IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

RENEE MARTIN, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	)	Civil Action No. 3:22-cv-00136-PDW-ARS

MEMORANDUM OF LAW IN SUPPORT OF INDIVIDUAL DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiff, Renee Kay Martin, filed suit alleging that employees from the federal Bureau of Indian Affairs (hereinafter "BIA") and employees from the Federal Bureau of Investigation (hereinafter "FBI"), in their individual capacities, violated her son's constitutional rights. The instant motion to dismiss is filed on behalf of BIA officers Lieutenant Kelan Gourneau; Officer Michael Slater; Officer Evan Parisien; Officer Heather Baker; and Chief Earl Charbonneau, as well as FBI Special Agent Reed Mesman (collectively the "Individual Federal Defendants"). Plaintiff alleges that defendants, along with other state/local law enforcement, violated her son's due process rights by intentionally pursuing him with a faulty warrant and killing him on August 23, 2020. Even under the liberal standards of construction that may be permitted to *pro se* litigants, Plaintiff's attempt to recover damages from federal employees in their personal capacities for actions done while fulfilling their official job responsibilities for the use of deadly force outside a home on the Turtle Mountain Indian Reservation – without details of their specific participation in the alleged misconduct conspiracy – is deeply misguided and fails as a matter of law.

Several reasons support this conclusion. First, a *Bivens* remedy is not available as the Supreme Court has never recognized an implied cause of action against BIA officers performing law enforcement services in Indian country or against FBI agents merely investigating police-involved shootings. And special factors counsel hesitation against extending *Bivens*, which is now a "disfavored judicial activity," to this context. *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022) (finding no cause of action for an alleged use of force by United States Customs and Border Patrol agents on private property near an international border); *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1848 (2017). Second, even if a *Bivens* remedy were available, the Individual

Federal Defendants are entitled to qualified immunity. Plaintiff's Complaint fails to include facts sufficient to plausibly allege that any Individual Federal Defendants personally participated in particular misconduct or violated clearly established law. Therefore, all claims against each Federal Individual Defendant should be dismissed with prejudice.

FACTUAL BACKGROUND

On August 23, 2020, Brandon Laducer (hereinafter "the decedent") was shot and killed by law enforcement officers on the Turtle Mountain Indian Reservation. Prior to his death, as the Complaint acknowledges, the decedent was involved in "an incident that occurred off reservation" in neighboring Bottineau County. *See* Compl. at 4. Plaintiff's Complaint references the North Dakota Bureau of Criminal Investigation's (hereinafter "NDBCI") report and relies on it to form the basis of a number of her allegations.[1] *See* report filed under seal and annexed hereto as Exhibit A. That report indicates that the decedent discharged a firearm at bar in Bottineau County (the "incident" the Complaint references), and was subsequently pursued by law enforcement officers. Plaintiff alleges that the decedent was "almost killed instantly" when "exiting his home." *Id*. at 5. The NDCBI report indicates that "three spent 9 mm ammunition

[1] When deciding a Rule 12(b)(6) motion, a court may consider documents that form the basis of a complaint or are extensively referenced in said complaint even if the document is not attached to the complaint. *See Collins v. Wells Fargo Bank*, No. CV-12-2284, 2013 U.S. Dist. LEXIS 102791 at *20 (D. Ariz. July 22, 2013). *See also Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1021 (8th Cir. 2013) (finding that when adjudicating Rule 12(b) motions, courts are not strictly limited to the four corners of complaints). "While courts primarily consider the allegations in the complaint in determining whether to grant a Rule 12(b)(6) motion, courts additionally consider matters incorporated by reference or integral to the claim . . . without converting the motion into one for summary judgment." *Miller v. Redwood Toxicology Lab'y, Inc.*, 688 F.3d 928, 931 n.3 (8th Cir. 2012) (quotations omitted). "Though 'matters outside the pleadings' may not be considered in deciding a Rule 12 motion to dismiss, documents necessarily embraced by the complaint are not matters outside the pleading." *See Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017) (quotations omitted). Alternatively, the undersigned requests that this Court take judicial notice of the NDBCI report to place Plaintiff's selective reference to it in context. *Lustgraaf v. Behrens*, 619 F.3d 867, 885-86 (8th Cir. 2010) ("[W]hen considering a motion to dismiss . . ., [a court] may take judicial notice (for the purpose of determining what statements the documents contain and not to prove the truth of the documents' contents) of relevant public documents . . . ."); *Collins*, 2013 U.S. Dist. LEXIS 102791 at *20 ("A district court may take judicial notice of material which is either submitted as part of the complaint or necessarily relied upon by the complaint or it may take judicial notice of matters of public record.").

casings," were recovered from the deck where the decedent's body was located, corroborating the on-scene officers' claims that the decedent "did discharge the handgun multiple times on the deck." Ex. A at 14.

Plaintiff makes varied statements as to who was responsible for her son's death and in what way. By and large, the Complaint fails to identify how each officer participated in the alleged wrongdoing. Plaintiff's Complaint often generalizes to include all BIA, FBI, and county officers as having "shot several times." *See, e.g.*, *Id*. at 6. According to Plaintiff's Complaint, the decedent "was murdered by the Bureau of Indian Affairs (BIA) and Rolette County Sherriff's Department officers"; "was shot several times by officers including officers from Rolette County"; and claims that Officer Parisien told a Bottineau business owner that he "delivered the deadly shot." *Id.* at 5-6. The NDBCI report indicated that Parisien (and no other federal defendant herein) was among five officers who discharged his weapon that evening, but does not attribute a deadly shot or shots to any particular law enforcement officer. Ex. A at 11. Like defendant Zachmeier, a NDBCI agent who this Court has already dismissed from this action, Order, Mar. 20, 2023, ECF No. 47, Chief Charbonneau, Officer Baker, and FBI Special Agent Mesman were not on the scene at the time of the shooting (and Mesman, like Zachmeier, was only involved in the post-shooting investigation). *Accord* Complaint at 10 (indicating that Mesman met with Plaintiff on February 18, 2021, several months after the incident).

