UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BECKLEY

KARA LESTER and
LANA LESTER,

Plaintiffs,

v. CIVIL ACTION NO. 5:24-cv-00054

TYLER SIZEMORE, and
JOHN DOE(S), and
WYOMING COUNTY COMMISSION,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending are Defendant Tyler Sizemore's Amended Motion to Dismiss and/or for Summary Judgment [Doc. 17], filed July 1, 2024, Motion to File Brief in Excess of Page Limit for Memorandum in Support [Doc. 18], filed July 1, 2024, Motion to Stay [Doc. 24], filed July 30, 2024, and Supplemental Motion [Doc. 38], filed October 1, 2024. Plaintiffs responded to the Amended Motion to Dismiss and/or for Summary Judgment on July 19, 2024, [Doc. 21], to which Mr. Sizemore replied on July 30, 2023, [Doc. 23]. The matters are ready for adjudication.[1]

I.

On February 9, 2022, Plaintiffs Kara and Lana Lester were in Kara Lester's home in Wyoming County. [Doc. 1]. At approximately 10:00 a.m., Mr. Sizemore and the John Doe

[1] The Court considers Mr. Sizemore's Amended Motion to Dismiss and/or for Summary Judgment and accompanying motion to exceed the page limit to be the operative motions in this matter. Accordingly, Mr. Sizemore's Motion to Dismiss and/or for Summary Judgment [**Doc. 15**], and accompanying Motion to File Brief in Excess of Page Limit for Memorandum in Support [**Doc. 16**], both filed June 27, 2024, are **DENIED AS MOOT**.

Defendants arrived at the home to execute a capias arrest warrant for Adam Graybeal. [*Id.*] At that time, Mr. Sizemore was participating in a United States Marshals Service ("USMS") joint task force and thus was "acting as [a] specially deputized member[] of the [USMS]." [Doc. 1 at 2 ¶ 4].

Plaintiffs allege, "Adam Graybeal is unrelated to the Plaintiffs and does not live at [Kara Lester's] residence." [Doc. 1 at 3 ¶ 8]. Upon arrival, the Defendants approached the front door with their weapons drawn and entered the residence without knocking and without Plaintiffs' consent. [*Id.* ¶¶ 9, 13]. When asked by Kara Lester's father if they had a warrant, the Defendants responded that they did not need one. [*Id.* ¶ 10].

While inside of the home, the Defendants allegedly pointed a firearm at Lana Lester, threatening to shoot her, and continued to point their firearms "repeatedly and indiscriminately as they entered the home." [Doc. 1 at 3 ¶ 11]. The Defendants purportedly drove their vehicles onto the lawn, causing damage, and used a battering ram to smash and destroy a window of a small building in the backyard. [*Id.* ¶ 12]. The Defendants also "broke the gate to Plaintiff Kara Lester's dog lot, broke a drain, and destroyed items inside" the home. [*Id.*].

On February 2, 2024, Plaintiffs Kara and Lana Lester instituted this action against Mr. Sizemore, John Doe(s), and the Wyoming County Commission. [Doc. 1]. They allege the following claims: (1) Count I – Violation of Constitutional Rights (Unreasonable Search and Seizure), (2) Count II – Assault, (3) Count III – Outrageous Conduct, and (4) Count IV – Negligence/Deliberate Indifference. [Doc. 1 at 4–6].

On July 1, 2024, Mr. Sizemore moved to dismiss. [Doc. 17]. He contends any claim brought against him pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), must be dismissed inasmuch as (1) this case presents a new context, (2) special factors counsel hesitation in creating a *Bivens* remedy here, and (3) Plaintiffs

have alternative available remedies. [Doc. 18-1 at 7–22]. Alternatively, Mr. Sizemore maintains he is entitled to qualified immunity. [*Id.* at 22]. Mr. Sizemore also contends any tort claim asserted against him should be dismissed because (1) he is immunized from tort liability under federal law, and (2) Plaintiffs have failed to exhaust administrative remedies. [*Id.* at 4–6].

