United States District Court for the Western District of Texas
Austin Division

Brenda Ramos, on behalf of herself and	§	
the Estate of Mike Ramos,	§	
Plaintiff,	§	
v.	§	Case no. 1:20-cv-1256
	§	
City of Austin and	§	
Christopher Taylor,	§	
Defendants.	§	

Plaintiff's Complaint and Request for Jury Trial

To the Honorable Court:

1. This is a lawsuit about Austin police officer Christopher Taylor who shot and killed Brenda Ramos's unarmed son, Mike Ramos, on April 24, 2020.

2. A bystander's cell phone video[1] and Austin police dashcam and body-worn camera videos[2] show Officer Taylor shoot Mike as he slowly drove forward and away from police. Or—in the sterile, dehumanizing way that Austin police speak about killing an Austinite's loved one—"The male subject drove forward out of the parking spot. Fearing the male subject intended to use the Toyota Prius as a deadly weapon, one patrol officer fired his patrol rifle, striking the male driver."[3]

3. Regardless of Officer Taylor's irrational fears, any competent police officer would have known that shooting a suspect in the head because he was driving away from police and bystanders—toward a dead-end blocked by dumpsters and a building—was a gross civil rights violation.

4. Ms. Ramos brings this lawsuit to vindicate her son's civil rights and for her own heartbreak and damages from losing her only child to excessive, unjustified police violence.

[1] *Mother of man killed by Austin police officer asks for answers*, Austin American-Statesman (May 31, 2020), available at https://www.youtube.com/watch?v=7dQMDiUpLHU&feature=youtu.be.
[2] http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020.
[3] *Austin Police Report Confirms Michael Ramos Was Fatally Shot, Says Officer Considered Car A Weapon*, KUT (May 20, 2020), available at https://www.kut.org/austin/2020-05-20/austin-police-report-confirms-michael-ramos-was-fatally-shot-says-officer-considered-car-a-weapon.

I. Parties

5. Brenda Ramos was born, raised, and has lived her whole life in Austin. She went to Travis High School. Her son Mike was also a native Austinite, born and raised. He attended Covington and played football at Bowie High School.



[4]

6. The City of Austin is a Texas municipal corporation in the Western District of Texas. Brian Manley is Austin's policymaker when it comes to policing.

7. Christopher Taylor is an Austin police officer.

II. Jurisdiction

8. This Court has federal question subject matter jurisdiction over this 42 U.S.C. § 1983 lawsuit under 28 U.S.C. § 1331.

9. This Court has general personal jurisdiction over Taylor because he works and lives in Texas. The City is subject to general personal jurisdiction because it is a Texas municipality.

10. This Court has specific personal jurisdiction over Taylor and the City because this case is about their conduct that occurred in Austin.

III. Venue

11. Under 28 U.S.C. § 1391(b), the Western District of Texas is the correct venue for this lawsuit because the events occurred in Austin.

[4] Little Mike with his mom and with his dad, 1979

IV. Facts

A. Officer Taylor killed Mike Ramos without justification.

12. On April 24, 2020, Austin Police responded to a 911 report about a man with a gun and a woman using drugs in a gold and black Prius in the front parking area of a South Austin apartment complex. The man was Mike Ramos and he did not, in fact, have a gun:

Operator: Austin 911, do you need police, fire, or EMS?

Caller: Police.

Operator: Okay. To what address or location?

Caller: 2601 South Pleasant Valley.

Operator: I'm sorry you said 2601 South Pleasant Valley?

Caller: Yeah.

Operator: Okay, hold on just one moment, please. Okay. At the Rosemont at Oak Valley Apartments?

Caller: Yeah. I'm in the Rosemont Apartments, it's a – it's a – it's a gold and black Prius outside. (unintelligible).

Operator: I'm sorry. The phone is real muffled. I couldn't hear what you were saying.

Caller: I can barely hear you.

Operator: Okay. I need you to start over. I couldn't understand anything you were saying. What's going on?

Caller: They're in the car smokin' crack and cookin' meth.

Operator: Okay. What color and type of vehicle is it?

Caller: Uh, it's a gold Prius. It's a gold Prius with a Hispanic man and Hispanic woman. They got toilet paper in the front – toilet paper in the front dash window. And I seen him with a gun, he had a gun, too.

Operator: You said a gold and black Prius?

Caller: Yes. And he has a gun. He has a gun to this lady.

Operator: You see him holding one to her?

Caller: Yes, I seen him holding a gun, maam.

Operator: Is he doing that right now?

Caller: Yes.

Operator: Just one moment. Is he pointing it at her?

Caller: He's – he's – he's holding it up.

Operator: He's holding it up? Or is he pointing it at her?

> Caller: He – he was pointing it at her. But he got – he got – maam, **I don't know what's goin' on**[5] but I need yall to come quick.
>
> Operator: Okay. But I need to know the difference. Is he pointing it at her or just holding in, it up?
>
> Caller: He's holding it. He's holding it.
>
> Operator: Okay. Is he – is he – but you said Hispanic male. Could you see what color clothing he has on?
>
> Caller: Uh, it's like a white shirt. (Unintelligible) it's a gold and black Prius. He has . . .
>
> Operator: Okay. Are they- okay.
>
> Caller: I'm (unintelligible).
>
> Operator: I need you to – (redacted), I understand. I already have officers en route. I'm trying to get this information to them. Where at in the parking lot? Is he by a particular building number? Or – okay. I can't understand anything you're saying. You're pulling the phone away or something.
>
> Caller: The first – the first left – it's gonna be the first left.
>
> Operator: When you enter the apartments?
>
> Caller: Yes. It's gonna be the first left. It's gonna be the first left (unintelligible).
>
> Operator: Okay. I do – like I said, I have officers already en route right now.[6]

13. Austin Police Chief Brian Manley summarized what happened next in his report about the shooting to the Texas Attorney General:

> Before arriving at the scene, officers stopped briefly to discuss their response to the area and create a plan before attempting to approach the subjects in the vehicle. **After formulating a course of action, officers approached the area in marked patrol units. Officers strategically parked their patrol vehicles, effectively blocking the exit and mitigating the risk of flight.**[7] Officers observed the Toyota Prius backed into a parking spot in the apartment complex parking lot near the one-way entrance/exit. Officers immediately commanded both subjects to show their hands as police communications identified the nature of the call as "gun urgent." Officers continued to give verbal

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[5] As it turned out, the caller truly did not know what was going on. The police found a man and a woman in a gold and black Prius, but the man was not, in fact wearing a white shirt (Mike's shirt was red) and he was not, in fact, in possession of a gun. Upon information and belief, the caller deliberately swatted Mike. "Swatting" is defined in the Cambridge Dictionary as:

> the action of making a false report of a serious emergency so that a SWAT team (a group of officers trained to deal with dangerous situations) will go to a person's home, by someone who wants to frighten, upset, or cause problems for that person

available at https://dictionary.cambridge.org/dictionary/english/swatting.

[6] http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020.

[7] This binding evidentiary admission by the City belies Officer Taylor's irrational fear that Mike would use the Prius as a deadly weapon. Officer Taylor claims that he killed Mike because he feared that "the male subject intended to use the Toyota Prius as a deadly weapon." Brian Manley reported to the Texas Attorney General that the strategic decision about where to place the police vehicles was effective.

> commands as both the male and female exited the vehicle. Officers commanded the male subject to lift his shirt and turn around in a circle. The male subject initially complied with commands but eventually became non-compliant and verbally confrontational. **The male subject began asking why officers had guns pointed at him and asked officers to put their weapons away.** The male subject walked back toward the driver's door of the Toyota Prius and remained non-compliant and verbally confrontational. The male refused verbal commands from officers to step forward and away from the driver's door. Due to the nature of the call and the 911 caller's information, officers had reason to believe the Toyota Prius could contain a gun. Due to the male subject's noncompliance and ability to possibly access a gun inside the vehicle or on his person, officers decided to deploy a less-lethal munition to gain compliance. The less-lethal munition struck the front of the male subject on the left side of his body but did not prove to be effective as the male subject quickly entered the driver's door of the Toyota Prius. The male subject closed the driver door and started the vehicle. Officers commanded the driver to turn off the vehicle but he did not comply. Approximately nine seconds later, the male subject drove forward out of the parking spot. [emphasis added].

14. While Chief Manley's report to the Attorney General essentially reflects the sequence of events, it fails to capture the chaotic, conflicting shouts by the officers and Mike's incredulity over why police were threatening to shoot him. Compare Manley's statement to the Texas Attorney General that, "the male subject began asking why officers had guns pointed at him and asked officers to put their weapons away," to the audio recordings:

> **Officer: Keep going! Keep going! Keep going! Stop! Stop! Walk toward me!**
>
> Mike: Man, what the fuck?! Why (unintelligble)?
>
> **Officer: Come toward us!**
>
> **Officer: Michael Ramos, you are gonna get impacted if you don't listen! Walk toward me!**
>
> Mike: Man, yall scaring the fuck out of me, dog.
>
> **Officer (not to Mike): Impact him.**
>
> **Officer: Michael Ramos! Michael Ramos!**
>
> Mike: Don't shoot, yall!
>
> **Officer: Michael Ramos!**
>
> Mike: Don't shoot!
>
> **Officer: Hey listen to me, man. Hey, relax! Relax, Michael! I need you to turn around for me. Michael! Michael, listen to me, man! Michael, listen to me, man. Just listen. I want you to turn around for me, man. Turn around for me, Michael! I'll explain it in a second.**
>
> **Officer: Don't go back!**
>
> Mike: What is going on?!
>
> **Officer: I cant explain it right now, Michael, but you need to turn around.**

Officer: Leave your hands up!

Officer: Do not go toward that door!

Mike: Man, what the fuck, man?!

Officer: Michael Ramos, come toward me!

Officer: Impact him.

Mike: Man what the, MAN WHAT THE FUCK did I fucking do, man?! The fuck are yall trippin' on, dog?!

Officer: Hey, hey, Michael, get on your knees! Get on your knees!

Mike: Man, why the fuck you fuckin' shoot, man?!

Officer: Michael, get on your knees! Do it now!

Mike: Man, what the fuck yall trippin on dog?!

Officer: Come out of the vehicle!

Officer: Michael, do it now!

Mike: Why all yall got guns, dog?! Man, what the fuck, man?!

Officer (screaming): IMPACT HIM!

Mike: What the fuck?!

Officer (not to Mike): Hit him with the impact whenever you get an angle.

Mike: I ain't GOT no fucking gun, dog! What the fuck?! (Unintelligible).

Officer (not to Mike): Hit him whenever you feel justified. He's not following commands and he has a weapon.[8]

Mike: Put the fucking gun down, dog! Man, what the fuck, dog?

Officer (not to Mike): Impact him.

Officer Pieper: Walk towards us! I'm going to impact you!

Officer: Keep your hands up, Passenger!

Mike: Impact me?! For what?!

Officer Pieper: Walk towards us! Comply with us!

Mike: Fuck! Put the fucking guns down, dog!

Officer Pieper: Comply with us!

Officer (not to Mike): Whenever you get a shot, go for the hit.

Mike: Man, what the fuck, dog?!

Officer Pieper: IMPACTING!

[8] This order from a senior officer to a trainee officer is confounding given that videos show that Mike—who *had* complied with police commands to lift his shirt and turn in a circle—did not, in fact, have a weapon. There was no weapon or anything that could be mistaken for a weapon throughout this incident.

Gunshot.

15. As Chief Manley reported to the Attorney General, Mike got back in his car after Officer Pieper shot him with the "less lethal" shotgun shell. Mike never threatened the officers or bystanders. He simply got back in his car. Nine seconds later, as Mike slowly drove forward and away from police and bystanders toward the dumpsters at the dead-end of the parking area, Officer Taylor shot Mike in the head and killed him. There was no gun on Mike, in the car, or in the vicinity. Officers never saw a gun or anything they mistook for a gun.