Plaintiff maintains that after the incident, she received the NDBCI report which stated Lt. Gourneau "offered to pursue" the decedent due to a faulty warrant. *Id*. at 5. Plaintiff suggests this occurred because the federal officials would otherwise somehow have violated "tribal jurisdiction" by "enter[ing] Richard Laducer's homestead," "without permission," "lights or sirens or warning." *Id.* Citing to "tribal jurisdiction" and "sovereignty" rights, the Complaint

purports to assert a *Bivens* claim for the violation of the decedent's civil rights, specifically due process. *Id*. at 4.

ARGUMENT

I. This Court Should Not Extend *Bivens* Liability Here Because This Case Presents a New Context and Special Factors Counsel Hesitation

Plaintiff seeks to recover damages from the Individual Federal Defendants under *Bivens*. However, in recent years, the Supreme Court has significantly curtailed the circumstances in which a plaintiff can assert a *Bivens* claim. Extending a *Bivens* remedy here to the use of deadly force by federal officials on the Turtle Mountain Indian Reservation is not appropriate.

In *Bivens*, the Supreme Court held that a Fourth Amendment violation by federal narcotics agents who entered a plaintiff's home gave rise to an implied cause of action for damages against the agents in their personal capacities, despite the absence of explicit statutory authorization for such suits. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Since *Bivens*, the Supreme Court has implied such a remedy on only two other occasions.[2] Further, the Supreme Court has repeatedly cautioned against *Bivens* expansion, finding that extension of *Bivens* to new contexts is now a "disfavored" judicial activity and noting that the Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants" for the past 30 years. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Thus, before permitting a lawsuit to proceed on a *Bivens* theory, courts must first ask whether a case arises in a context that differs "in a meaningful way from previous

[2] In *Davis v. Passman*, 442 U.S. 228 (1979), the Supreme Court provided a Fifth Amendment Due Process Clause damages remedy for an administrative assistant suing a congressman for gender discrimination. In *Carlson v. Green*, 446 U.S. 14 (1980), the Supreme Court held that the Eighth Amendment Cruel and Unusual Punishments Clause gave a prisoner's estate a damages remedy against federal jailers for failure to provide adequate medical treatment for an inmate's life-threatening asthma, resulting in his death. *Id.* at 19.

Bivens cases decided by [the Supreme Court]." *Abbasi*, 137 S. Ct. at 1859. *See also Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020).

If a case differs meaningfully from *Bivens*, *Davis*, or *Carlson*, a court must consider whether any special factors counsel hesitation in expanding *Bivens* to the plaintiff's claims. *Abbasi*, 137 S. Ct. at 1857. In other words, the court must analyze whether "alternative, existing process[es]" make a *Bivens* remedy inappropriate. *Wilkie*, 551 U.S. at 550. Additionally, the existence of "special factors counselling hesitation" must be considered "before authorizing a new kind of federal litigation." *Id.* This "special-factors" inquiry must concentrate on "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Hernandez*, 140 S. Ct. at 743 (quoting *Abbasi*, 137 S. Ct. at 1858). Here, Plaintiff's generalized claim alleging a violation of the decedent's civil rights through the use of force on an Indian reservation fails because it improperly seeks to extend *Bivens* to a new (and never approved) context, and there are several reasons counseling hesitation against authorizing an implied remedy in this case.

A. Plaintiff's Claims Seeks to Extend *Bivens* to a New Context

"The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new." *Abbasi*, 137 S. Ct. at 1859. "[A] modest extension is still an extension," even where the case has "significant parallels to one of the Court's previous *Bivens* cases" and the differences are "perhaps small." *Abbasi*, 137 S. Ct. at 1861, 1864, 1865; *see also Hernandez*, 140 S. Ct. at 743 ("[O]ur understanding of a 'new context' is broad."); *Ahmed v. Weyker*, 984 F.3d 564, 570 (8th Cir. 2020) (recognizing a presumption against creating new *Bivens* causes of action – "[i]f the test sounds strict, it is.").

Here, Plaintiff's claims against the Individual Federal Defendants present a new context because they differ in several material aspects from the three *Bivens* claims recognized by the Supreme Court. *See Abbasi*, 137 S. Ct. at 1864 (noting that even a new case with "significant parallels to one of the [Supreme] Court's [three] previous *Bivens* cases," or a case presenting just a "modest extension" of one of them, "is still an extension" into a new context). *Davis* and *Carlson* did not involve allegations of policing individuals in Indian country or investigating officer-involved shootings. *Bivens* itself, moreover, did not involve BIA officers, officer involved shootings, or post-incident investigations. Even more significantly, Webster Bivens was inside his home, not outside a dwelling located in Indian country, a geographic area that as the Plaintiff alleges raises unique issues of federal jurisdiction and sovereignty. That fact itself has significant implications and raises new factors not previously considered, which alone establishes a new context. *See Egbert*, 142 S. Ct. at 1803-05 (holding that superficial similarities – i.e. cases involving "similar allegations of excessive force" that present "almost parallel circumstances" or a similar "mechanism of injury" – were insufficient to support the judicial creation of a cause of action where use of force was on private property near the Canadian border). As the Eighth Circuit recently emphasized, one difference is all it takes to find a context new for purposes of *Bivens*, even if significant parallels to *Bivens* itself exist. *Ahmed*, 984 F.3d at 568; *see also Hernandez*, 140 S. Ct. at 747 (declining to extend a *Bivens* remedy for an excessive-force claim against a Border Patrol agent who shot and killed a 15-year-old Mexican national across the border in Mexico because "regulating the conduct of agents at the border unquestionably has national security implications," and the "risk of undermining border security provides reason to hesitate before extending *Bivens*"); *Mejia v. Miller*, 61 F.4th 663, 668 (9th Cir. 2023) (declining to extend a *Bivens* remedy for a use of force in Joshua Tree National Park

where (1) the incident involved a different federal agency than previous cases; (2) unlike *Bivens'* narcotics arrest in a home, the incident occurred on public lands; and (3) the subject defendant had "a different mandate than the narcotics officers" in *Bivens*).

