

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 23-cv-01951-CNS-MDB

JACQUELINE ARMENDARIZ and CHINOOK CENTER,

Plaintiffs,

v.

CITY OF COLORADO SPRINGS,  
DANIEL SUMMEY, a detective with the Colorado Springs Police Department,  
in his individual capacity,  
B.K. STECKLER, a detective with the Colorado Springs Police Department,  
in his individual capacity,  
JASON S. OTERO, a sergeant with the Colorado Springs Police Department,  
in his individual capacity,  
ROY A. DITZLER, a police officer with the Colorado Springs Police Department,  
in his individual capacity, and  
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

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**MOTION TO SUBSTITUTE THE UNITED STATES FOR DANIEL SUMMEY  
AS DEFENDANT TO CLAIM 4 PURSUANT TO 28 U.S.C. § 2679(d)(1)**

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Pursuant to 28 U.S.C. § 2679(d)(1), the United States of America moves to substitute for Defendant Daniel Summey as a defendant to Claim 4 of the First Amended Complaint, ECF No. 12. Undersigned counsel conferred with Plaintiffs' counsel regarding this motion on November 2, 2023. Plaintiffs oppose this motion. There is good cause to substitute the United States as defendant to Claim 4, as set forth below.

1. This case arises out of law enforcement actions allegedly taken after a housing rights march in Colorado Springs in 2021. *See* ECF No. 12 ¶ 3. In Claim 4 of the First Amended Complaint, Plaintiff Jacqueline Armendariz alleges that Defendant Summey and

Defendant Ditzler violated article II §§ 7 (Security of Person and Property Searches Seizures Warrants), 10 (Freedom of Speech and Press), and 24 (Right to Assemble and Petition) of the Colorado constitution. *Id.* ¶¶ 195-205. Plaintiff brings the claim pursuant to Colo. Rev. Stat. § 13-21-131 (Civil Action for Deprivation of Rights). *Id.* at p. 47.

2. Defendant Summey was a full-time, specially deputized Task Force Officer assigned to the Joint Terrorism Task Force of the Federal Bureau of Investigation at the time of the events giving rise to Claim 4. *See* Exhibit 1, Certification of Scope of Employment, ¶ 2; *see also* ECF No. 12 ¶ 111 (pleading that Summey signed the application and affidavit for the search warrant identifying his position as “Task Force Officer”); *id.* ¶ 112 (pleading that Summey’s affidavit “noted his assignment to the FBI Joint Terrorism Task Force”). Defendant Summey was acting within the scope of his federal office or employment at the time of the incident out of which Claim 4 arose. Ex. 1 ¶ 3.

3. Pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly referred to as the Westfall Act, a suit against the United States is the exclusive remedy for persons with claims for damages “resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . .” 28 U.S.C. § 2679(b)(1).

4. Upon certification of the Attorney General or his delegated representative that the defendant federal employee was acting within the scope of his office or employment at the time of the incident giving rise to the claim, the civil action “shall be deemed an action against the United States under the provision of this title . . . , and the United States shall be substituted as the party defendant.” 28 U.S.C. § 2679(d)(1). The Attorney General has delegated certification

authority to the United States Attorneys. *See* 28 C.F.R. § 15.4.

5. The Westfall Act disallows substitution by the United States only in two circumstances: when a civil action for money damages is brought against the federal employee (1) “for a violation of the Constitution of the United States,” or (2) “for a violation of a statute of the United States under which such action against an individual is otherwise authorized.” 28 U.S.C. § 2679(b)(2)(A)-(B). There is no similar exception for violations of a state constitution or state statute.

6. This substitution procedure applies to state constitutional claims as well as state statutory or common-law tort claims. *See Capps v. Hester*, No. 20-cv-52, 2020 WL 8371878, at \*5 (W.D.N.C. Dec. 30, 2020) (recommending substitution of United States as a defendant to a state constitutional claim asserting an unlawful seizure), *recommendation adopted*, 2021 WL 326143 (W.D.N.C. Feb. 1, 2021), *aff’d*, 848 F. App’x 580 (4th Cir. 2021); *McCabe v. Macaulay*, 450 F. Supp. 2d 928, 940 (N.D. Iowa 2006) (“The court thus finds that the Westfall certification procedure outlined in 28 U.S.C. § 2679(d)(1) applies to Plaintiffs’ state constitutional law claims.”); *Chin v. Wilhelm*, 291 F. Supp. 2d 400, 402-03 (D. Md. 2003) (municipal police officer who was a deputized Task Force Officer for the federal government was a federal employee for purposes of the Westfall Act and substitution of the United States was proper); *Employers Ins. of Wausau A Mut. Co. v. Bush*, 791 F. Supp. 1314, 1325 (N.D. Ill. 1992) (granting substitution of the United States for individual defendants for purposes of state constitutional claims); *see also* Order Changing Caption at 1, *Panagacos v. Towery*, No. 10-cv-5018 (W.D. Wash. Dec. 17, 2010), ECF No. 82 (“the United States of America is substituted as the sole party defendant . . . with respect only to those claims alleged by Plaintiffs based on the Washington State

Constitution,” which asserted violations of free speech and privacy rights related to a pretextual arrest).

7. Claim 4 asserts a claim under a state statute for violations of the Colorado constitution. Therefore, substitution under the Westfall Act is available.

8. Cole Finegan, United States Attorney for the District of Colorado, has certified that, at the time of the conduct underlying Claim 4 of the First Amendment Complaint, Defendant Summey was acting within the scope of his federal employment as a full-time Task Force Officer for the FBI. *See* Ex. 1 ¶¶ 2-3.

9. Accordingly, the United States “shall” substitute for Defendant Summey as a defendant to Claim 4 of the First Amended Complaint, pursuant to 28 U.S.C. § 2679(d)(1).<sup>1</sup>

Respectfully submitted on November 3, 2023.

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<sup>1</sup> The United States does not seek to substitute for Defendant Roy A. Ditzler, who was not a federal Task Force Officer or federal employee at the time of the underlying incident. The United States similarly does not seek to substitute for Defendant Summey for purposes of Claim 1, which is a claim under the United States Constitution.

**CERTIFICATE OF SERVICE**

I certify that November 3, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve all parties and counsel of record.

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