B. Austin fostered the institutionally racist and aggressive policing culture that led to Mike Ramos's death.

16. In 2016, the Center for Policing Equity found that Austin police officers used more violence in the neighborhoods where Black and Hispanic Austinites live than in predominantly white neighborhoods. The study adjusted for crime and poverty variables and found that Austin police officers' use of force in those communities was disproportionate and unjustified. Austin police were more likely to use severe force against Black people and other people of color. Austin police were disproportionately more likely to shoot rather than use their hand-to-hand training or deploy pepper spray when the person subjected to force was Black.

17. The Austin City Council criticized the Austin Police Department's patterns of racist behavior and outcomes in December 2019, *less than five months before Officer Taylor, a white officer, killed Mike Ramos, a mixed race Black and Hispanic Austinite*:

> APD's state-mandated racial profiling reports consistently show that Black and Latino drivers are more than twice as likely to be searched as their white counterparts during traffic stops despite similar "hit rates", including in 2018 where 6% of traffic stops of white drivers resulted in a police searches compared to 14% for Latino drivers and 17% for Black drivers.
>
> APD data provided per Council Resolution No. 20180614-073 (one of the Freedom City Resolutions) showed that in 2017 APO [sic] police officers made discretionary arrests of African Americans at more than twice the rate of either White or Latino residents.
>
> That same 2017 data also showed Black and Latino residents accounted for nearly 75% of those discretionary arrests for driving with an invalid license, although the two groups combine to make up less than 45% of Austin's population.
>
> That same 2017 data also showed that one out of every three discretionary arrests for misdemeanor marijuana possession involved a Black resident even though less than one in ten Austinites is Black, while usage rates of marijuana are similar across racial groups.
>
> Per the quarterly report for Council Resolution No. 20180614-073, issued by APD on May 3, 2019, African Americans comprised 32% of persons arrested by APD for offenses eligible for citation, which, proportionally, amounts to more than three times Austin's Black population.

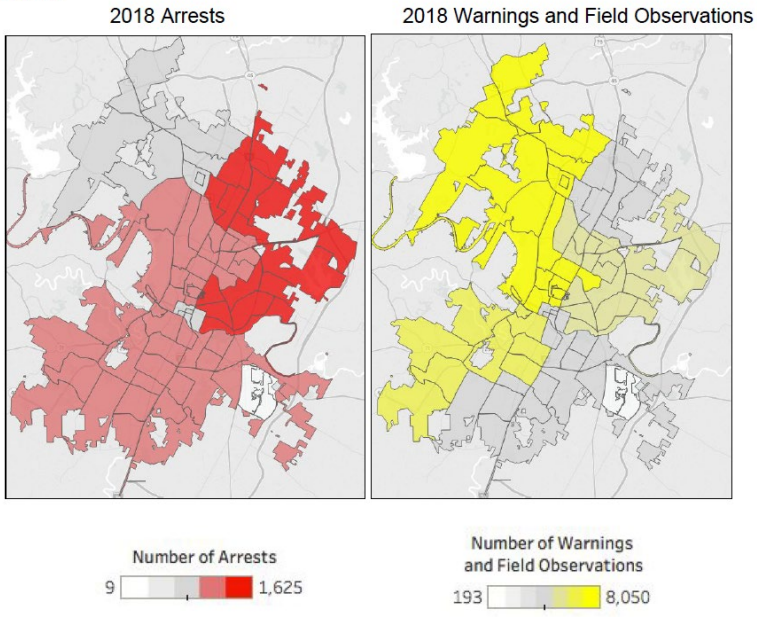
> An anonymous whistle-blower recently accused an Assistant Chief of the Austin Police Department of using racist epithets and derogatory terms, including "nigger," to refer to specific Black elected officials and sworn officers of the Austin Police Department.
>
> Patterns and specific incidents of discrimination and bigotry in the Austin Police Department erode the public trust, which is necessary to effectively enforce the law, solve crimes, and maintain public safety, and so the Council finds it imperative to understand the full extent of bigotry and systemic racism and discrimination within APD, and consider reforms to APD's policies, protocols, and training curriculum.

18. The Austin Office of Police Oversight, Office of Innovation, and Equity Office published a joint report in January 2020 (*less than four months before Officer Taylor killed Mike Ramos*) critical of the Austin Police Department's policing practices based on race during motor vehicle stops:

> Data reveals racial disparities in motor vehicle stops in 2018, with Black/African Americans as the most overrepresented of all racial/ethnic groups in Austin.
>
> In 2018, Black/African Americans made up 8% of the Austin population, 15% of the motor vehicle stops, and 25% of the arrests.
>
> Black/African Americans and Hispanic/Latinos are increasingly overrepresented in motor vehicle stops from 2015-2018. White/Caucasians are increasingly underrepresented during the same time period.
>
> Data from 2018 shows that Black/African Americans are disproportionately overrepresented in cases when their race is known by officers before the stop compared to cases when their race is not known before the stop.
>
> APD classifies motor vehicle stops based on whether the race of the person stopped was known to the officer prior to the stop. In 2018, Black/African Americans are overrepresented in both Race Not Known and Race Known categories. In the Race Not Known category, Black/African Americans make up 14% of stops (this is a 6% overrepresentation compared to their share of the Austin population). Black/African Americans are further overrepresented when their race is known before the stop, making up 17% of stops in the Race Known category and indicating a 9% overrepresentation when compared to their share of the population.

19. That same 2020 report included two maps of Austin that snapshot the Austin Police Department's approach. The map with red coloring shows the location of vehicle stops that resulted in arrests. The map with yellow coloring shows the location of vehicle stops that resulted in warnings. Austin's East Side has higher concentrations of people of color and the police made more arrests, while Austin's West Side is disproportionally white, and the police gave more warnings:

Map 2 and 3: 2018 Motor Vehicle Stops Resulting in Arrests and Warnings and Field Observations



20. On April 16, 2020, *one week before Officer Taylor killed Mike Ramos*, the City of Austin released a third-party investigative report regarding persistent racist behavior that permeated the Austin Police Department and the almost certain retaliation that employees who dared to speak out must be prepared to endure:

> By several accounts, [Assistant Chief] Newsom's use of racist language was well known throughout the Department as was the use of such language by other officers who were known to be close friends with AC Newsom and used such language openly and often.
>
> Reports came to us, from different ranks, races and genders, advising of the fact that the racist and sexist name calling and use of derogatory terms associated with race and sex persists. Anecdotal history indicated that even members of the executive staff over the years had been known to use racist and sexist language, particularly when around the lower ranks or other subordinates.
>
> We listened to many anecdotes illustrating inappropriate comments over the years through which APD personnel expressed concern about racist behavior, but also sexist behavior, and dissimilar treatment in the handling of officer discipline and those who may be served by APD chaplain services with the denial of marital services to same sex couples. There are some real cultural issues that are in need of attention.
>
> Tatum Law was able to establish that [Austin Police] Chief Manley had reason to inquire as to [Assistant Chief] Newsom's conduct . . . The October 7, 2019, email received by Chief Manley alleging similar facts to those later alleged in the October 30, 2019 complaint about AC Newsom's use of the derogatory term "nigger" in text messages to refer to African Americans provided sufficient information . . . Chief Manley did not send these allegations for review or investigation.

> Whether it is about a grievance or misconduct there is an overwhelming sentiment among officers, at or previously involved with the Austin Police Department, and regardless of rank, that an officer, or even civilian staff member, who wishes to right a wrong, complain about improper conduct, or participate in an investigation such as this one, must be prepared in the present climate and culture to face almost certain retaliation, and not necessarily from Chief Manley, directly or solely.

21. The Austin City Council made additional, equally unequivocal findings on June 11, 2020 (*less than a month after Officer Taylor killed Mike Ramos*) regarding the City's anemic and unsuccessful efforts to fix its racist and violent policing culture:

> **The elected members of City Council have no confidence that current Austin Police Department leadership intends to implement the policy and culture changes required to end the disproportionate impact of police violence on Black Americans, Latinx Americans, other nonwhite ethnic communities.**
>
> The measures that current Austin Police Department leadership have been willing to implement are inadequate, and resemble the same flawed police training and command expectations that have existed in the past. [emphasis added].

22. These recent findings by Austin's City Council, Office of Police Oversight, Office of Innovation, and Equity Office are binding evidentiary admissions by the City that its policing policies have led to disproportionate and unconstitutional police violence against members of the Black and Hispanic communities in Austin. Mike Ramos—a mixed race, native Austinite—bridged these two communities and his tragic death is a direct result of the racism that has permeated policing in Austin. It is that much more heartbreaking that he was killed in the same year that City leaders began to admit to—and grapple with—these ingrained problems. Mike's unjustified killing by Officer Taylor emphasizes the urgency of the problem Austin faces.

V. Claims

A. Officer Taylor violated Mike Ramos's Fourth and Fourteenth Amendment rights when he shot and killed Mike without justification.

23. Ms. Ramos incorporates sections I through V above into her excessive force claim brought under 42 U.S.C. § 1983.

24. Officer Taylor was acting under color of law when he shot Mike Ramos as Mike drove away from police officers. Taylor shot Mike even though Mike did not pose an imminent threat of serious injury or death to anyone that would have justified Taylor's lethal force. Taylor's use of lethal force under these circumstances and considering clearly established law was excessive and objectively unreasonable.

25. Taylor's unlawful and unconstitutional use of deadly force violated Mike's civil rights, is the direct cause of Mike's death, and caused Ms. Ramos's heartbreak and damages.

B. Austin's policies cause its police to violate the civil rights of Black and Hispanic people including Mike Ramos.

26. Ms. Ramos incorporates sections I through V.A above into her *Monell* claim brought under 42 U.S.C. § 1983.

27. Austin had these policies, practices, and customs on April 24, 2020:

a. Disproportionate use of excessive force against people of color,

b. Condoning such disproportionate use of excessive force against people of color

c. Choosing not to adequately train officers regarding civil rights protected by the United States Constitution,

d. Choosing not to adequately supervise officers regarding the use of force against people of color,

e. Choosing not to intervene to stop excessive force and civil rights violations by its officers,

f. Choosing not to investigate excessive violence and civil rights violations by its officers, and

g. Making the deliberate choice not to discipline officers for—and deter officers from—using excessive force and violating civil rights.

28. The City and Brian Manley knew about these policies and required Austin police to comply with them.

29. The City and Brian Manley developed and issued these policing policies with deliberate indifference to Mike Ramos's and other Black and Hispanic Austinites' civil rights.

30. The City and Brian Manley were aware of the obvious consequences of these policies. Implementation of these policies made it predictable that Mike's civil rights would be violated in the manner they were, and the City and Brian Manley knew that was likely to occur.

31. These policies were the moving force behind Taylor's violation of Mike's civil rights and thus, proximately caused Mike's death and Ms. Ramos's damages.

VI. Damages

32. Brenda Ramos incorporates sections I through V above into this section on damages.

33. Ms. Ramos seeks recovery under the Texas survivorship statute for the damages that Mike would have been entitled to if he had lived including damages for Mike's physical pain and mental anguish and his economic loss.

34. Ms. Ramos also seeks recovery under the Texas wrongful death statute for her own mental anguish and injuries including damages for the loss of her relationship with Mike, her loss of the love, support, and services that Mike would have given to her, economic loss, and funeral and burial expenses.

VII. Request for jury trial

35. Ms. Ramos requests a jury trial.

VIII. Prayer

36. For all these reasons, Brenda Ramos requests that the City of Austin and Christopher Taylor be summoned to appear and answer her allegations. After a jury trial regarding her claims, Ms. Ramos seeks to recover the damages listed above in an amount to be determined by the jury and any other relief to which she is entitled including her attorney's fees and expenses under 42 U.S.C. §1988(b), court costs, and pre- and post-judgment interest.

Respectfully submitted,
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS	§	
Plaintiff,	§	**CIVIL ACTION NO. 1:20-cv-1256-RP**
v.	§	
CITY OF AUSTIN AND CHRISTOPHER TAYLOR,	§	
Defendants.	§	

DEFENDANT CITY OF AUSTIN'S MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant City of Austin files this Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure as follows:

I. NATURE OF THE LAWSUIT

Plaintiff brings this civil rights action as a result of injuries and damages she alleges she sustained as the result of the death of her son, Mike Ramos, during an officer-involved shooting in a parking lot of an apartment complex in Austin, Texas on April 24, 2020. Plaintiff filed this lawsuit against the City and Officer Christopher Taylor alleging various constitutional violations under 42 U.S.C. §1983. (Doc. No. 1). In particular, Plaintiff alleges that the City's "institutionally racist and aggressive policing culture" and policies led to Ramos's death. Plaintiff also asserts that the City's inadequate training, supervision, investigation and discipline constituted a deliberate indifference to a deprivation of constitutional rights in this case.