The Supreme Court has never extended *Bivens* liability to a BIA officer operating under federal statutory authority to perform law enforcement activities in Indian country. The Supreme Court has also never extended *Bivens* liability to an FBI agent investigating an officer involved in shooting or "meeting" with a decedent's family afterwards. These facts alone demonstrate that the context is new, and BIA and FBI officers constitute a "new category of defendants" operating under different authorities, in a different sort of location than seen before – and one with unique federal interests heavily regulated by Congress. Plaintiff's claims substantially differ from *Bivens*, *Davis*, or *Carlson*, and this Court must consider whether any special factors counsel hesitation.

B. Special Factors Counsel Hesitation Against Recognizing a *Bivens* Remedy Here

Once the *Bivens* context is deemed new, the question remains whether to extend *Bivens* liability. The threshold inquiry is "whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Egbert*, 142 S. Ct. at 1803. "If there is a rational reason to think that the answer is 'Congress'— as it will be in most every case, — no *Bivens* action may lie." *Id.* "[W]hen a party seeks to assert an implied cause of action under the constitution itself . . . separation-of-powers principles are or should be central to the analysis." *Abbasi*, 137 S. Ct. at 1857. Extending *Bivens* liability is particularly inappropriate under separation-of-powers principles where the subject matter is constitutionally committed to the political branches. *See id*. at 1861 (discussing national security); *Hernandez*, 140 S. Ct. at 745 (discussing foreign policy). In the wake of *Egbert* and *Abbasi*, federal courts have heeded

these principles and declined to extend *Bivens* remedies to uses of force or similar law enforcement encounters in areas of unique federal interest like borders, public lands, airports and prisons.[3]

i. Plaintiff's constitutional claims raise separation of powers concerns

Here, as the Supreme Court has long recognized, "[t]he relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character." *United States v. Kagama*, 118 U.S. 375, 381 (1886). The Supreme Court has "long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020); *see also United States v. Wheeler*, 435 U.S. 313, 319 (1978) ("Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government"); *Winton v. Amos*, 255 U.S. 373, 391 (1921) ("Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property"). That is because "the Constitution grants Congress broad general powers to

[3] *Egbert*, 142 S. Ct. at 1806 (asking "whether a court is competent to authorize a damages action . . . against Border Patrol agents generally" and declaring "[t]he answer, plainly, is no"); *Hernandez*, 140 S. Ct. at 747 ("Since regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining border security provides reason to hesitate before extending *Bivens* into this field."); *Lovell v. Parker*, 618 F. Supp. 3d 127, 139 (E.D.N.Y. 2022) (finding no *Bivens* remedy where plaintiff brought suit against Department of Homeland Security's Customs and Border Protection (CBP) officers for conduct performed while on duty at a border checkpoint within an international airport); *Salamone v. United States*, 618 F. Supp. 3d 146, 154 (S.D.N.Y. 2022) ("Because the plaintiff's *Bivens* claims are brought against four CBP officers who allegedly detained a suspect at a port of entry into the United States, it is foreclosed by *Egbert*."); *Ortega v. United States Customs & Border Prot.*, No. CV 21-11250-FDS, 2023 U.S. Dist. LEXIS 30525, at *15-6 (D. Mass. Feb. 23, 2023) (finding "that the Fourth Amendment claims asserted here represent an unwarranted extension of *Bivens* to a new context" where the "allegedly unlawful searches and seizures were conducted by CBP officers at Logan Airport, and were directed to individuals entering the United States from the Dominican Republic"); *Mejia*, 61 F.4th at 668–69 ("Fourth Amendment excessive force claims against [Bureau of Land Management ("BLM")] officers would have ''systemwide' consequences' for BLM's mandate to maintain order on federal lands, and uncertainty about these consequences provides a reason not to imply such a cause of action."); *Morel v. Dep't of Just.*, No. CV 7:22-015-DCR, 2022 U.S. Dist. LEXIS 162900, at *14 (E.D. Ky. Sept. 9, 2022) (declining to extend a *Bivens* remedy to federal prisoner's Eighth Amendment claim based on the use of excessive force against him by prison officials); *Smith v. Garcia*, No. 21CV578NGGRJR, 2022 U.S. Dist. LEXIS 230748, at *15 (E.D.N.Y. Dec. 22, 2022) (finding no *Bivens* remedy where defendants were "acting as arresting officers" but "were addressing protestors in a federal prison").

legislate in respect to Indian tribes, powers that [the Supreme Court] ha[s] consistently described as plenary and exclusive." *United States v. Lara*, 541 U.S. 193, 200 (2004). The Supreme Court has identified the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as constitutional sources of that power. *Id.*; *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"). Even a tribe's authority to police its own land is subject to the plenary authority of Congress – as is virtually every other aspect of tribal self-governance. *See United States v. Cooley*, 141 S. Ct. 1638, 1643 (2021) ("In all cases, tribal authority remains subject to the plenary authority of Congress."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess"). Based on the foregoing, Supreme Court precedent has made clear that matters relating to tribal relations are within the province of the Legislature, or the Executive, not the courts. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government"); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902) ("The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts").

