of the United States government, acting within the scope of his/her employment, shall be an action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), §§ 2671-2680.
>
> C. "Employee" of the United States. For the limited purpose of defending claims arising out of a CCTF in which the FBI is a Participating Agency: Those State or local law enforcement officers who have been federally deputized, and those State and local personnel who have been formally detailed to the FBI or any other FEA pursuant to 5 U.S.C. §3374, and who are acting within the course and scope of his or her official duties, details, and assignments pursuant to this SOP, may be considered an "employee" of the United States government as defined in 28 U.S.C. § 2671. See 5 U.S.C. § 3374(c)(2).

Yet this case does not involve FTCA claims. It presents constitutional claims, and the FTCA explicitly disclaims its application to claims against "an employee of the [federal] Government" "brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b). Thus, Officer Weyker's attempt to divine some sort of quasi-contractual definition from a section of one MOU addressing FTCA claims and then graft

[12] Even if the provision did provide a definition, Officer Weyker's cross-deputization form explicitly states that her "appointment does not constitute employment by . . . the United States Government." SAC ¶ 44. And Officer Weyker concedes (at 13–14) that MOU provisions "do not dictate whether local officers [a]re federal employees for purposes of the [FTCA]" (citing *Askar v. Hennepin County*, 600 F. Supp. 3d 948, 954 (D. Minn. 2022).

it onto a different section of both MOUs addressing constitutional claims under Section 1983 and *Bivens* is meritless.

The MOUs are additional evidence that, if viewed in Ms. Mohamud's favor, demonstrate Officer Weyker acted under color of state law when she violated Ms. Mohamud's clearly established rights.

Conclusion

This Court should freely give leave to Ms. Mohamud to amend her complaint, giving her claims an opportunity to be tested on the merits.

Respectfully submitted on August 2, 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 Reply in Support of Motion for Leave to File Second Amended Complaint 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 Schoolbook font. As calculated using the word-count function of Microsoft Word 365, the memorandum contains 5,867 words, including all text, headings, footnotes, and quotations.

/s/ Patrick Jaicomo
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