For the reasons set forth below, the Court should dismiss all of Plaintiff's claims against the City since Plaintiff's allegations fail to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

II. MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

In reviewing a motion to dismiss, the "court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (internal quotes and citations omitted). To overcome a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *see also Culberson v. Lykos*, 790 F.3d 608, 616 (5th Cir. 2015). A plaintiff's lawsuit will not survive a motion to dismiss if the facts pleaded do not raise the right to relief "above the speculative level," even if the facts are viewed in the light most favorable to the plaintiff. *Twombly*, 550 U.S. at 555. "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Taylor v. Books A Million*, 296 F.3d 376, 378 (5th Cir. 2002) (quoting *Fernandez–Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993)).

III. PLAINTIFF'S SECTION 1983 CLAIMS AGAINST THE CITY SHOULD BE DISMISSED.

A. Insufficient Facts to Establish a Policy or Practice

Contrary to federal pleading requirements, Plaintiffs failed to plead an express policy of the Austin Police Department that led to any of the alleged constitutional violations. It is well-settled that to bring a Section 1983 suit against a city, a plaintiff must allege the implementation or execution of a policy or custom that was officially adopted by the city. Specifically, "[a] plaintiff must identify: '(1) an official policy (or custom), of which (2) a policymaker can be

charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy or custom.'" *Valle v. City of Houston*, 613 F.3d 536, 541-42 (5th Cir. 2010) (quoting *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002). Liability can attach only through "acts directly attributed to it through some official action or imprimatur." *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009) (quoting *Piotrowski v. City of Houst*on, 237 F.3d 567, 578 (5th Cir. 2001)) (internal quotations removed). *Respondeat superior* liability is insufficient to establish constitutional liability against a city. *See Monell v. Dep't of Social Service of City of New York*, 436 U.S. 658 (1978).

Moreover, the Fifth Circuit has recently confirmed that to survive a motion to dismiss, a plaintiff's *Monell* pleadings "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ratliff v. Aransas County*, 948 F.3d 281, 285 (5th Cir. 2020), quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In *Ratliff*, the Fifth Circuit affirmed the dismissal of the plaintiff's *Monell* claim when the complaint failed to establish an official custom or policy of excessive force because the only facts the plaintiff alleged with any specificity related to the incident which was the subject of the lawsuit. *Id.* "[T]o plead a practice so persistent and widespread as to practically have the force of law, [the plaintiff] must do more than describe the incident that gave rise to his injury." *Id.*, quoting *Pena v. Rio Grande City*, 879 F.3d 613, 622 (5th Cir. 2018).

Plaintiff cites to investigative reports regarding alleged racist behavior of individuals within the Austin Police Department and the Austin City Council's criticism of Department leadership's alleged inadequate implementation of measures to eradicate police bias and racism. (Doc. 1, ¶¶ 20-22). Any argument that the findings of these investigative reports constitutes a pattern tantamount to official policy fails. A plaintiff may show a "persistent, widespread practice

of City officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Piotrowski*, 237 F.3d at 579 (quoting *Webster v. City of Houston*, 735 F.2d 838, (5th Cir. 1984) (en banc)). However, "[a]ctions of officers or employees of a municipality do not render the municipality liable under section 1983 unless they execute official policy as above defined." *Id.*

Plaintiff's Complaint does not contain sufficient factual allegations to sustain such a claim. "A pattern requires similarity and specificity; '[p]rior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question.'" *Peterson v. City of Fort Worth*, 588 F.3d 838, 851-52 (5th Cir. 2009)(quoting *Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 383 (5th Cir. 2005). A pattern sufficient to support a *Monell* claim cannot be established by previous bad acts of the municipality unless those bad acts are specific and similar to the violation in question. *Id.; see also Crawford v. Caddo Parish Coroner's Office*, 2019 WL 943411, Feb. 25, 2019 (W.D. Louisiana)(Rule 12(b)(6) motion granted when plaintiff failed to allege specific facts to demonstrate policy or pattern of depriving African-Americans of fair and unbiased criminal procedures).

Here, Plaintiff's allegation of a pattern or custom of a "racist and violent policing culture" consists of an investigative report's documentation of a former assistant police chief's use of racist language and "anecdotal history" of other racist or sexist language of APD personnel. (Doc. 1, ¶ 20) None of these prior bad acts are specific and similar to the alleged violation in this case, i.e., Taylor's use of deadly force on Ramos. Plaintiffs make no allegations that any alleged pattern or practice of APD consisted of prior bad acts which were specific and similar to Taylor's use of deadly force. Plaintiff's Complaint fails to allege non-conclusory facts sufficient to establish an

actual policy or custom of the Austin Police Department. As a result, this claim fails as a matter of law.

B. Insufficient Facts to Establish Moving Force Causation

Plaintiff's Original Complaint alleges unconstitutional conduct by Officer Taylor, and the Complaint is filled with general conclusions that Taylor acted pursuant to policies, practices, and customs of the City. The Complaint contains a number of specific factual allegations regarding the incident itself and the actions of the officer along with detailed facts about Ramos's death. The Plaintiff also asserts that the City fostered an "institutionally racist and aggressive policing culture." The Complaint, however, does not contain any specific facts to support the Plaintiff's claim that the alleged "policing culture" was the moving force of the alleged constitutional violation committed by Officer Taylor.

Plaintiff alleges that the "institutionally racist and aggressive policing culture" is demonstrated by several studies and reports that concluded that Austin police officers used more violence in minority neighborhoods and that African-Americans and Hispanics were more likely to be searched and arrested by APD officers during traffic stops. (Doc. 1, ¶¶ 16-19) However, the facts of this incident as alleged in the Complaint did not involve a traffic stop or the search of a minority suspect during a traffic stop. Instead, as set forth in the Complaint, this incident arose out of the Austin Police Department's response to a 911 call about a man pointing a gun at a woman while they were in a vehicle parked in an apartment complex parking lot. (Doc. 1, ¶ 12)

In order to hold a municipality liable under Section 1983 for the misconduct of one of its employees, a plaintiff must initially allege that an official policy or custom "was a cause in fact of the deprivation of rights inflicted. *Spiller v. City of Texas City, Police Dept.*, 130 F.3d 162, 167 (5th Cir. 1997), quoting *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994). The

description of a policy or custom and its relationship to the underlying constitutional violation, moreover, cannot be conclusory, it must contain specific facts. *Spiller*, 130 F.3d at 167.

In *Spiller*, the Fifth Circuit affirmed the trial court's dismissal under Fed. R. Civ. P. 12 (b)(6) of a plaintiff's §1983 claim against a municipality for the alleged wrongful arrest of the plaintiff for disorderly conduct. *Spiller*, 130 F.3d at 167. The plaintiff contended that the police department had policies of operating "in a manner of total disregard for the rights of African American citizens" and "engag[ing] in conduct toward African American citizens without regard to probable cause to arrest." *Id.* The Fifth Circuit found that the plaintiff's complaint failed to allege specific non-conclusory facts to demonstrate how these alleged policies were causally connected to the officer's alleged misconduct. *Id.*

The Plaintiff in this case likewise fails to allege specific facts that demonstrate that the officer's alleged constitutional violation was caused by the City's alleged policy or custom of racially disproportionate traffic stops. Plaintiff's conclusory allegations of moving force causation are clearly insufficient to support a *Monell* claim.

The Plaintiff's only other factual allegations regarding the City's alleged policies and customs are citations to investigative reports regarding alleged racist behavior of individuals within the Austin Police Department and the Austin City Council's criticism of Department leadership's alleged inadequate implementation of measures to eradicate police bias and racism. (Doc. 1, ¶¶ 20-22). Yet, again, Plaintiff alleges no specific, non-conclusory facts which demonstrate that bias or racism played any role in this incident much less was the moving force of the death of Ramos. Plaintiff's Complaint points to no action or statement of Officer Taylor or others that demonstrates that any "racist culture" of the Austin Police Department was the moving force of Taylor's decision to use deadly force on Ramos. As a result, Plaintiff's claim against the City fails as a matter of law.

C. Inadequate Training and Supervision Policies.

Plaintiff also alleges that the City had a policy, practice or custom of "choosing not to adequately train officers regarding civil rights protected by the United States Constitution. (Doc. 1, ¶ 27c) She also alleges that the City had a policy, practice or custom of "choosing not to adequately supervise officers regarding the use of force against people of color." (Doc. 1, ¶27d) "A municipality's culpability for a deprivation of right is at its most tenuous where the claim turns upon a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). Failure-to-train claims require sufficient factual allegations to allow the court to draw the reasonable inference that: (1) the municipality's training procedures were inadequate; (2) the municipality was deliberately indifferent in adopting its training policy; and (3) the inadequate training policy directly caused the constitutional violation. *See Sanders-Burns v. City of Plano*, 594 F.3d 366, 381 (5th Cir. 2010). Further, a failure to train claim cannot be based upon a single incident. Rather, a plaintiff must demonstrate "at least a pattern of similar incidents in which the citizens were injured . . . to establish the official policy requisite to municipal liability under section 1983." *Snyder v. Trepagier*, 142 F.3d 791, 798 (5th Cir. 1998) (quoting *Rodrigues*, 871 F.2d at 554-55.

For liability to attach based upon an inadequate training claim, the plaintiff "must allege with specificity how a particular training program is defective." *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005). With either a failure to train or failure to supervise claim, the plaintiff must show: "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Goodman v. Harris County*, 571 F.3d 388, 395 (5th Cir. 2009); *Waters v. City of Hearne*, 2015 WL 10767483, (W.D. Tex. January 14, 2015)(insufficient allegations of

inadequate training or policy of racially profiling ethnic minorities for purpose of investigative stops).

Here, Plaintiff has not included any specific, non-conclusory facts which support a claim for either failure to train or supervise. The Complaint fails to identify an actual, specific training policy, describe any training procedures, and fails to provide *any* factual support to show a plausible conclusion that the City was indifferent to unconstitutional police action. Plaintiff's Complaint contains no factual allegations regarding the City's existing training policies or the training or supervision provided to Officer Taylor. Similarly, the Complaint contains no facts regarding deliberate indifference in adopting its policies, and no facts that show that any such training or supervision directly caused the alleged constitutional violation. Therefore, this claim should be dismissed.

D. Inadequate Disciplinary Policies.

Plaintiff generically alleges that the City had inadequate disciplinary policies by "making the deliberate choice not to discipline officers for—and deter officers from—using excessive force and violating civil rights." (Doc. 1, ¶27g). Plaintiff also alleges that the City chose not to investigate excessive violence and civil rights violations by its officers. (Doc. 1 at ¶ 27f). Again, Plaintiff's Complaint provides only conclusory allegations with no specific factual allegations about the City's disciplinary policies. Plaintiff has not alleged any prior complaints against the individual defendant or any pattern of complaints by other citizens. Plaintiff has not presented non-conclusory factual allegations about deliberate indifference in adopting the disciplinary policies. Absent these kinds of allegations, Plaintiff fails to state a claim upon which relief can be granted. *See Piotrowski*, 237 F.3d at 581-82. Finally, there are no factual allegations to show that the alleged inadequate disciplinary or investigatory policies were the moving force

behind Plaintiff's alleged constitutional injuries. Therefore, this claim should be dismissed.

PRAYER

Defendant City of Austin respectfully requests that the Court grant its Motion to Dismiss and dismiss all claims against the City of Austin with prejudice and with all costs assessed to the Plaintiffs.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN L. RILEY, LITIGATION DIVISION CHIEF

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this 5th day of March, 2021

Via ECF/e-filing:

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H. GRAY LAIRD III

United States District Court for the Western District of Texas
Austin Division

Brenda Ramos, on behalf of herself and	§	
the Estate of Mike Ramos,	§	
Plaintiff,	§	
v.	§	Case no. 1:20-cv-1256
	§	
City of Austin and	§	
Christopher Taylor,	§	
Defendants.	§	

Plaintiff's First Amended Complaint and Request for Jury Trial

To the Honorable Court:

1. This is a lawsuit about Austin police officer Christopher Taylor who shot and killed Brenda Ramos's unarmed son, Mike Ramos, on April 24, 2020.