II.

A. Summary Judgment

As an initial matter, Plaintiffs contend Mr. Sizemore's motion for summary judgment is premature and should be denied pursuant to *Federal Rule of Civil Procedure* 56(d) and *Local Rule of Civil Procedure* 7.1(a). [Doc. 21 at 5–8]. Rule 56(d), which addresses the premature filing of motions for summary judgment, provides:

> When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) Defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d). Local Rule 7.1(a) requires that "[a]ll motions . . . be concise, state the relief requested precisely, and be filed timely but not prematurely." S.D. W. Va. LR Civ P 7.1(a).

After a thorough review of the record, the Court concludes it would be premature to treat Mr. Sizemore's motion as one for summary judgment. Accordingly, the motion [**Doc. 17**] is **DENIED AS MOOT** to that extent. The Court will, however, treat the motion as one to dismiss pursuant to Rule 12(b)(6).

B. Motion to Dismiss

Federal Rule of Civil Procedure 8(a)(2) requires that a pleader provide "a short and plain statement of the claim showing . . . entitle[ment] to relief." Fed. R. Civ. P. 8(a)(2); *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). Rule 12(b)(6) correspondingly permits a defendant to challenge a complaint when it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Any defense presented under Rule 12(b)(6) "must be made before pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b). Thus, the motion to dismiss must be filed before any answer to the complaint is filed. Additionally, and as an aside, any answer must be filed within twenty-one days of the issuance of the summons, except for situations wherein that timeline is enlarged by the court. Fed. R. Civ. P. 12(a).

The required "short and plain statement" must provide "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and citation omitted); *McCleary-Evans v. Md. Dep't of Transp., State Highway Admin.*, 780 F.3d 582, 585 (4th Cir. 2015). Additionally, the showing of an "entitlement to relief" amounts to "more than labels and conclusions." *Twombly*, 550 U.S. at 555. It is now settled that "a formulaic recitation of the elements of a cause of action will not do." *Id.*; *McCleary-Evans*, 780 F.3d at 585; *Bing v. Brivo Sys., LLC*, 959 F.3d 605, 616 (4th Cir. 2020), *cert. denied*, 209 L. Ed. 2d 122, 141 S. Ct. 1376 (2021); *Giarratano v. Johnson*, 521 F.3d 298, 304 (4th Cir. 2008).

The complaint need not "forecast evidence sufficient to prove the elements of [a] claim," but it must "allege sufficient facts to establish those elements." *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012) (citing *Robertson v. Sea Pines Real Est. Cos.*, 679 F.3d 278, 291 (4th Cir. 2012)) (internal quotation marks omitted). Stated another way, the operative pleading

need only contain "[f]actual allegations . . . [sufficient] to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (noting the opening pleading "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."). In sum, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570; *Robertson*, 679 F.3d at 288.

The decision in *Iqbal* provides some additional markers concerning the plausibility requirement:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief. . . .'"
>
> Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief."
>
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 556 U.S. at 678–79 (citations omitted).

As noted in *Iqbal*, the Supreme Court has consistently interpreted the Rule 12(b)(6) standard to require a court to "accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Twombly*, 550 U.S. at 555-56); *see*

also S.C. Dep't of Health & Env't Control v. Com. & Indus. Ins. Co., 372 F.3d 245, 255 (4th Cir. 2004) (citing *Franks v. Ross*, 313 F.3d 184, 192 (4th Cir. 2002)). The court is required to "draw[] all reasonable . . . inferences from those facts in the plaintiff's favor." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

III.