Since the 1830s, Congress has exercised its plenary authority (1) to authorize the President to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs," 25 U.S.C. § 9; and (2) to charge the then-

Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, with "the management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2. When it comes to policing Indian country, the BIA has traditionally been responsible for doing so. *United States v. Schrader*, 10 F.3d 1345, 1350 (8th Cir. 1993). For instance, in 1975, Congress enacted the Indian Self Determination and Education Assistance Act (the "Self Determination Act"), Pub. L. No. 93-638, 88 Stat. 2203 (1975), 25 U.S.C. § 5321, to promote a federal policy of tribal self-determination through self-governance. While that legislative initiative (to compel the BIA, if requested by a tribe, to enter into a contract to provide law enforcement services in Indian country) does not directly control here, it illustrates the sort of choices Congress has elected in this arena. *See generally United States v. Danley*, No. CR 11-10029, 2011 U.S. Dist. LEXIS 149855, at *2 (D.S.D. Dec. 30, 2011). In 1988, Congress permitted recovery against the United States for money damages under the Federal Tort Claims Act (FTCA) for certain tort claims. *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234 (8th Cir. 1995). In 1990, Congress enacted the Indian Law Enforcement Reform Act (ILERA), Pub. L. No. 101-379, 104 Stat 473 (Aug. 18, 1990) (codified at 25 U.S.C. §§ 2801–2815), "to clarify and strengthen the authority of the law enforcement personnel and functions within the BIA." *Schrader*, 10 F.3d at 1350 (citations omitted); 25 U.S.C. § 2802(a). In connection with this authority, "the Secretary may charge [BIA] employees with a broad range of law enforcement powers" in Indian country. *United States v. Roy*, 408 F.3d 484, 489 (8th Cir. 2005) (citations omitted); 25 U.S.C. § 2803. The ILERA also authorizes the BIA to enter into memoranda of agreement with Indian tribes to assist in carrying out its federal law enforcement functions in Indian country. *United States v. Bettelyoun*, 16 F.3d 850, 852 (8th Cir. 1994); 25 U.S.C. § 2804(a)(1) ("[T]he Secretary shall establish procedures to enter into memoranda of agreement

for the use … of the personnel or facilities of a Federal, tribal, State, or other government agency to aid in the enforcement or carrying out in Indian country of a law of either the United States or an Indian tribe that has authorized the Secretary to enforce tribal laws."). In none of these legislative efforts in the BIA law enforcement arena did Congress provide a private right of action.

Similarly to the BIA, the FBI's jurisdiction in Indian country has also been regulated by Congress. The FBI derives its investigative jurisdiction in Indian country from 28 U.S.C. § 533, pursuant to which the Attorney General grants the FBI the authority to investigate all federal crimes not assigned exclusively to another agency. Like the BIA, the FBI investigates crimes under 18 U.S.C. §§ 1152 and 1153. According to a 1993 memorandum of understanding between the BIA and the FBI, the FBI was to "assist the BIA in its investigative matters," and be "the agency primarily responsible" for "use of sensitive investigative techniques" in cases.[4] *See* The United States Department of Justice Archives, *Memorandum of Understanding Between the United States Department of Interior Bureau of Indian Affairs and the United States Department of Justice Federal Bureau of Investigation* (Jan. 22, 2020), https://perma.cc/L5G4-TPWD.

At no point in the promulgation of these provisions did Congress authorize any kind of direct cause of action for money damages. Despite extensive Congressional attention to tribal affairs generally, to policing Indian country specifically, and to expanding FTCA liability to

[4] In 2022, the United States Department of Interior (hereinafter "DOI"), the Department that houses the BIA, and the FBI entered into an agreement pursuant to the Indian Law Enforcement Reform Act of 1990 (ILERA). 25 U.S.C. §§ 2801-2815. *See FBI and Bureau of Indian Affairs Sign Agreement to Improve Law Enforcement in Indian Country* (Dec. 1, 2022), https://perma.cc/X664-NSRS. This agreement updated the guidelines to provide for the effective and efficient administration of criminal investigations in Indian Country. This 2022 agreement between the United States DOI and the BIA elaborated on the relationship between the BIA and the FBI by specifically noting the FBI takes the initial primary role in the investigation of BIA or Tribal law enforcement officer-involved shootings and in-custody death incidents. *See* BIA.gov, *Memorandum of Understanding Between the United States Department of the Interior Bureau of Indian Affairs and the United States Department of Justice Federal Bureau of Investigation* (Dec. 01, 2022), https://perma.cc/ML7P-29H7. This was the first update since the 1993 memorandum of understanding between the bureaus.

cover torts arising out of self governance contracts, nowhere has Congress authorized any kind of direct cause of action against BIA for money damages Plaintiff seeks. Such silence when Congress has legislated extensively is both "relevant and telling." *Abbasi*, 137 S. Ct. at 1849. This case, moreover, involves two separate sovereigns (the United States and the Turtle Mountain Chippewa Tribe), raising other sensitive issues. S*ee Egbert*, 142 S. Ct. at 1805-06 (declining to extend a *Bivens* remedy where a border patrol agent allegedly used excessive force on the U.S. side of the Canadian border); *Hernandez*, 140 S. Ct. at 745 (declining to extend *Bivens* to cross-border shooting, in part, because of competing interests of two sovereigns, the United States and Mexico, both of which "have legitimate and important interests that may be affected by the way in which this matter is handled"). Consistent with these principles, at least two district courts have refused to extend *Bivens* liability where doing so might interfere with tribal relations. *See, e.g.*, *Nally v. Graham*, 551 F. Supp. 3d 1062 (D. Kan. 2021); *Leroy v. United States*, No. CV-19-100, 2020 U.S. Dist. LEXIS 191410, *28-43 (D. Mont. Sept. 8, 2020).