2. A bystander's cell phone video[1] and Austin police dashcam and body-worn camera videos[2] show Officer Taylor shoot Mike as he slowly drove forward and away from police. Or—in the sterile, dehumanizing way that Austin police speak about killing an Austinite's loved one—"The male subject drove forward out of the parking spot. Fearing the male subject intended to use the Toyota Prius as a deadly weapon, one patrol officer fired his patrol rifle, striking the male driver."[3]

3. Regardless of Officer Taylor's irrational fears, any competent police officer would have known that shooting a suspect in the head because he was driving away from police and bystanders—toward a dead-end blocked by dumpsters and a building—was a gross civil rights violation.

4. Ms. Ramos brings this lawsuit to vindicate her son's civil rights and for her own heartbreak and damages from losing her only child to excessive, unjustified police violence.

[1] *Mother of man killed by Austin police officer asks for answers*, Austin American-Statesman (May 31, 2020), available at https://www.youtube.com/watch?v=7dQMDiUpLHU&feature=youtu.be.
[2] http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020.
[3] *Austin Police Report Confirms Michael Ramos Was Fatally Shot, Says Officer Considered Car A Weapon*, KUT (May 20, 2020), available at https://www.kut.org/austin/2020-05-20/austin-police-report-confirms-michael-ramos-was-fatally-shot-says-officer-considered-car-a-weapon.

I. Parties

5. Brenda Ramos was born, raised, and has lived her whole life in Austin. She went to Travis High School. Her son Mike was also a native Austinite, born and raised. He attended Covington and played football at Bowie High School.



[4]

6. The City of Austin is a Texas municipal corporation in the Western District of Texas. Brian Manley is Austin's policymaker when it comes to policing.

7. Christopher Taylor is an Austin police officer.

II. Jurisdiction

8. This Court has federal question subject matter jurisdiction over this 42 U.S.C. § 1983 lawsuit under 28 U.S.C. § 1331.

9. This Court has general personal jurisdiction over Taylor because he works and lives in Texas. The City is subject to general personal jurisdiction because it is a Texas municipality.

10. This Court has specific personal jurisdiction over Taylor and the City because this case is about their conduct that occurred in Austin.

III. Venue

11. Under 28 U.S.C. § 1391(b), the Western District of Texas is the correct venue for this lawsuit because the events occurred in Austin.

[4] Little Mike with his mom and with his dad, 1979

IV. Facts

A. Officer Taylor killed Mike Ramos without justification.

12. On April 24, 2020, Austin Police responded to a 911 report about a man with a gun and a woman using drugs in a gold and black Prius in the front parking area of a South Austin apartment complex. The man was Mike Ramos and he did not, in fact, have a gun:

> Operator: Austin 911, do you need police, fire, or EMS?
>
> Caller: Police.
>
> Operator: Okay. To what address or location?
>
> Caller: 2601 South Pleasant Valley.
>
> Operator: I'm sorry you said 2601 South Pleasant Valley?
>
> Caller: Yeah.
>
> Operator: Okay, hold on just one moment, please. Okay. At the Rosemont at Oak Valley Apartments?
>
> Caller: Yeah. I'm in the Rosemont Apartments, it's a – it's a – it's a gold and black Prius outside. (unintelligible).
>
> Operator: I'm sorry. The phone is real muffled. I couldn't hear what you were saying.
>
> Caller: I can barely hear you.
>
> Operator: Okay. I need you to start over. I couldn't understand anything you were saying. What's going on?
>
> Caller: They're in the car smokin' crack and cookin' meth.
>
> Operator: Okay. What color and type of vehicle is it?
>
> Caller: Uh, it's a gold Prius. It's a gold Prius with a Hispanic man and Hispanic woman. They got toilet paper in the front – toilet paper in the front dash window. And I seen him with a gun, he had a gun, too.
>
> Operator: You said a gold and black Prius?
>
> Caller: Yes. And he has a gun. He has a gun to this lady.
>
> Operator: You see him holding one to her?
>
> Caller: Yes, I seen him holding a gun, maam.
>
> Operator: Is he doing that right now?
>
> Caller: Yes.
>
> Operator: Just one moment. Is he pointing it at her?
>
> Caller: He's – he's – he's holding it up.
>
> Operator: He's holding it up? Or is he pointing it at her?

> Caller: He – he was pointing it at her. But he got – he got – maam, **I don't know what's goin' on**[5] but I need yall to come quick.
>
> Operator: Okay. But I need to know the difference. Is he pointing it at her or just holding in, it up?
>
> Caller: He's holding it. He's holding it.
>
> Operator: Okay. Is he – is he – but you said Hispanic male. Could you see what color clothing he has on?
>
> Caller: Uh, it's like a white shirt. (Unintelligible) it's a gold and black Prius. He has . . .
>
> Operator: Okay. Are they- okay.
>
> Caller: I'm (unintelligible).
>
> Operator: I need you to – (redacted), I understand. I already have officers en route. I'm trying to get this information to them. Where at in the parking lot? Is he by a particular building number? Or – okay. I can't understand anything you're saying. You're pulling the phone away or something.
>
> Caller: The first – the first left – it's gonna be the first left.
>
> Operator: When you enter the apartments?
>
> Caller: Yes. It's gonna be the first left. It's gonna be the first left (unintelligible).
>
> Operator: Okay. I do – like I said, I have officers already en route right now.[6]

13. Austin Police Chief Brian Manley summarized what happened next in his report about the shooting to the Texas Attorney General:

> Before arriving at the scene, officers stopped briefly to discuss their response to the area and create a plan before attempting to approach the subjects in the vehicle. **After formulating a course of action, officers approached the area in marked patrol units. Officers strategically parked their patrol vehicles, effectively blocking the exit and mitigating the risk of flight.**[7] Officers observed the Toyota Prius backed into a parking spot in the apartment complex parking lot near the one-way entrance/exit. Officers immediately commanded both subjects to show their hands as police communications identified the nature of the call as "gun urgent." Officers continued to give verbal

---

[5] As it turned out, the caller truly did not know what was going on. The police found a man and a woman in a gold and black Prius, but the man was not, in fact wearing a white shirt (Mike's shirt was red) and he was not, in fact, in possession of a gun. Upon information and belief, the caller deliberately swatted Mike. "Swatting" is defined in the Cambridge Dictionary as:

> the action of making a false report of a serious emergency so that a SWAT team (a group of officers trained to deal with dangerous situations) will go to a person's home, by someone who wants to frighten, upset, or cause problems for that person

available at https://dictionary.cambridge.org/dictionary/english/swatting.

[6] http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020.

[7] This binding evidentiary admission by the City belies Officer Taylor's irrational fear that Mike would use the Prius as a deadly weapon. Officer Taylor claims that he killed Mike because he feared that "the male subject intended to use the Toyota Prius as a deadly weapon." Brian Manley reported to the Texas Attorney General that the strategic decision about where to place the police vehicles was effective.

> commands as both the male and female exited the vehicle. Officers commanded the male subject to lift his shirt and turn around in a circle. The male subject initially complied with commands but eventually became non-compliant and verbally confrontational. **The male subject began asking why officers had guns pointed at him and asked officers to put their weapons away.** The male subject walked back toward the driver's door of the Toyota Prius and remained non-compliant and verbally confrontational. The male refused verbal commands from officers to step forward and away from the driver's door. Due to the nature of the call and the 911 caller's information, officers had reason to believe the Toyota Prius could contain a gun. Due to the male subject's noncompliance and ability to possibly access a gun inside the vehicle or on his person, officers decided to deploy a less-lethal munition to gain compliance. The less-lethal munition struck the front of the male subject on the left side of his body but did not prove to be effective as the male subject quickly entered the driver's door of the Toyota Prius. The male subject closed the driver door and started the vehicle. Officers commanded the driver to turn off the vehicle but he did not comply. Approximately nine seconds later, the male subject drove forward out of the parking spot. [emphasis added].

14. While Chief Manley's report to the Attorney General essentially reflects the sequence of events, it fails to capture the chaotic, conflicting shouts by the officers and Mike's incredulity over why police were threatening to shoot him. Compare Manley's statement to the Texas Attorney General that, "the male subject began asking why officers had guns pointed at him and asked officers to put their weapons away," to the audio recordings:

> **Officer: Keep going! Keep going! Keep going! Stop! Stop! Walk toward me!**
>
> Mike: Man, what the fuck?! Why (unintelligble)?
>
> **Officer: Come toward us!**
>
> **Officer: Michael Ramos, you are gonna get impacted if you don't listen! Walk toward me!**
>
> Mike: Man, yall scaring the fuck out of me, dog.
>
> **Officer (not to Mike): Impact him.**
>
> **Officer: Michael Ramos! Michael Ramos!**
>
> Mike: Don't shoot, yall!
>
> **Officer: Michael Ramos!**
>
> Mike: Don't shoot!
>
> **Officer: Hey listen to me, man. Hey, relax! Relax, Michael! I need you to turn around for me. Michael! Michael, listen to me, man! Michael, listen to me, man. Just listen. I want you to turn around for me, man. Turn around for me, Michael! I'll explain it in a second.**
>
> **Officer: Don't go back!**
>
> Mike: What is going on?!
>
> **Officer: I cant explain it right now, Michael, but you need to turn around.**

Officer: Leave your hands up!

Officer: Do not go toward that door!

Mike: Man, what the fuck, man?!

Officer: Michael Ramos, come toward me!

Officer: Impact him.

Mike: Man what the, MAN WHAT THE FUCK did I fucking do, man?! The fuck are yall trippin' on, dog?!

Officer: Hey, hey, Michael, get on your knees! Get on your knees!

Mike: Man, why the fuck you fuckin' shoot, man?!

Officer: Michael, get on your knees! Do it now!

Mike: Man, what the fuck yall trippin on dog?!

Officer: Come out of the vehicle!

Officer: Michael, do it now!

Mike: Why all yall got guns, dog?! Man, what the fuck, man?!

Officer (screaming): IMPACT HIM!

Mike: What the fuck?!

Officer (not to Mike): Hit him with the impact whenever you get an angle.

Mike: I ain't GOT no fucking gun, dog! What the fuck?! (Unintelligible).

Officer (not to Mike): Hit him whenever you feel justified. He's not following commands and he has a weapon.[8]

Mike: Put the fucking gun down, dog! Man, what the fuck, dog?

Officer (not to Mike): Impact him.

Officer Pieper: Walk towards us! I'm going to impact you!

Officer: Keep your hands up, Passenger!

Mike: Impact me?! For what?!

Officer Pieper: Walk towards us! Comply with us!

Mike: Fuck! Put the fucking guns down, dog!

Officer Pieper: Comply with us!

Officer (not to Mike): Whenever you get a shot, go for the hit.

Mike: Man, what the fuck, dog?!

Officer Pieper: IMPACTING!

[8] This order from a senior officer to a trainee officer is confounding given that videos show that Mike—who *had* complied with police commands to lift his shirt and turn in a circle—did not, in fact, have a weapon. There was no weapon or anything that could be mistaken for a weapon throughout this incident.

Gunshot.

15. As Chief Manley reported to the Attorney General, Mike got back in his car after Officer Pieper shot him with the "less lethal" shotgun shell. Mike never threatened the officers or bystanders. He simply got back in his car. Nine seconds later, as Mike slowly drove forward and away from police and bystanders toward the dumpsters at the dead-end of the parking area, Officer Taylor shot Mike in the head and killed him. There was no gun on Mike, in the car, or in the vicinity. Officers never saw a gun or anything they mistook for a gun.

B. Austin fostered the institutionally racist and aggressive policing culture that led to Mike Ramos's death.

16. In 2016, the Center for Policing Equity found that Austin police officers used more violence in the neighborhoods where Black and Hispanic Austinites live than in predominantly white neighborhoods. The study adjusted for crime and poverty variables and found that Austin police officers' use of force in those communities was disproportionate and unjustified. Austin police were more likely to use severe force against Black people and other people of color. Austin police were disproportionately more likely to shoot rather than use their hand-to-hand training or deploy pepper spray when the person subjected to force was Black.