A. Count I - Violation of Constitutional Rights (Unreasonable Search and Seizure)

Mr. Sizemore seeks dismissal of Plaintiffs' Count I claims for unconstitutional search and seizure. Plaintiffs have voluntarily dismissed all 42 U.S.C. § 1983 claims against Mr. Sizemore without prejudice, unless and until it is determined through discovery Mr. Sizemore was acting in both his state and federal capacities during the alleged incident. [Doc. 21 at 7–8]. Accordingly, the Court **DISMISSES WITHOUT PREJUDICE** Plaintiffs' § 1983 claims against Mr. Sizemore and **GRANTS** the Amended Motion to Dismiss to the same extent. Inasmuch as Plaintiffs' constitutional claims against Mr. Sizemore are brought pursuant to *Bivens*, however, the Court proceeds with its analysis.

Mr. Sizemore contends Plaintiffs' allegations do not support a plausible claim against him under the limited circumstances in which *Bivens* liability has been recognized. Although § 1983 "entitles an injured person to money damages if a state official violates his or her constitutional rights[,] Congress did not create an analogous statute for federal officials." *Ziglar v. Abbasi*, 582 U.S. 120, 130 (2017). However, in 1971, the Supreme Court created a judicial remedy for money damages against federal officials for Fourth Amendment violations. *See Bivens*, 403 U.S. at 397 (holding that a man who alleged federal narcotics officers searched his apartment and

arrested him without a warrant or probable cause and used unreasonable force in so doing could sue those officers on an implied claim for money damages under the Fourth Amendment).

In the five decades that followed, the Supreme Court extended *Bivens* liability only twice, namely, (1) permitting an administrative assistant to sue a Congressman for gender discrimination in violation of the Fifth Amendment Due Process Clause (*Davis v. Passman*, 442 U.S. 228 (1979)), and (2) permitting a federal inmate's estate to pursue an Eighth Amendment claim for inadequate medical care (*Carlson v. Green*, 446 U.S. 14 (1980)). The High Court has emphasized this cautious approach. *See*, *e.g.*, *Egbert v. Boule*, 596 U.S. 482, 484–86 (2022) (noting that in the four decades since deciding *Carlson*, the Supreme Court "declined 11 times to imply a similar cause of action for other alleged constitutional violations," and citing cases). The Supreme Court has gone so far as to characterize extending the remedy as "a disfavored judicial activity" impinging upon "separation-of-powers principles . . . ." *Id.* at 491.

Reflecting these concerns, the Supreme Court has imposed a two-step inquiry to determine the availability of *Bivens* remedies. First, a case must present "a new *Bivens* context." *Egbert*, 596 U.S. at 492. "If the context is *not* new . . . then a *Bivens* remedy continues to be available." *Dyer v. Smith*, 56 F.4th 271, 277 (4th Cir. 2022) (quoting *Tun-Cos v. Perrotte*, 922 F.3d 514, 522–23 (4th Cir. 2019)). Second, if the context is new, a court must consider whether there are "special factors" counseling against extending liability. *Egbert*, 596 U.S. at 492. "If there is even a single reason to pause before applying *Bivens* in a new context, a court may not recognize a *Bivens* remedy." *Id.* (internal quotation marks omitted). Accordingly, this two-step inquiry often resolves to a single question: "[I]s [there] any reason to think that Congress might be better equipped to create a damages remedy." *Id.* at 493. "[A] court may not fashion a *Bivens* remedy if

Congress already has provided, or has authorized the Executive to provide, 'an alternative remedial structure.'" *Id.* (quoting *Ziglar*, 582 U.S. at 137).

The Court concludes no *Bivens* remedy is available for two reasons. First, Plaintiffs' Fourth Amendment claims arise in a new context -- the USMS operating a joint state and federal task force to apprehend fugitives. Second, special factors counsel hesitation, including the fact Congress and the Executive Branch have created alternative procedures to review a claim that a task force member unlawfully conducted a search and seizure.

1. New Context

In determining whether this case presents a new *Bivens* context, the question is whether it is "different in any meaningful way from the three cases in which the Supreme Court has recognized a *Bivens* remedy." *Dyer*, 56 F.4th at 277 (cleaned up). "A radical difference is not required to make a case meaningfully different . . . ." *Id.* (cleaned up). As the Supreme Court explained:

> A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Ziglar, 582 U.S. at 140. The Supreme Court has also recognized that a case presents a new context when it involves a "new category of defendants." *Egbert*, 596 U.S. at 492 (internal quotation marks omitted).