Expanding *Bivens* liability is now a "disfavored judicial activity" and that in "most every case – no *Bivens* action may lie." *Egbert*, 142 S. Ct. at 1803 (citations omitted); *see also id.* at 1800 ("[I]n all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts."). The question is not *is* a remedy desirable, but *who* should decide whether to create any such cause of action. *Id.* at 1803. If there is any reason to think Congress might be better equipped, that ends the inquiry. *Id.* The Eighth Circuit has applied this judicial reticence faithfully: "[W]e have adopted a presumption against judicial recognition of direct actions for violations of the Constitution by federal officials." *Farah v. Weyker*, 926 F.3d 492, 500 (8th Cir. 2019) (citations omitted). Extending *Bivens* liability in this case would have "'systemwide' consequences" for FBI and BIA's role in "maintain[ing] order on federal lands,

and uncertainty about these consequences provides a reason not to imply such a cause of action." *Mejia*, 61 F.4th at 663, 668-69. Given the "anomalous" and "complex" relationship between the United States and "the Indian tribes," *Kagama*, 118 U.S. at 381; the Constitutional commitment of tribal affairs to the Legislature; and the extensive Congressional attention in this arena, there are ample reasons to "pause" and decline the invitation to extend *Bivens* liability.

ii. Alternative, existing processes preclude any *Bivens* claims.

Courts also "may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide, an alternative remedial structure." *Egbert*, 142 S. Ct. at 1804 (internal quotations and citation omitted). "If there are alternative remedial structures in place, *that alone*, like any special factor, is reason enough to limit the power of the Judiciary to infer a new *Bivens* cause of action." *Id.* (internal quotations and citation omitted). It does not matter whether a *Bivens* action would "disrupt" the remedial scheme or whether the existing remedial scheme leaves the alleged wrong without a money damages remedy or complete relief. Instead, "the court must ask only whether it, rather than the political branches, is better equipped to decide whether existing remedies should be augmented by the creation of a new judicial remedy." *Id.* (internal quotations and citation omitted). Here, alternative avenues do exist.

First, the availability of a Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671, *et seq.*, action underscores the unavailability of a *Bivens* remedy in this case. In *Carlson*, the Supreme Court found that the FTCA did not preclude *Bivens* relief because "congressional comments" indicated the legislation, as amended, intended "FTCA and *Bivens* [to be] parallel, complementary causes of action." 446 U.S. at 20. In *Egbert*, however, the Court clarified that such reasoning "carries little weight because it predates the Court's current approach to implied

causes of action." 142 S. Ct. at 1799 (2022).[5] The FTCA thus is among the alternative remedial schemes courts may consider, as the Fifth and Tenth Circuits most recently acknowledged.[6]

Moreover, as the Court noted in *Egbert*, declining to extend a *Bivens* remedy does not mean there are no checks on official misconduct. "[W]e never held that a *Bivens* alternative must afford rights to participation or appeal." *Egbert*, 142 S. Ct. at 1806. Because *Bivens* "is concerned solely with deterring the unconstitutional acts of individual officers—*i.e.*, the focus is whether the Government has put in place safeguards to 'preven[t]' constitutional violations 'from recurring.' . . . So long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy." *Id.* at 1806-07 (internal citations omitted). That is true even if a court independently concludes that "the Government's procedures are 'not as effective as an individual damages remedy.'" *Id*.

Here, such "safeguards" exist. Pursuant to the Congressional delegation of authority to the President, 25 U.S.C. § 9, and the Secretary of the Interior, 25 U.S.C. § 2, the Secretary promulgated regulations directing the Director of the BIA to "develop and maintain a reporting system that allows any resident of or visitor to Indian country to report officer misconduct." 25 C.F.R. § 12.52. "The [BIA] Director, Office of Law Enforcement Services[7] maintains an internal

[5] A number of "district courts … have similarly concluded that *Carlson*'s analysis of adequate alternative remedies cannot survive *Abbasi* and dismissed *Bivens* claims because the FTCA provides an adequate alternative remedy," *see Scott v. Quay*, No. 19-CV-1075, 2020 U.S. Dist. LEXIS 216990, at *24-25 (E.D.N.Y. Nov. 16, 2020) (collecting cases). *See also McKinney v. United States*, No. 17-cv-4156, 2021 U.S. Dist. LEXIS 162580, at *20-21 (Minn. August 27, 2021); *Wiley v. Fernandez*, No. 19-CV-652, 2021 U.S. Dist. LEXIS 226803, at *20-21 (N.D.N.Y. Nov. 24, 2021), *report and recommendation adopted*, No. 19-CV-0652, 2022 U.S. Dist. LEXIS 10020 (N.D.N.Y. Jan. 19, 2022) (same).

[6] *See Williams v. Keller*, No. 21-4022, 2021 U.S. App. LEXIS 29608, at *10-11 (10th Cir. Oct. 1, 2021); *Oliva v. Nivar*, 973 F.3d 438, 444 (5th Cir. 2020); *Cantu v. Moody*, 933 F.3d 414, 423 (5th Cir. 2019); *see also Hernandez*, 140 S. Ct. at 748 n.9 (rejecting the argument that through the FTCA Congress "intended for a robust enforcement of *Bivens* remedies").