17. The Austin City Council criticized the Austin Police Department's patterns of racist behavior and outcomes in December 2019, *less than five months before Officer Taylor, a white officer, killed Mike Ramos, a mixed race Black and Hispanic Austinite*:

> APD's state-mandated racial profiling reports consistently show that Black and Latino drivers are more than twice as likely to be searched as their white counterparts during traffic stops despite similar "hit rates", including in 2018 where 6% of traffic stops of white drivers resulted in a police searches compared to 14% for Latino drivers and 17% for Black drivers.
>
> APD data provided per Council Resolution No. 20180614-073 (one of the Freedom City Resolutions) showed that in 2017 APO [sic] police officers made discretionary arrests of African Americans at more than twice the rate of either White or Latino residents.
>
> That same 2017 data also showed Black and Latino residents accounted for nearly 75% of those discretionary arrests for driving with an invalid license, although the two groups combine to make up less than 45% of Austin's population.
>
> That same 2017 data also showed that one out of every three discretionary arrests for misdemeanor marijuana possession involved a Black resident even though less than one in ten Austinites is Black, while usage rates of marijuana are similar across racial groups.
>
> Per the quarterly report for Council Resolution No. 20180614-073, issued by APD on May 3, 2019, African Americans comprised 32% of persons arrested by APD for offenses eligible for citation, which, proportionally, amounts to more than three times Austin's Black population.

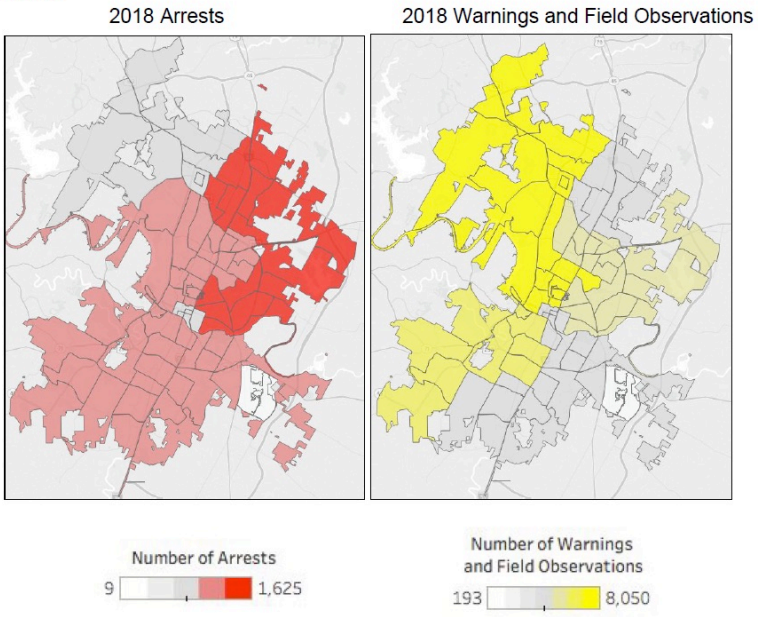
> An anonymous whistle-blower recently accused an Assistant Chief of the Austin Police Department of using racist epithets and derogatory terms, including "nigger," to refer to specific Black elected officials and sworn officers of the Austin Police Department.
>
> Patterns and specific incidents of discrimination and bigotry in the Austin Police Department erode the public trust, which is necessary to effectively enforce the law, solve crimes, and maintain public safety, and so the Council finds it imperative to understand the full extent of bigotry and systemic racism and discrimination within APD, and consider reforms to APD's policies, protocols, and training curriculum.

18. The Austin Office of Police Oversight, Office of Innovation, and Equity Office published a joint report in January 2020 (*less than four months before Officer Taylor killed Mike Ramos*) critical of the Austin Police Department's policing practices based on race during motor vehicle stops:

> Data reveals racial disparities in motor vehicle stops in 2018, with Black/African Americans as the most overrepresented of all racial/ethnic groups in Austin.
>
> In 2018, Black/African Americans made up 8% of the Austin population, 15% of the motor vehicle stops, and 25% of the arrests.
>
> Black/African Americans and Hispanic/Latinos are increasingly overrepresented in motor vehicle stops from 2015-2018. White/Caucasians are increasingly underrepresented during the same time period.
>
> Data from 2018 shows that Black/African Americans are disproportionately overrepresented in cases when their race is known by officers before the stop compared to cases when their race is not known before the stop.
>
> APD classifies motor vehicle stops based on whether the race of the person stopped was known to the officer prior to the stop. In 2018, Black/African Americans are overrepresented in both Race Not Known and Race Known categories. In the Race Not Known category, Black/African Americans make up 14% of stops (this is a 6% overrepresentation compared to their share of the Austin population). Black/African Americans are further overrepresented when their race is known before the stop, making up 17% of stops in the Race Known category and indicating a 9% overrepresentation when compared to their share of the population.

19. That same 2020 report included two maps of Austin that snapshot the Austin Police Department's approach. The map with red coloring shows the location of vehicle stops that resulted in arrests. The map with yellow coloring shows the location of vehicle stops that resulted in warnings. Austin's East Side has higher concentrations of people of color and the police made more arrests, while Austin's West Side is disproportionally white, and the police gave more warnings:

Map 2 and 3: 2018 Motor Vehicle Stops Resulting in Arrests and Warnings and Field Observations



20. On April 16, 2020, *one week before Officer Taylor killed Mike Ramos*, the City of Austin released a third-party investigative report regarding persistent racist behavior that permeated the Austin Police Department and the almost certain retaliation that employees who dared to speak out must be prepared to endure:

> By several accounts, [Assistant Chief] Newsom's use of racist language was well known throughout the Department as was the use of such language by other officers who were known to be close friends with AC Newsom and used such language openly and often.
>
> Reports came to us, from different ranks, races and genders, advising of the fact that the racist and sexist name calling and use of derogatory terms associated with race and sex persists. Anecdotal history indicated that even members of the executive staff over the years had been known to use racist and sexist language, particularly when around the lower ranks or other subordinates.
>
> We listened to many anecdotes illustrating inappropriate comments over the years through which APD personnel expressed concern about racist behavior, but also sexist behavior, and dissimilar treatment in the handling of officer discipline and those who may be served by APD chaplain services with the denial of marital services to same sex couples. There are some real cultural issues that are in need of attention.
>
> Tatum Law was able to establish that [Austin Police] Chief Manley had reason to inquire as to [Assistant Chief] Newsom's conduct . . . The October 7, 2019, email received by Chief Manley alleging similar facts to those later alleged in the October 30, 2019 complaint about AC Newsom's use of the derogatory term "nigger" in text messages to refer to African Americans provided sufficient information . . . Chief Manley did not send these allegations for review or investigation.

> Whether it is about a grievance or misconduct there is an overwhelming sentiment among officers, at or previously involved with the Austin Police Department, and regardless of rank, that an officer, or even civilian staff member, who wishes to right a wrong, complain about improper conduct, or participate in an investigation such as this one, must be prepared in the present climate and culture to face almost certain retaliation, and not necessarily from Chief Manley, directly or solely.

21. The Austin City Council made additional, equally unequivocal findings on June 11, 2020 (*less than a month after Officer Taylor killed Mike Ramos*) regarding the City's anemic and unsuccessful efforts to fix its racist and violent policing culture:

> **The elected members of City Council have no confidence that current Austin Police Department leadership intends to implement the policy and culture changes required to end the disproportionate impact of police violence on Black Americans, Latinx Americans, other nonwhite ethnic communities.**
>
> The measures that current Austin Police Department leadership have been willing to implement are inadequate, and resemble the same flawed police training and command expectations that have existed in the past. [emphasis added].

22. Recent City-commissioned studies detail how the Austin Police training Academy inculcates and indoctrinates Austin police officers into Austin's racist policing culture and specifically trains officers to use excessive force against people of color:

> APD Training Academy Review and Strategic Plan
> Sara Villanueva
> May 22, 2020
>
> Austin Police Department Training Academy Curriculum Review
> Miguel Ferguson, PhD
> June 19, 2020
>
> Racial Inequities and Institutional Racism: A Report Submitted to the City of Austin Equity Office and the Austin Police Department
> Joyce James Consulting
> Nov. 2020
>
> Community + APD Equity Assessment Series: Austin Police Department, Training and Recruiting Divisions
> Peach Mill Research and Communications
> Dec. 28, 2020
>
> Equity assessment SWOT analyses and report on racial inequities within Austin Police Department
> Brion Oaks, Austin Chief Equity Officer
> Dec. 29, 2020

Community Video Review Panel Final Report
Life Anew Restorative Justice
Jan. 14, 2021

Community Report APD Training Video Review Panel
Jeaux Anderson, Angelica Erazo, Andrea Black, Maya Pilgrim, Miriam Conner, Phil Hopkins
Jan. 18, 2021

23. These recent findings by Austin's City Council, Austin Office of Police Oversight, Austin Office of Innovation, Austin Equity Office, and third-party consultants retained by the City[9] are binding evidentiary admissions by the City that its policing policies have led to disproportionate and unconstitutional police violence against members of the Black and Hispanic communities in Austin. Mike Ramos—a mixed race, native Austinite—bridged these two communities and his tragic death is a direct result of the racism that has permeated policing in Austin. It is that much more heartbreaking that he was killed in the same year that City leaders began to admit to—and grapple with—these ingrained problems. Mike's unjustified killing by Officer Taylor emphasizes the urgency of the problem Austin faces.

V. Claims

A. Officer Taylor violated Mike Ramos's Fourth and Fourteenth Amendment rights when he shot and killed Mike without justification.

24. Ms. Ramos incorporates sections I through V above into her excessive force claim brought under 42 U.S.C. § 1983.

25. Officer Taylor was acting under color of law when he shot Mike Ramos as Mike drove away from police officers. Taylor shot Mike even though Mike did not pose an imminent threat of serious injury or death to anyone that would have justified Taylor's lethal force. Taylor's use of lethal force under these circumstances and considering clearly established law was excessive and objectively unreasonable.

26. Taylor's unlawful and unconstitutional use of deadly force violated Mike's civil rights, is the direct cause of Mike's death, and caused Ms. Ramos's heartbreak and damages.

B. Austin's policies cause its police to violate the civil rights of Black and Hispanic people including Mike Ramos.

27. Ms. Ramos incorporates sections I through V.A above into her *Monell* claim brought under 42 U.S.C. § 1983.

28. Austin had these policies, practices, and customs on April 24, 2020:

[9] Each of the Council Resolutions, internal City of Austin studies, and external studies ordered by the City referenced above are incorporated by reference in their entireties into this First Amended Complaint.

a. Training officers to use excessive force against Black people by purposefully using racist training materials (such as training videos that depict Black people as scary thugs) at the Austin Police Academy;

b. Habitually condoning excessive force against people of color through a purposefully anemic chain-of-command "force review" process that has rarely, if ever, resulted in a determination that excessive force was used;

c. Ignoring or, worse yet, choosing to directly defy the advice and counsel of its past Police Monitors Margo Frasier and Judge Clifford Brown, former Citizen Review Panel, current Director of Office of Police Oversight Farah Muscadin, and current Community Police Review Commission regarding excessive use of force against Black people and other people of color;

d. Refusing to swear our criminal complaints for assault and homicide against one of their own. To be clear, an Austin Police officer has never once been charged by Austin Police for an assault or homicide while on duty in the entire history of the department. Any time an Austin police officer has been indicted, it was because the Travis County DA made her or his own determination that there was sufficient probable cause. Case in point, the Defendant Officer in this matter was indicted on March 10, 2020 in spite of the judgment of Austin Police Special Investigations Unit detectives that there was not probable cause to charge him.

e. Requiring that administrative investigations exonerate officers of excessive force. In other words, Austin Police Internal Affairs investigators are directed to use the administrative investigation process to show that subject officers *did not* violate APD's written policies about use of force (which, in many cases, are counter to the customs and actual official policies of the department). APD's IA reports going back many years are clearly written from the perspective of clearing the subject officers from allegations of wrongdoing.