In *Bivens*, Federal Bureau of Narcotics agents entered a home, handcuffed and arrested the owner, threatened his family, and searched "from stem to stem" for alleged narcotics

violations before subjecting the owner to a visual strip search, all without a warrant or probable cause. *Bivens*, 403 U.S. at 389. Plaintiffs' allegations are similar. Both cases involved allegations of unjustified, warrantless searches and seizures inside a private residence. But these "superficial similarities," or even "almost parallel circumstances," are not necessarily sufficient. *See Egbert*, 596 U.S. at 495 (quoting *Ziglar*, 582 U.S. at 139); *see also Hicks v. Ferreyra*, 64 F.4th 156, 167 (4th Cir. 2023) ("[C]ourts do not evaluate a potential *Bivens* cause of action at the level of the Fourth Amendment or even at the level of the unreasonable-searches-and-seizures clause." (cleaned up)).

One meaningful distinction between this action and *Bivens* is the subject federal agency. Plaintiffs' claims would require scrutiny of a new category of defendants -- appointed members of a USMS joint task force. "To be sure, one could reasonably question what difference it should make which windbreaker federal agents wear when they invade the privacy of one's home, so long as they do so while cloaked in federal authority." *Wickline v. Cumberledge*, No. 2:23-cv-00799, 2024 WL 4340045, at *5 (S.D. W. Va. Sept. 27, 2024) (citing *Egbert*, 596 U.S. at 503–04 (Gorsuch, J., concurring)). But the unique circumstances under which the USMS operates joint task forces raises significant questions counseling a deliberate pause.

The "primary role and mission" of the USMS is to "provide for the security" of, and to "execute[ ] and enforce all orders of[,] the United States District Courts [and] the United States Courts of Appeals." 28 U.S.C. § 566(a). The execution and enforcement category covers investigations of "fugitive matters . . . as directed by the Attorney General." *Id.* § 566(e)(1)(B). In 2000, Congress mandated the USMS establish permanent regional task forces to apprehend fugitives. 34 U.S.C. § 41503(a) (providing for the establishment of "permanent Fugitive Apprehension Task Forces consisting of Federal, State, and local law enforcement authorities in

designated regions of the United States, to be directed and coordinated by the United States Marshals Service, for the purpose of locating and apprehending fugitives," including state fugitives). When state and local law enforcement officers participate in these task forces, they are deputized and perform the functions of deputy marshals. *See* 28 C.F.R. § 0.112(b).

Given the unusual statutory scheme authorizing cooperative joint ventures between state and federal officers, it is apparent that a new context is afoot. *See Robinson v. Sauls*, 102 F.4th 1337, 1345 (11th Cir. 2024) ("This case presents a new context because the Supreme Court has never recognized a cause of action for excessive force against officers operating as part of a USMS joint federal and state task force apprehending fugitives."); *Logsdon v. U.S. Marshals Serv.*, 91 F.4th 1352, 1358 (10th Cir. 2024) ("More compelling as a special factor is that agents of the USMS are a new category of defendant.").

2. Special Factors

Inasmuch as the aforementioned claims occur in a new context, the Court next examines any "special factors" counseling hesitation in extending *Bivens*. *Egbert*, 596 U.S. at 492. The inquiry "focus[es] on 'separation-of-powers principles' and 'requires courts to ask whether judicial intrusion into a given field is appropriate.'" *Mays v. Smith*, 70 F.4th 198, 202 (4th Cir. 2023) (quoting *Bulger v. Hurwitz*, 62 F.4th 127, 137 (4th Cir. 2023)). Courts should evaluate "whether Congress *might doubt* the need for an implied damages remedy," *Tun-Cos*, 922 F.3d at 525, or if there is "reason to pause before applying *Bivens*" to new contexts, *Hernandez v. Mesa*, 589 U.S. 93, 102 (2020). "A single sound reason to defer to Congress is enough to require a court to refrain from creating [a damages] remedy." *Egbert*, 596 U.S. at 491 (cleaned up). "Put another way, 'the most important question is who should decide whether to provide for a damages remedy,

Congress or the courts?'" *Id.* at 491–92 (quoting *Hernandez*, 589 U.S. at 114). "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.* (internal citation omitted).