[7] The Office of Law Enforcement Services is now known as the BIA's Office of Justice Services. *See* Protection of

affairs program that investigates all allegations of misconduct by BIA officers, and any officer receiving funding and/or authority from the BIA. All allegations of misconduct must be thoroughly investigated and appropriate action taken when warranted." 25 C.F.R. § 12.53. Regarding allegations against FBI agents, the Department of Justice Office of the Inspector General (hereinafter "DOJ-OIG") has jurisdiction to review programs and personnel in all DOJ components, including the FBI. *See* Office of the Inspector General, *Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act* (July 15, 2022), https://perma.cc/8U9D-A7GE. The DOJ-OIG has jurisdiction over complaints of misconduct against Federal Bureau of Investigation employees. *Id.* In addition, section 1001 of the USA Patriot Act, Public Law 107-56, directs the Inspector General to review information and receive complaints alleging abuses of civil rights and civil liberties by Department of Justice employees. U.S. DEPT. OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, *Submitting a Complaint*, https://perma.cc/EH53-Z95Q (accessed March 9, 2023). The DOI also has an Office of Inspector General (hereinafter "DOI-OIG"), to which DOI employees are responsible for "report[ing] . . . matters coming to their attention which do or may involve violations of law or regulation by employees, contractors, sub-contractors, grantees, subgrantees, lessees, licensees or other persons having official business with the Department." 43 C.F.R. § 20.103. While these grievance processes provide no monetary compensation, the Eighth Circuit has explained, "even remedies that provide *no* compensation for victims and little deterrence for violators, such as injunctions and writs of habeas corpus, trigger the general rule that, 'when alternative methods of relief are available, a *Bivens* remedy usually is not.'" *Farah*, 926 F.3d at 502 (quoting *Abbasi*, 137 S. Ct. at 1863) (emphasis in original); *accord Egbert*, 142 S. Ct. at 1804, 1807 (rejecting the

Indian Arts and Crafts, Pub. L. 111–211, 124 Stat 2258 (2010) (codified as amended at 25 U.S.C. § 2801).

argument that the grievance process was inadequate to remedy the alleged wrong because "whether a given remedy is adequate is a legislative determination that must be left to Congress, not the federal courts." Indeed, each remedial structure "alone" is "reason enough to 'limit the power of the Judiciary to infer a new *Bivens* cause of action.'").

II. The Individual Federal Defendants are Entitled to Qualified Immunity

Courts have long recognized that individual capacity damages suits against federal officials give rise to "substantial social costs," particularly "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). To mitigate these costs, the doctrine of qualified immunity shields government officials from personal liability to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity thus affords officials "breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

This protection shields "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986); and applies "regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotations omitted); *see also Davis v. Hall*, 375 F.3d 703, 712 (8th Cir. 2004) ("Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines."). And because qualified immunity is designed to shield officials from the burdens of litigation, it should be resolved "at the earliest possible stage in litigation." *Pearson*, 555 U.S. at 232. In the qualified immunity analysis, courts ask two questions: (1) whether the facts alleged show that the defendant

personally violated a constitutional right; and (2) whether that right was clearly established. *Id.* at 232. Courts can decide which question to answer first. *Id.* at 236. Once a defendant invokes qualified immunity, it is the plaintiff's burden to demonstrate that "the law was clearly established." *Smith v. City of Minneapolis*, 754 F.3d 541, 546 (8th Cir. 2014). If the Complaint does not show an individual government official violated a constitutional right, or if that right was not clearly established at the time of the events, the defendant is immune from suit, and no discovery appropriate. *Pearson*, 555 U.S. at 243-45. The Individual Federal Defendants are entitled to qualified immunity because Plaintiff fails to allege their personal involvement in a constitutional violation. Furthermore, it was not clearly established that any pled conduct violated the Constitution.

A. Plaintiff's Complaint Fails to Allege Sufficient Facts to Plausibly Allege a Constitutional Claim Against Each Individual Federal Defendant

i. Plaintiff Fails to Allege Personal Involvement by the Individual Federal Defendants

Whether or not Plaintiff states a constitutional claim against an individual government official is the first step of the qualified immunity inquiry. As an initial matter, Plaintiff's Complaint should be dismissed as it fails to allege *any* facts, much less sufficient ones, to create a claim against Gourneau, Slater, Baker, Charbonneau, or Mesman. Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Zink v. Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015). These factual allegations must "'raise a right to relief above the speculative level.'" *Horras v. Am. Cap. Strategies, Ltd.*, 729 F.3d 798, 806 (8th Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). These considerations apply fully to cases involving qualified immunity. A court must consider whether the plaintiff has stated "a plausible

claim for violation of a constitutional or statutory right and whether the right was clearly established at the time of the alleged infraction." *Hager v. Ark. Dep't of Health*, 735 F.3d 1009, 1013 (8th Cir. 2013) (dismissing the claim under qualified immunity where plaintiff did nothing more than allege conclusory assertions); *see also Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 680 (6th Cir. 2011) ("[j]ust as we gauge other pleading-stage dismissals to determine only whether the complaint states a claim upon which relief can be granted . . . so we review an assertion of qualified immunity to determine only whether the complaint 'adequately alleges the commission of acts that violated clearly established law.'"). The pleaded facts must be viewed in the light most favorable to the plaintiff, but a court should "neither 'strain to find inferences favorable to the plaintiffs,' nor 'accept conclusory allegations' or 'unwarranted deductions.'" *Ruvalcaba v. Angleton Indep. Sch. Dist.*, No. 20-40491, 2022 U.S. App. LEXIS 3213 at *7 (5th Cir. Feb. 4, 2022) (internal citations omitted). While *pro se* complaints are construed liberally, "the court need not act as a clairvoyant, trying to read the tea leaves of a pro se motion to determine what the movant actually seeks. A litigant, even a *pro se* one, bears some responsibility for advocating for himself." *In re Heyl*, 609 B.R. 194, 202 (B.A.P. 8th Cir. 2019); *see also Neubauer v. FedEx Corp.*, 849 F.3d 400, 404 (8th Cir. 2017) (stating that a court will not mine a complaint searching for nuggets that might refute obvious pleading deficiencies.). Simply reciting the elements of a cause of action along with conclusory statements is insufficient to meet this requirement. *See Thomas v. City of St. Louis*, No. 4:18-CV-01566 JAR, 2021 U.S. Dist. LEXIS 193964, at *8 (E.D. Mo. Oct. 7, 2021) (partially dismissing plaintiff's claim under qualified immunity, specifically finding that plaintiff's "generic allegations" against the officers were insufficient).