29. Rarely disciplining officers for excessive force, including the Defendant Officer in this case who shot and killed a mentally ill college professor under questionable circumstances nine months before he killed Ms. Ramos's son. The City's policing policymaker, Brian Manley, condoned the use of force both times that Defendant Taylor killed people of color. The City and Brian Manley knew about these policies and required Austin police to comply with them.

30. The City and Brian Manley developed and issued these policing policies with deliberate indifference to Mike Ramos's and other Black and Hispanic Austinites' civil rights. The City and Brian Manley have been put on notice again and again that its policing policies lead to disproportionate deaths in the Black community and yet they have not revised these policies. The deliberate choice NOT to adopt common sense reforms suggested by numerous internal and external City of Austin reports is rooted in indifference to the lives and civil rights of Black people in Austin.

31. The City and Brian Manley were aware of the obvious consequences of these policies. Implementation of these policies made it predictable that Mike's civil rights would be violated in the manner they were, and the City and Brian Manley knew that was likely to occur.

32. These policies were the moving force behind Taylor's violation of Mike's civil rights and thus, proximately caused Mike's death and Ms. Ramos's damages.

VI. Damages

33. Brenda Ramos incorporates sections I through V above into this section on damages.

34. Ms. Ramos seeks recovery under the Texas survivorship statute for the damages that Mike would have been entitled to if he had lived including damages for Mike's physical pain and mental anguish and his economic loss.

35. Ms. Ramos also seeks recovery under the Texas wrongful death statute for her own mental anguish and injuries including damages for the loss of her relationship with Mike, her loss of the love, support, and services that Mike would have given to her, economic loss, and funeral and burial expenses.

VII. Request for jury trial

36. Ms. Ramos requests a jury trial.

VIII. Prayer

37. For all these reasons, Brenda Ramos requests that the City of Austin and Christopher Taylor be summoned to appear and answer her allegations. After a jury trial regarding her claims, Ms. Ramos seeks to recover the damages listed above in an amount to be determined by the jury and any other relief to which she is entitled including her attorney's fees and expenses under 42 U.S.C. §1988(b), court costs, and pre- and post-judgment interest.

Respectfully submitted,
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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Brenda Ramos, on behalf of herself and	§	
the Estate of Mike Ramos,	§	
Plaintiff,	§	
v.	§	Case no. 1:20-cv-1256
	§	
City of Austin and	§	
Christopher Taylor,	§	
Defendants.	§	

Plaintiff's Response to City of Austin's Motion to Dismiss

I. Introduction

Ms. Ramos's Complaint [doc. 1] clearly states a section 1983 civil rights claim against the City of Austin upon which relief can be granted.

The City's boilerplate FRCP 12(b) motion ignores the allegations regarding Austin's policing policies in Ms. Ramos's Complaint as they impact minority communities. For example, the City's Motion asserts that the "only facts the plaintiff alleged with any specificity related to the incident which was the subject of the lawsuit." The City's claim is wrong. It would be hard to be more specific than asserting the well-documented fact that Austin police kill people of color at a disproportionate and unjustified rate (¶16):

> 16. In 2016, the Center for Policing Equity found that Austin police officers used more violence in the neighborhoods where Black and Hispanic Austinites live than in predominantly white neighborhoods. The study adjusted for crime and poverty variables and found that Austin police officers' use of force in those communities was disproportionate and unjustified. Austin police were more likely to use severe force against Black people and other people of color. Austin police were disproportionately more likely to shoot rather than use their hand-to-hand training or deploy pepper spray when the person subjected to force was Black.

Another example of the City's flawed 12(b) motion is the claim that "the Complaint contains no facts regarding deliberate indifference in adopting its policies." This is an unfounded claim. Ms. Ramos's Complaint cites the Austin City Council's explicit criticism of the City's chief policing policymaker (Brian Manley) for refusing to reform the City's policing policies in the face of indisputable evidence that they lead to discriminatory outcomes involving people of color. This policymaker's documented refusal to adopt better policies is textbook deliberate indifference:

> 21. The Austin City Council made additional, equally unequivocal findings on June 11, 2020 (*less than a month after Officer Taylor killed Mike Ramos*) regarding the City's anemic and unsuccessful efforts to fix its racist and violent policing culture:
>
> > **The elected members of City Council have no confidence that current Austin Police Department leadership intends to implement the policy and culture changes required to end the disproportionate impact of police violence on Black Americans, Latinx Americans, other nonwhite ethnic communities.**
> >
> > The measures that current Austin Police Department leadership have been willing to implement are inadequate, and resemble the same flawed police training and command expectations that have existed in the past. [emphasis added].

Finally, the City makes the incorrect claim that, "Plaintiff's allegation of a pattern or custom of a racist and violent policing culture consists of an investigative report's documentation of a former assistant police chief's use of racist language and anecdotal history of other racist or sexist language of APD personnel." The City's statement does nothing less than belittle the magnitude of the Austin Police Department's systemic policy flaws. To the contrary, Ms. Ramos's Complaint (¶17) cites an Austin City Council resolution specifically detailing Austin's pattern of racist policing:

17. The Austin City Council criticized the Austin Police Department's patterns of racist behavior and outcomes in December 2019, *less than five months before Officer Taylor, a white officer, killed Mike Ramos, a mixed race Black and Hispanic Austinite*:

> APD's state-mandated racial profiling reports consistently show that Black and Latino drivers are more than twice as likely to be searched as their white counterparts during traffic stops despite similar "hit rates", including in 2018 where 6% of traffic stops of white drivers resulted in a police searches compared to 14% for Latino drivers and 17% for Black drivers.
>
> APD data provided per Council Resolution No. 20180614-073 (one of the Freedom City Resolutions) showed that in 2017 APO [sic] police officers made discretionary arrests of African Americans at more than twice the rate of either White or Latino residents.
>
> That same 2017 data also showed Black and Latino residents accounted for nearly 75% of those discretionary arrests for driving with an invalid license, although the two groups combine to make up less than 45% of Austin's population.
>
> That same 2017 data also showed that one out of every three discretionary arrests for misdemeanor marijuana possession involved a Black resident even though less than one in ten Austinites is Black, while usage rates of marijuana are similar across racial groups.
>
> Per the quarterly report for Council Resolution No. 20180614-073, issued by APD on May 3, 2019, African Americans comprised 32% of persons arrested by APD for offenses eligible for citation, which, proportionally, amounts to more than three times Austin's Black population.

Ms. Ramos cited specific empirical data to substantiate her claims of deliberate indifference of the Austin Police Department policies that illegally impact mostly Black and Latino Austin residents. Ms. Ramos's Complaint (¶18) also cites an internal City of Austin report by the Austin Office of Police Oversight, Equity Office, and Office of Innovation that shows, in addition to a years-long history of racist outcomes, *the problem is becoming increasingly worse over time*:

18. The Austin Office of Police Oversight, Office of Innovation, and Equity Office published a joint report in January 2020 (*less than four months before Officer Taylor killed Mike Ramos*) critical of the Austin Police Department's policing practices based on race during motor vehicle stops:

> Data reveals racial disparities in motor vehicle stops in 2018, with Black/African Americans as the most overrepresented of all racial/ethnic groups in Austin.
>
> In 2018, Black/African Americans made up 8% of the Austin population, 15% of the motor vehicle stops, and 25% of the arrests.
>
> Black/African Americans and Hispanic/Latinos are increasingly overrepresented in motor vehicle stops from 2015-2018. White/Caucasians are increasingly underrepresented during the same time period.
>
> Data from 2018 shows that Black/African Americans are disproportionately overrepresented in cases when their race is known by officers before the stop compared to cases when their race is not known before the stop.

The external report commissioned by the City of Austin was inexplicably handwaved by the City's 12(b) motion. The City's cavalier attitude to dismiss this comprehensive report that contains stomach-churning detail about the institutionalized racism within the Austin Police Department (¶ 20) as "anecdotal history" underscores the state of denial within the City continues to operate:

20. On April 16, 2020, *one week before Officer Taylor killed Mike Ramos*, the City of Austin released a third-party investigative report regarding persistent racist behavior that permeated the Austin Police Department and the almost certain retaliation that employees who dared to speak out must be prepared to endure:

> By several accounts, [Assistant Chief] Newsom's use of racist language was well known throughout the Department as was the use of such language by other officers who were known to be close friends with AC Newsom and used such language openly and often.
>
> Reports came to us, from different ranks, races and genders, advising of the fact that the racist and sexist name calling and use of derogatory terms associated with race and sex persists. Anecdotal history indicated that even members of the executive staff over the years had been known to use racist and sexist language, particularly when around the lower ranks or other subordinates.
>
> We listened to many anecdotes illustrating inappropriate comments over the years through which APD personnel expressed concern about racist behavior, but also sexist behavior, and dissimilar treatment in the handling of officer discipline and those who may be served by APD chaplain services with the denial of marital services to same sex couples. There are some real cultural issues that are in need of attention.

The horse has left the barn regarding the well-documented harm *directly caused* by the City of Austin's policing policies. The policies listed in Ms. Ramos's complaint are universally criticized in reports authored internally by the Austin Office of Police Oversight, Equity Office, and Office of Innovation and externally by numerous outside consultants hired by the City itself.

One powerful aspect of the tragedy of Mike Ramos's death at the hands of Austin Police Officer Christopher Taylor is that the Austin City Council had already publicly recognized that the City of Austin's policing policies have directly given rise to serious abuses by Austin police officers. The City Council had already demanded reform of the policies cited by Ms. Ramos before her son was killed. But the chief policing policy-maker at the City (Brian Manley) repeatedly hindered, interfered, and impeded opportunities for reform during his tenure. Chief Manley's stubborn loyalty to doing things the same old way at the Austin Police Department has led the City Council to demand more studies of the Austin Police Department's policies, particularly as they affect Austin's citizens of color. The City's own studies not only show the plausibility of Ms. Ramos's *Monell* claim, but they also show the legitimacy and rightness of her claim as well.

Despite that Ms. Ramos maintains the adequacy and plausibility of her original Complaint, Plaintiff has taken this opportunity to amend her Complaint to further clarify and expand her allegations against the City regarding the City's deliberate indifference to the racially charged impact of its police department's policies. Thus, the Court should choose to analyze the City's 12(b) motion under Plaintiff's First Amended Complaint.

II. **Legal Standard**

In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept all well pleaded facts as true and view them in the light most favorable to Ms. Ramos. *See Baker v.*

Putnal, 75 F. 3d 190, 196 (5th Cir. 1996). The issue is not whether Ms. Ramos will prevail but whether she is entitled to pursue her complaint and offer evidence in support of her claims. *See Doe v. Hillsborough Indep. Sch. Dist*., 81 F.3d 1395, 1401 (5th Cir. 1996). The City's boilerplate motion could be Exhibit A for why such motions are disfavored and are rarely granted. *See Bernal v. Freeport-McMoran, Inc*., 197 F.3d 161, 164 (5th Cir. 1999).

The Court should not dismiss Ms. Ramos's Complaint unless it appears beyond doubt that she can prove no set of facts in support of her claims which would entitle her to relief. *Ashcroft v. Iqbal* simply requires that Ms. Ramos's Complaint be plausible on its face, do more than offer labels and conclusion, and offer some factual basis in support of her claim. *See* 129 S. Ct. 1937, 1949 (2009). Ms. Ramos's Complaint does just that.