While the Supreme Court has never provided a comprehensive list of special factors that may give courts pause, it has urged analysis of "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." *Ziglar*, 582 U.S. at 136. Uncertainty as to the systemwide consequences of creating a novel damages remedy, and the existence of alternative remedies, are two recognized special factors counseling hesitation. *Bulger*, 62 F.4th at 140. Both exist here.

Despite periodically enacting legislation governing fugitive-apprehension task forces, *see, e.g.*, 34 U.S.C. §§ 20989, 41503(a), Congress has not created a private right of action against joint task force members who commit constitutional violations. *See Robinson*, 102 F.4th at 1345. This congressional silence "speaks volumes and counsels strongly against judicial usurpation of the legislative function." *Tun-Cos*, 922 F.3d at 527; *see also Robinson*, 102 F.4th at 1346 ("[C]ongressional silence . . . counsels against creating a *Bivens* cause of action for money damages in this context."); *Ziglar*, 582 U.S. at 143–44 ("[I]n any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant."); *Egbert*, 596 U.S. at 503 (Gorsuch, J., concurring) ("Weighing the costs and benefits of [a] new [cause of action] is the bread and butter of legislative committees. It has no place in federal courts charged with deciding cases and controversies under existing law.").

Extending *Bivens* in this context exposes individual officers to personal liability and the burdens of litigation. The fear of potential liability could, in turn, hinder the Government's ability to attract and retain quality officers to participate in these task forces. Inasmuch as the

USMS is statutorily required to partner with state and local law-enforcement authorities to create these task forces, chilling task force participation would undermine the Executive's ability to enforce federal law by apprehending and prosecuting fugitives. *See Robinson*, 102 F.4th at 1345 ("Recognizing a cause of action for money damages against a task force member could impact cooperation among law enforcement agencies and the operation of these task forces [and] chill recruitment for the task forces, which could negatively affect their operations in apprehending fugitives at both the state and federal level."); *Logsdon*, 91 F.4th at 1358 ("Chilling participation in joint task forces is . . . a potential cost of expanding *Bivens* to Deputy U.S. Marshals."); *see also Egbert*, 596 U.S. at 499 ("Recognizing any new *Bivens* action entails substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." (cleaned up)); *Ziglar*, 582 U.S. at 136 ("[T]he decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide. Those matters include the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself.").

There are also at least two alternative remedial processes designed to deter unconstitutional acts by USMS personnel: (1) the internal USMS grievance procedure, and (2) the Department of Justice's ("DOJ") Office of the Inspector General ("OIG") investigation procedure. By statute and regulations, the USMS is obligated to "supervise and direct" its employees, 28 U.S.C. § 561(g), and investigate "alleged improper conduct on the part of" its deputies, including local or state officers deputized to participate in a joint task force, 28 C.F.R. § 0.111(n). Any aggrieved individual, including Plaintiffs, may report misconduct by filling out an online grievance form. *Complaint Regarding United States Marshals Service (USMS) Personnel or Programs*, U.S. Marshals Serv., https://www.usmarshals.gov/sites/default/files/media/document/complaint-form.

pdf (last visited Oct. 2, 2024). Any "[i]ntentional, reckless or negligent violation of rules governing searches and seizures" is subject to punishment by reprimand or removal of the officer. *USMS Guidance: Table of Disciplinary Offenses and Penalties*, U.S. Marshals Serv., https://www.usmarshals.gov/sites/default/files/media/document/united-states-marshals-guidance-table-of-disciplinary-offenses-and-penalties.pdf (last visited Oct. 2, 2024).