At the motion to dismiss phase, a plaintiff must plausibly allege "each individual defendant's personal involvement in the alleged violation." Order on Motion to Dismiss/Failure to State a Claim, Mar. 20, 2023, ECF No. 47 at 4-5 (dismissing NDBCI defendant Zachmeier from this case), citing *White v. Jackson*, 865 F.3d 1064, 1081 (8th Cir. 2017); *S.M. v. Krigbaum*, 808 F.3d 335, 340 (8th Cir. 2015), and *Torres v. City of St. Louis*, 39 F.4th 494, 504 (8th Cir. 2022); *accord Faulk v. City of St. Louis*, 30 F.4th 739, 744, 746 (8th Cir. 2022) (finding that "[m]ere presence at the scene" was not enough to defeat a claim of qualified immunity – "Liability for damages for a federal constitutional tort is personal, so each defendant's conduct must be independently assessed."); *Tallman v. Reagan*, 846 F.2d 494, 495 (8th Cir. 1988) ("Only federal officials who actually participate in alleged violations are subject to a *Bivens*-type suit."). Several Circuits, including the Eighth Circuit, have held that collective allegations against a group of defendants should not overcome qualified immunity as to any one of them.[8] Especially when "a number of government actors" face suit "in their individual capacities" alongside a "government agency," it is "important . . . that the complaint make clear exactly who is alleged to have done what to whom, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state." *Robbins*, 519 F.3d at 1249–50; *see also Lanman v. Hinson*, 529 F.3d 673, 684 (6th Cir. 2008) ("damage claims against government officials arising from alleged violations of constitutional

[8] *See, e.g., S.M. v. Krigbaum*, 808 F.3d 335, 340 (8th Cir. 2015) ("The doctrine of qualified immunity requires an individualized analysis of each officer's alleged conduct.") (citation and quotations omitted); *Marcilis v. Twp. of Redford*, 693 F.3d 589, 596–97 (6th Cir. 2012) ("categorical references to 'Defendants'" do not "allege, with particularity, facts that demonstrate what each defendant did to violate the asserted constitutional right") (citation and quotation omitted); *Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008) (rejecting a complaint using "either the collective term 'Defendants' or a list of the defendants named individually but with no distinction as to what acts are attributable to whom"); *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001) ("By lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct, [the plaintiff's] complaint failed to satisfy [the] minimum standard.").

rights must allege, with particularity, facts that demonstrate what each defendant did to violate the asserted constitutional right").

In this case, Plaintiff's Complaint fails to include facts that would allow any court to reasonably infer that Gourneau, Slater, Baker, Charbonneau, and Mesman violated the Constitution. The Complaint uses conclusory language and groups the above individuals with all the officers in the BIA and Rolette County Sherriff's Department. Plaintiff does not allege that any of these individuals shot the decedent, but instead refers to the defendants collectively. She does not attempt to identify the role of any officer with respect to the alleged faulty warrant. Nor does she even identify who was present at the time of the shooting. Of the aforementioned individuals, Plaintiff only specifically mentions Special Agent Mesman and Lt. Gourneau, merely claiming that Gourneau offered to pursue the decedent in response to a call reporting the shooting in Bottineau County, *see* Compl. at 4-5, and that Mesman was present at a meeting on February 18, 2021, with the decedent's family. *Id*. Neither allegation is sufficient to state a claim. Put simply, Plaintiff's Complaint does not allege "who is alleged to have done what to whom" and thus is unable "to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state." *Robbins*, 519 F.3d at 1249–50; *see also Lanman v. Hinson*, 529 F.3d 673, 684 (6th Cir. 2008). Thus, dismissal of these five individuals on failure to allege personal participation is warranted.

ii. Plaintiff Fails to Allege a Constitutional Violation

Even as to Officer Parisien, the only defendant herein with respect to whom the NDBCI report indicates even discharged his weapon, Plaintiff does not state a constitutional claim. Whether an officer used excessive force is analyzed under the Fourth Amendment's "objective

reasonableness standard." *Graham v. Connor*, 490 U.S. 386, 388 (1989).[9] That standard asks "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. "In determining reasonableness, a court considers the totality of the circumstances and 'the severity of the crime at issue, the immediate threat the suspect poses to the safety of the officer or others, and whether the suspect is actively resisting or attempting to evade arrest by flight.'" *Smith v. Kan. City, Mo. Police Dep't*, 586 F.3d 576, 581 (8th Cir. 2009) (citation omitted). This list of factors is non-exhaustive. *Retz v. Seaton*, 741 F.3d 913, 918 (8th Cir. 2014). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. And "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97. Finally, reasonableness must be "based upon the information the officers had when the conduct occurred." *Cnty. of Los Angeles v. Mendez*, 581 U.S. 420, 428 (2017) (quoting *Saucier v. Katz*, 533 U.S. 194, 207 (2001)). *See also Shekleton v. Eichenberger*, 677 F.3d 361 (8th Cir. 2012).

The Supreme Court has held that the use of deadly force is reasonable where an officer has "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). This objective reasonableness analysis must be conducted separately for each search or seizure that is alleged

[9] Plaintiff's Complaint asserts a Fifth Amendment due process violation. However, as she is *pro se*, we liberally construe this Complaint to allege a Fourth Amendment violation.

to be unconstitutional. *See Mendez*, 137 S. Ct. at 1547. Put simply, even if an officer has committed a different Fourth Amendment violation leading up to the use of deadly force, if said use of force was reasonable then there is no Fourth Amendment violation for that use of deadly force. *Id*. at 1546-47 ("A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure.").