III. Ms. Ramos alleges specific policies.

Ms. Ramos's First Amended Complaint alleges the following official policies were in practice by Austin police on April 24, 2020:

a. Training officers to use excessive force against Black people by purposefully using racist training materials (such as training videos that depict Black people as scary thugs) at the Austin Police Academy;

b. Habitually condoning excessive force against people of color through a purposefully anemic chain-of-command "force review" process that has rarely, if ever, resulted in a determination that excessive force was used;

c. Ignoring or, defying the advice and counsel of the City's past Police Monitors Margo Frasier and Judge Clifford Brown, the former Citizen Review Panel, the current Director of Office of Police Oversight Farah Muscadin, and the current Community Police Review Commission regarding excessive use of force against Black residents of Austin and other people of color;

d. Austin Police Department's refusal to swear out criminal complaints for assault and homicide against one of their own. To be clear, an Austin Police officer has never once been charged by Austin Police for an assault or homicide while on duty in the entire history of the department. Any time an Austin police officer has been indicted, it was

because the Office of the Travis County DA made its own determination that there was sufficient probable cause. Case in point, the Defendant Officer in this matter was indicted on March 10, 2020 in spite of the Austin Police Special Investigations Unit detectives' refusal to sign a probable cause affidavit to charge him.

e. A policy for administrative investigations to exonerate officers of excessive force. In other words, Austin Police Internal Affairs (IA) investigators are directed to use the administrative investigation process to show that subject officers did not violate APD's written policies about use of force (which, in many cases, are counter to the customs and actual official policies of the department). APD's IA reports going back many years are unmistakably written from the perspective of clearing the subject officers from allegations of wrongdoing.

f. A policy of rarely disciplining officers for excessive force, including the Defendant Officer in this case who shot and killed another member of Austin's minority community, a mentally ill college professor under questionable circumstances nine months before he killed Ms. Ramos's son. The City's policing policymaker, Brian Manley, condoned the use of force both times that Defendant Taylor killed people of color.

The Fifth Circuit has deemed similar allegations sufficiently specific. The Fifth Circuit upheld a verdict where "no changes had been made in their policies." *Grandstaff v. Borger*, 767 F.2d 161, 171 (5th Cir. 1985). Even a tepid reaction can ". . . say[] more about the existing disposition of the City's policymaker than would a dozen incidents . . ." *Id.* But here the Complaint has more; it has allegations of more than one incident, each with their own tepid reaction. Further, "the Fifth Circuit does 'not require a plaintiff to plead facts 'peculiarly within the knowledge of defendants.'" *Ybarr v. Davis*, 1:19-CV-1099-RP, 2020 U.S. Dist. LEXIS 175150, at *19–20 (W.D. Tex. September 24, 2020) (quoting *Morgan v. Hubert*, 335 F. App'x 466, 472 (5th Cir. 2009)). But Ms. Ramos even without access to discovery has pled the existence of specific policies describing the policies, practices, and trainings of the City of Austin.

Here, the City's three cases on insufficiency of allegations are not comparable. First, *Pistrowski v. City of Houston* dealt with a plaintiff whose allegations merely related to the plaintiff's experience alone. 237 F.3d 567, 580–81 (5th Cir. 2001) (cited in City's mot. Doc. 4 at 4).

That is unlike the instant matter where Ms. Ramos's complaint outlines six different policies each applied to multiple incidents in the Department's history continuing today. Second, *Peterson v. City of Fort Worth* involved a summary judgment—not a motion to dismiss—where the plaintiff failed to provide *enough evidence* and merely pointed to different of excessive force with different mechanisms of injuries. *See* 588 F.3d 838, 851–52 (5th Cir. 2009) (cited in City's mot. Doc. 4 at 4.) But here, this is a motion to dismiss with allegations taken as true, and the Complaint alleging the same types of injuries multiple times in similar contexts—contexts that the City's own reports recognize and provide. Third, *Crawford v. Caddo Parish Coroner's Office* had a plaintiff that only alleged conclusory allegations, such as "operate[d] in a manner of total disregard for the rights of African American citizens." *See* No. 17-cv-1509, 2019 U.S. Dist. LEXIS 32243, at * 28, 2019 WL 943411 (W.D. La. Feb. 25, 2019) (cited in City's mot. Doc. 4 at 4). Instead, the Complaint at hand explains how each of the six policies have resulted in unconstitutional action.

IV. Ms. Ramos draws a direct line from Austin's policing policies to her son's death.

Ms. Ramos's complaint could not be clearer that Officer Taylor was following his training and the official Austin Police Department policies enacted, implemented, and ratified by Chief Brian Manley when Taylor used excessive force against Mike Ramos. Officer Taylor was indoctrinated into Austin police's racist culture at the training academy and served under a chief who condoned violence against people of color by choosing to never find fault even in the most troubling cases. It was these official policies that led Taylor—despite all the evidence to the contrary—to view Mike Ramos as a threat instead of viewing him as a scared and confused

human being fleeing over a half dozen police after he had just been shot with a projectile and reasonably feared for his life.

Mike Ramos's death is not incidental to the Austin Police Department's culture of racism and violence, it was directly caused by it.

> . . . a plaintiff must establish that the policy was the moving force behind the violation. In other words, a plaintiff must show direct causation." *Peterson*, 588 F.3d at 848. This means that "there must be a direct causal link" between the policy and the violation, not merely a "but for" coupling between cause and effect. *Id. Fraire v. City of Arlington*, 957 F.2d 1268, 1281 (5th Cir. 1992).

Lupi v. Diven, No. 1:20-CV-207-RP, 2020 U.S. Dist. LEXIS 200265, at *29-30 (W.D. Tex. Oct. 27 2020). If not for Officer Taylor's indoctrination to the racist training and adherence to the racist policies of Austin Police Department, both of which have been shown time and time again to lead to disproportionately violent outcomes for people of color, Mike Ramos would be alive today.

V. City-commissioned studies and reports cited by Ms. Ramos establish inadequate policies in the area of training, supervision, and discipline.

The Plaintiff's Complaint cites and incorporates by reference 12 internal and external, City-commissioned reports that lay out the inadequate training, supervision, and discipline policies of the Austin police department.

This is the tip of the iceberg of evidence that Ms. Ramos will develop through discovery regarding her claim against the City of Austin. For instance, the reams of advice and counsel of Austin's past Police Monitors Margo Frasier and Judge Clifford Brown, former Citizen Review Panel, current Director of Office of Police Oversight Farah Muscadin, and current Community Police Review Commission are not all public record. Ms. Ramos alleges that Austin had an official policy of ignoring and defying this advice (which she will seek in discovery). Every time the City's policing policymaker, Brian Manley, ignored or defied advice that was meant to revise policies to

save the lives of people of color, he was deliberately indifferent to those populations' civil and constitutional rights to life, liberty, and the pursuit of happiness.

It is not unusual for *Monell* claims to be buttressed by the offending municipality's own reports. In *Sheppard v. Dallas County*, a plaintiff sued Dallas County for inadequate medical care while he was in the County jail. 591 F.3d 445, 450 (5th Cir. 2009). There, Dallas County retained a third party to conduct a comprehensive review of the health services at the jail. *Id.* at 450–51. The County's report, along with one completed by the Department of Justice, had shocking findings of the inadequacy of care at the jail. *Id.* Both reports were submitted into evidence and the jury rendered a verdict in favor of plaintiff. *Id.* at 451. On appeal, the County argued that the district court erred in admitted the Department of Justice report into evidence *Id.* at 456. In affirming the judgment, the Fifth Circuit found that that while the report's shocking findings were "undoubtedly prejudicial," the report's probative value could not seriously be doubted. *Id.* at 457–58. Similarly, the various reports cited by Plaintiff in her Complaint evidence a shocking history and continued practice of the Austin Police Department in their policies and customs.

VI. Conclusion

Here, Ms. Ramos has alleged three elements of *Monell*: (1) there were six official policies, *supra* at 6–8; (2) these policies were known by the chief policing policymaker, *id* at 2, 5; and (3) these policies led to the constitutional violation, *id* at 8–10. That is enough. *Ybarr v. Davis*, 1:19-CV-1099-RP, 2020 U.S. Dist. LEXIS 175150, at *19–20 (W.D. Tex. September 24, 2020). For these reasons, the Court should deny the City of Austin's Motion to Dismiss.

Respectfully submitted,
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS Plaintiff, V. THE CITY OF AUSTIN AND CHRISTOPHER TAYLOR Defendants.	§ § § § § § § § §	No. 1:20-cv-01256-RP JURY DEMANDED

DEFENDANT CHRISTOPHER TAYLOR'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND SUPPORTING BRIEF

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES Defendant, Christopher Taylor (hereinafter "Officer Taylor"), the individual defendant in the above-entitled and numbered cause, and moves that this Court dismiss Plaintiff's Complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted, and in support would respectfully show the Court as follows:

I. SUMMARY OF THE ARGUMENT

1. The videos incorporated into Plaintiff's Complaint reflect that Officer Christopher Taylor's conduct did not constitute a violation of the Fourth Amendment as a matter of law. The Fifth Circuit mandates the use of its two-prong *Hathaway* test for analyzing cases where pedestrian officers shoot into vehicles. The *Hathaway* test thus must be applied to this case's facts to determine if no reasonable police officer would have believed that Ramos posed a threat to the officers standing in front of his car.

2. The test's prongs deal with (1) time, and (2) perceived proximity, respectively. Applied here, Officer Taylor had (1) a split second—the amount of time it takes for a car to travel approximately one-to-two car lengths—to decide whether to use deadly force to stop a car that (2) ***his fellow police officers were actively scrambling away from to escape the car's path***. Pursuant to such test, reasonable officers witnessing those circumstances could have considered Ramos's car a potentially deadly threat to the officers scrambling away from it, and that using deadly force to stop that deadly threat would not be unreasonable.

3. Officer Christopher Taylor is also entitled to Qualified Immunity. The Supreme Court strictly enforces the requirement to identify an analogous case and explain the analogy for the purposes of satisfying the "clearly established law" prong of Qualified Immunity. *Irwin* was decided in January 2021 on largely similar facts—after commands to stop were refused, police officers fired at the driver of a car driving toward the general direction of the police officers. The *Irwin* court searched through pre-existing controlling case law, found no factually similar analogous cases, and granted the Officer-Defendants Qualified Immunity as a result. Officer Taylor likewise lacked any such pre-existing legal precedents that could legally operate to strip him of the protections of Qualified Immunity in the case at bar.

II. ARGUMENTS & AUTHORITIES

A. Standard for Dismissal under Rule 12(b)(6).

4. A motion to dismiss pursuant to Rule 12(b)(6) challenges a plaintiff's complaint on the basis that it fails to state a claim upon which relief may be granted.[1] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[2] "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.[3] "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."[4] "To withstand a Rule 12(b)(6) motion, [a] complaint must allege 'more than labels and conclusions,'" and "a formulaic recitation of the elements of a cause of action will not do."[5]

5. For the purposes of Rule 12(b)(6), a complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"[6] A "complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief – including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'"[7] "Conversely, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum

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[1] *See* FED. R. CIV. P. 12(b)(6).
[2] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
[3] *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).
[4] *Id*. (quoting *Twombly* at 556).
[5] *Norris v. Hearst Tr.*, 500 F.3d 454, 464 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).
[6] *Iqbal*, 556 U.S. at 678.
[7] *Cuvillier v. Sullivan*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).

expenditure of time and money by the parties and the court."[8] A court need not "strain to find inferences favorable to the plaintiffs."[9]

B. Standard for Qualified Immunity.

6. Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss an action barred by Qualified Immunity.[10] It is Plaintiff's burden to plead and prove specific facts overcoming Qualified Immunity for each applicable claim.[11] Courts use a two-prong analysis to determine whether an officer is entitled to Qualified Immunity.[12] A plaintiff must show (1) the official violated a constitutional right; and (2) the constitutional right was "clearly established" at the time of the defendant's alleged misconduct.[13] If Plaintiff fails to satisfy either prong here, Officer Taylor is immune from suit as a matter of law.[14]

7. A right is clearly established when "the contours of the right [are] sufficiently clear [such] that a reasonable official would understand that what he is doing violated that right."[15] Because Qualified Immunity shields "all but the plainly incompetent or those who knowingly violate the law***," the Fifth Circuit considers Qualified Immunity the norm, and admonishes***

[8] *Id.* (quotation and alteration omitted).
[9] *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 361 (5th Cir. 2004) (quoting *Westfall v. Miller*, 77 F.3d 868, 870 (5th Cir. 1996)).
[10] *See Bustillos v. El Paso Cnty. Hosp. Dist.*, 226 F. Supp. 3d 778, 793 (W.D. Tex. 2016) (Martinez, J.) (dismissing a plaintiff's claim based on qualified immunity).
[11] *See Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009); *see also Elliot v. Perez,* 751 F.2d 1472, 1479 (5th Cir. 1985).
[12] *Cole v. Carson*, No. 14-10228, 2019 WL 3928715, at *5 (5th Cir. Aug. 20, 2019), as revised (Aug. 21, 2019).
[13] *Reed v. Taylor*, 923 F.3d 411, 414 (5th Cir. 2019).
[14] *Zarnow v. City of Wichita Falls*, 500 F.3d 401, 407 (5th Cir. 2007).
[15] *Werneck v. Garcia*, 591 F.2d 386, 392 (5th Cir. 2009) (citations omitted); *see also Freeman v. Gore*, 483 F.3d 404, 411 (5th Cir. 2007) (the court applies an objective standard "based on the viewpoint of a reasonable official in light of the information available to the defendant and the law that was clearly established at the time of defendant's actions."); *see also Kinney v. Weaver*, 367 F.3d 337, 349-50 (5th Cir. 2004), quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

courts to deny a defendant immunity only in rare circumstances.[16] Officer Taylor raises the defense of Qualified Immunity here in response to all of Plaintiff's claims alleged against him.[17] It is thus Plaintiff's burden to plead and prove that Officer Taylor is not entitled to such protections. Plaintiff's Complaint fails to meet that burden.