Additionally, aggrieved individuals may report to the OIG misconduct "related to" the USMS -- a subagency of the DOJ -- by submitting an online form, *Submitting a Complaint*, U.S. Dep't of Just., Off. of Inspector Gen., https://oig.justice.gov/hotline/submit_complaint (last visited Oct. 2, 2024). The OIG is authorized to "investigate allegations of criminal wrongdoing or administrative misconduct by an employee of the" DOJ. 5 U.S.C. § 413(b)(2). If the OIG decides to investigate, the result may be a "criminal prosecution or civil or administrative action." *Criminal and Civil Cases*, U.S. Dep't of Just., Off. of Inspector Gen. https://oig.justice.gov/investigations/criminal_and_civil_cases (last visited Oct. 2, 2024). If the OIG chooses not to investigate, it may refer the complaint to the internal-affairs office of the USMS. U.S. Dep't of Just., Off. of Inspector Gen., No. 22-102, *Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act* 3–4 (2022), https://oig.justice.gov/sites/default/files/reports/22-102.pdf.

Although the alternative remedies are not subject to judicial review of the agency determination, the Supreme Court has held a similar remedial scheme "independently foreclose[d]" a *Bivens* remedy. *Egbert*, 596 U.S. at 497–98 ("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."). Furthermore, the Attorney General may settle certain claims up to $50,000 for personal injury, death, or property

damage caused by law enforcement employees of the DOJ acting within the scope of employment. *See* 31 U.S.C. § 3724. And at least two Courts of Appeals have found this alternative remedy precluded an extension of *Bivens*. *See Cain v. Rinehart*, No. 22-1893, 2023 WL 6439438, at *4 (6th Cir. July 25, 2023) (unpublished); *Davis v. Dotson*, No. 20-13123, 2021 WL 5353099, at *2 (11th Cir. Nov. 17, 2021) (per curiam).

Accordingly, inasmuch as special factors counsel against here extending *Bivens*, the Court **DISMISSES WITHOUT PREJUDICE** Plaintiffs' *Bivens* claims against Mr. Sizemore and **GRANTS** the Amended Motion to Dismiss to the same extent.[2]

B. Counts II and III

In addition to the constitutional claims, Mr. Sizemore seeks dismissal of Plaintiffs' Counts II and III tort claims for outrageous conduct and assault. Federal employees are absolutely immune from common law tort claims arising out of acts undertaken in the course of their official duties. 28 U. S. C. §2679(b)(1). Plaintiffs have thus agreed to voluntarily dismiss their tort claims against Mr. Sizemore without prejudice, unless and until it is determined through discovery Mr. Sizemore was acting in both his state and federal capacities during the alleged incident. [Doc. 21 at 8]. Accordingly, the Court **DISMISSES WITHOUT PREJUDICE** Counts II and III as to Mr. Sizemore and **GRANTS** the Amended Motion to Dismiss to the same extent.

IV.

Based upon the foregoing analysis of the record and controlling law, the Court

[2] Because the Court concludes Plaintiffs' constitutional claims against Mr. Sizemore should be dismissed for lack of a *Bivens* remedy, it refrains at this stage from addressing whether Mr. Sizemore is entitled to qualified immunity.

ORDERS as follows:

1. Mr. Sizemore's Motion to File Brief in Excess of Page Limit for Memorandum in Support [**Doc. 18**] is **GRANTED**;
2. Mr. Sizemore's Amended Motion to Dismiss and/or for Summary Judgment [**Doc. 17**] and Supplemental Motion [**Doc. 38**] are **GRANTED** and Counts I through III are **DISMISSED WITHOUT PREJUDICE** as to Mr. Sizemore; and
3. Mr. Sizemore's Motion to Stay [**Doc. 24**] is **DENIED AS MOOT**.

The Clerk is directed to transmit a copy of this written opinion and order to counsel of record and any unrepresented parties.

ENTER: October 15, 2024

Frank W. Volk
Chief United States District Judge