Here, Plaintiff's Complaint improperly conflates the alleged warrant confusion and lack of knowledge of who owned the subject property with the allegation of excessive force. However, the Supreme Court has held that such conflation is without merit. *Mendez*, 137 S. Ct. at 1547 ("An excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances. It is not a claim that an officer used reasonable force after committing a distinct Fourth Amendment violation such as an unreasonable entry."). Furthermore, Plaintiff acknowledges that prior to the decedent's death there was an "incident" in Bottineau County. Per the NDBCI report, the decedent used a gun in that incident. *See* Exhibit A at 9. Thus, it was reasonable for the officers pursuing him to believe that he was still armed.[10] *See Kohorst v. Smith*, 968 F.3d 871, 877 (8th Cir. 2020). Based on this serious offense, it was objectively reasonable for the BIA officers to treat the decedent as a potential suspect who posed a threat to officer safety. Indeed, in *Kohorst v. Smith*, 968 F.3d 871, 877 (8th Cir. 2020), the officer learned that a suspect might have been involved in an altercation at a local theater. Based on that fact

[10] Plaintiff's Complaint does not acknowledge that the decedent was armed but even assuming he was unarmed, the officers had reasonable *belief* that he was in possession of a firearm. *See Loch v. City of Litchfield*, 689 F.3d 961, 966 (8th Cir. 2012) (quoting *Billingsley v. City of Omaha*, 277 F.3d 990, 995 (8th Cir. 2002); *Capps v. Olson*, 780 F.3d 879, 885 (8th Cir. 2015); *see also Liggins v. Cohen*, 971 F.3d 798, 801 (8th Cir. 2020) (officer need not wait until the suspect is pointing his weapon to use deadly force). Such mistakes are exactly the reason qualified immunity exists. *See Pearson*, 555 U.S. at 231 (2009) (stating that qualified immunity applies "regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'"); *see also Davis v. Hall*, 375 F.3d 703, 712 (8th Cir. 2004) ("Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.").

alone, the Eighth Circuit held that "it was reasonable for [the officer] to approach [the individual] as a potential suspect in an assault investigation who posed a threat to officer safety." *Id.*

Not only did the incident in Bottineau County support the reasonableness of the use of force here, Plaintiff cannot ignore that the NDBCI report that she relies on and incorporates in numerous instances in her complaint also indicates that the decedent had a weapon and fired it that night on the porch. *See Sinclair v. City of Des Moines*, 268 F.3d 594, 596 (8th Cir. 2001) ("[N]o constitutional or statutory right exists that would prohibit a police officer from using deadly force when faced with an apparently loaded weapon."); *Shannon v. Koehler*, 616 F.3d 855, 863 (8th Cir. 2010) ("[T]here can be no doubt that officers are permitted to use force when their safety is threatened."). The fact that four officers, faced with the same circumstances that night also discharged their weapons, underscores that Parisien's conduct was constitutionally reasonable and he is entitled to qualified immunity.

B. There Was No Violation of a Clearly Established Right

Under the second prong of the analysis, an official is entitled to qualified immunity unless the asserted right was clearly established, which means it was "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quotation omitted). If "a reasonable officer might not have known *for certain* that the conduct was unlawful" in light of pre-existing law, then he is immune from liability. *Abbasi*, 137 S. Ct. at 1867 (emphasis added). Consequently, to overcome an assertion of qualified immunity, the plaintiff must identify "cases of controlling authority" or "a consensus of cases of persuasive authority," *Youngbey v. Mar.*, 676 F.3d 1114, 1117 (D.C. Cir. 2012) (quotations omitted), that place the constitutional or statutory question "beyond debate," *Reichle v. Howards*, 566 U.S. 658, 664 (2012). "It is not enough that the rule is suggested by then-existing precedent." *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018).

"The 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him." *Id.* In other words, the right must be beyond debate "not merely 'at a high level of generality' but 'in light of the specific context of the case.'" *Palmieri v. United States*, 896 F.3d 579, 586 (D.C. Cir. 2018) (quoting *Hedgpeth v. Rahim*, 893 F.3d 802, 806 (D.C. Cir. 2018)). "This demanding standard protects all but the plainly incompetent or those who knowingly violate the law." *Wesby*, 138 S. Ct. at 589 (quotation omitted).

Whether the right at issue was "clearly established" is a question of law for the court to decide. *Littrell v. Franklin*, 388 F.3d 578, 582 (8th Cir. 2004). The Supreme Court has admonished courts "not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). "The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *Id*. While the Court does not require "a case directly on point," it has "stressed the need to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *See Wesby*, 138 S. Ct. at 590 (internal quotations omitted). "Such specificity is especially important in the Fourth Amendment context, where . . . it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullenix*, 136 S. Ct. at 308 (internal quotations and citation omitted). As the Eighth Circuit has stated, "[f]ailing to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment is often fatal to a claim outside of obvious cases." *Moore-Jones v. Quick*, 909 F.3d 983, 985 (8th Cir. 2018) (internal quotations and citation omitted). The plaintiff "has the burden to demonstrate that

the law is clearly established." *Morgan v. Robinson*, 920 F.3d 521, 524 (8th Cir. 2019) (en banc) (citation omitted). This is a "demanding standard." *Wesby*, 138 S. Ct. at 589. Here, the Individual Federal Defendants are unaware of any case law that would have put every reasonable officer on notice that the Fourth Amendment required anything different than what five officers on the scene did in this case: shot at an individual they *reasonably believed* to be armed (and who as it turned out was armed and discharged his own weapon repeatedly on the porch that night). *E.g.*, *Kohorst*, 968 F.3d at 877 and cases cited *supra* n.10 (granting qualified immunity in use of force cases even where the subject ended up bring unarmed).

CONCLUSION

For the reasons stated above, the Individual Federal Defendants respectfully requests that the Court grant this Motion and dismiss them from the case with prejudice.

Dated: May 8, 2023

Respectfully submitted,

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