C. Videos of the subject incident have been incorporated by reference for this Court's consideration—and take precedence over the Complaint itself.

8. Pursuant to controlling Fifth Circuit and Supreme Court precedents, "court[s] may take into account documents incorporated into the complaint by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned" when analyzing a 12(b)(6) motion to dismiss.[18] In addition to documents, videos may also be incorporated by reference, including but not limited to body cam and dash cam videos as part of motions to dismiss §1983 claims.[19]

9. The first page of Plaintiff's Complaint references "Austin police dashcam and body-worn camera videos" of the subject incident, and provides hyperlinks for the Court to retrieve and view such videos.[20] One of the hyperlinks directs to a City of Austin website that contains the cited videos in a manner that is obviously specifically intended for public consumption, making the videos inherently "matters of public record" that this Court may consider for the purposes of

[16] *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (internal quotation marks omitted) (emphasis added).
[17] *See generally* Pl. Orig. Compl., Dkt. # 1.
[18] *Meyers v. Textron, Inc.*, 540 Fed.Appx. 408, 409 (5th Cir. 2013) (per curiam) (*citing Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (also citing § 1357 Motion to Dismiss Practice Under Rule 12(b)(6)).
[19] *Scott v. White*, No. 1:16-CV-1287-RP, 2018 WL 2014093, * 1 (W.D. Tex. April 30, 2018).
[20] Pl. Orig. Compl., pg. 1, fn. 1 – 2, Dkt. # 1.

this motion.[21] If an allegation in a complaint is contradicted by the contents of an exhibit incorporated by reference into the complaint, then "***indeed the exhibit and not the allegation controls***."[22] Accordingly, this Court may consider the subject incident videos to be both relevant and controlling when determining whether or not Plaintiff's Complaint contains a claim against Officer Taylor for which relief may be granted.

D. Plaintiff has failed to state a claim pursuant to the Fourteenth Amendment for which relief may be granted.

10. Plaintiff has no recourse under the Fourteenth Amendment, and her claims brought pursuant to it should be dismissed.[23] "The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it."[24] The Fourteenth Amendment guarantees substantive due process rights associated with trial, conviction, and ensuing incarceration, ***but not*** due process rights associated with unreasonable search and seizure under the Fourth Amendment.[25] All claims arising from the use of excessive force "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."[26] "A viable Fourth Amendment claim essentially precludes any Fourteenth

[21] Pl. Orig. Compl, pg. 1, fn. 2, Dkt. # 1.
[22] *See U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 377 (5th Cir. 2004) (emphasis added) (*citing Simmons v. Peavy–Welsh Lumber Co.*, 113 F.2d 812, 813 (5th Cir.), cert. denied, 311 U.S. 685 (1940).
[23] *See* Pl. Orig. Compl, pg. 10 – 11, Dkt. # 1.
[24] *Albright v. Oliver*, 510 U.S. 266, 274 (1994).
[25] *See Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 919, fn. 8 (2017) (fn. 8 citing *Jackson v. Virginia,*443 U.S. 307, 318, (1979)) (emphasis added).
[26] *Albright*, at 276, (Ginsburg, J., concurring) (discussing use of force); *Duckett*, 950 F.2d at 278 (5th Cir. 1992) (discussing probable cause).

Amendment claim predicated on the same injury."[27] Plaintiff has thus failed to allege a claim for which relief may be granted pursuant to the Fourteenth Amendment.

E. An application of this case's facts to the mandatory two-prong *Hathaway* test precludes the existence of a Fourth Amendment violation, and thus Plaintiff has no claim against Officer Taylor for which relief may be granted.

11. The video footage incorporated by reference reveals no actionable Fourth Amendment violation as a matter of law pursuant to *Hathaway* and its progeny. To state an excessive force claim, a plaintiff must show "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness was ***clearly unreasonable***."[28] District Courts—including this one—across the Fifth Circuit have recognized that the two-prong *Hathaway* test is binding in "cases that involve [pedestrian officers] shooting at vehicles" ***for the purposes of the reasonableness inquiry***.[29]

12. The Fifth Circuit has reliably upheld and applied this two-prong legal test since its inception in *Hathaway*.[30] In *Hathaway*, the Fifth Circuit "surveyed the relevant case law and identified two 'central' factors in the reasonableness inquiry in these kinds of cases: (1) the

[27] *See Pineda v. W. Tex. Cmty. Supervision*, 2020 WL 466052, at *5 (W.D. Tex. Jan. 27, 2020).
[28] *Ontiveros v. City of Rosenberg*, 565 F.3d 379, 382 (5th Cir. 2009) (emphasis added).
[29] *Dudley v. Bexar County*, 5:12-CV-357-DAE, 2014 WL 6979542, at *5 (W.D. Tex. Dec. 9, 2014) (noting "[i]n cases that involve shooting at vehicles, there are two "central" factors in the reasonableness inquiry: (1) the limited time [the] officer[] ha[s] to respond to the threat from the vehicle; and (2) the closeness of the officers to the projected path of the vehicle.") (internal quotes removed); *see also Irwin*, 2021 WL 75452, at *5 (noting "[f]or cases involving deadly force by a pedestrian-officer against an individual fleeing by vehicle, the Fifth Circuit has identified two more specific considerations: (1) the limited time an officer has to respond to the threat from the vehicle; and (2) the closeness of [an] officer to the projected path of the vehicle.") (internal quotes removed); *see also Malbrough v. City of Rayne*, 2019 WL 1120064, at *11 (W.D. La. Mar. 11, 2019), aff'd sub nom. *Malbrough v. Stelly*, 814 Fed. Appx. 798 (5th Cir. 2020).
[30] *See Hathaway v. Bazany*, 507 F.3d 312, 321 (5th Cir. 2007) (adopting the temporal and proximity test) (adopting in part *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005)); *see also e.g. Sanchez v. Edwards*, 433 Fed. Appx. 272, 275 (5th Cir. 2011).

limited time an officer has to respond to the threat from the vehicle; and (2) the closeness of the officer to the projected path of the vehicle."[31]

13. The two-prong test was most recently applied by the Fifth Circuit in *Malbrough* less than one year ago to date.[32] The test turns on temporal and proximity factors. More specifically, there are "two factors in determining that the officer's use of deadly force was reasonable: (1) the limited time the officer had to respond, and (2) the officer's proximity to the path of the vehicle."[33]

i. The proximity prong of the *Hathaway* test bears out that a reasonable officer from Officer Taylor's vantage point would have considered his fellow officers to be in the possible path of Ramos's vehicle.

14. It is easier to conceptualize the *Hathaway* test here by considering the two factors inversely. The second proximity prong considers how close the endangered officers or bystanders were positioned relative to the *possible* path of the vehicle. The word "*possible"* must be emphasized, because the Fifth Circuit mandates that, for the purposes of the *Hathaway* test, the "[potentially endangered person's] location matters, but it's not relevant whether, in hindsight, he was ever in real danger. We must ask whether it would have *appeared* to a reasonable officer on the scene that [the Defendant-Officer,] other officers, or bystanders were in danger."[34] The incorporated video footage in this case clearly reflects that "it would have *appeared* to a reasonable officer"—from the perspective of Officer Taylor—the "other officers…were in danger."

[31] *Sanchez*, 433 Fed. Appx. at 275.
[32] *Malbrough v. Stelly*, 814 F. App'x 798, 803-04 (5th Cir. 2020).
[33] *Id.* at 804.
[34] *Id.* at 804 – 05.

15. The dash camera footage of APD Officer Valerie Taveres is particularly instructive regarding what a reasonable officer would have perceived from Officer Taylor's vantage point.[35] Taveres' dash cam footage depicts a rear view of four nearby pedestrian police officers who were standing to the left of Officer Taylor when he utilized deadly force in their defense. These four officers would have been in or around the direct path of Ramos's vehicle if he had continued driving straight forward rather than turning. It is the proximity of those four officers who must be legally considered for evaluating the *Hathaway* proximity prong.

16. After standing relatively motionless for several minutes, the four police officers at 7:02 begin scrambling backwards away from Ramos's vehicle as soon as it begins to move.[36] Their body language and instinctual reactions seen on video make it undeniable that they believe they might possibly be in the path of Ramos's vehicle—and thus in danger of being run over by it. More importantly here, it is undeniable that another officer witnessing such instinctual reactions would perceive that the threat to those officers was real.

17. The officers are discussed from left to right herein. As soon as Ramos's car takes off, the first officer jumps inside the leftmost police vehicle through the front driver side door to get out of the way of Ramos's car. The second officer quickly scrambles backwards to get behind the same leftmost police vehicle, ostensibly using it as a protective barrier to put the vehicle between him and Ramos's car. The third and fourth officers likewise scramble backwards to get out of the way of Ramos's car, one of whom shelters behind a different police vehicle for protection from the oncoming vehicle.[37] A reasonable police officer who perceives his fellow officers quickly jumping into—and sheltering behind—nearby vehicles as a reaction to a suspect suddenly

[35] *See* Exhibit No. 2, Supplemental Video No. 2, 03:46 – 7:23. Available at http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020 .
[36] *See* Exhibit No. 2, Supplemental Video No. 2, 07:02 – 7:08.
[37] *Id.*

driving forward would very plausibly believe those officers were in the path of the vehicle. Such a belief would be even more plausible for an officer who was dealing with a suspect who was refusing commands, acting verbally confrontational,[38] believed to have a gun,[39] and thought to have very recently ingested crack cocaine.[40] People do not scramble to get out of the way of cars headed away from them.

18. The Court also has for its consideration a top-down helicopter view of the scene soon after the shooting.[41] As the view rotates, the short, 9-second helicopter video immediately depicts the four police vehicles that arrived and were positioned specifically to block the only motor vehicle exit out of the apartment parking lot.[42] A reasonable officer would operate under the belief that—because the only motor vehicle exit was blocked by police vehicles and the officers standing next to them—Ramos's options were necessarily limited to submitting to arrest, resisting, fleeing on foot, ***or driving through and over*** the nearby police officers with his car to escape. The helicopter video also depicts a minivan parked directly in front of the strategically positioned police vehicles—perhaps one-to-two car lengths in front of them—which is clearly the same minivan parked directly to the right of Ramos's Prius when he put his car in gear and drove forward.[43] Ramos's vehicle can be seen where it eventually came to a stop after Ramos

[38] Pl. Orig. Compl, pg. 5, Dkt. # 1 ("the male subject initially complied with commands but eventually became non-compliant and verbally confrontational.").
[39] Pl. Orig. Compl, pg. 3, Dkt. # 1 (providing a transcription of the 911 call, where the caller tells the dispatcher that Ramos "has a gun. He has a gun to this lady.").
[40] Pl. Orig. Compl, pg. 3, Dkt. # 1 (providing a transcription of the 911 call, where the caller tells the dispatcher that Ramos is "in the car and smoking crack.").
[41] *See* Exhibit No. 1, Supplemental Video No. 1, 00:01 – 00:09. Available at http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020.
[42] *Id.*; *see also See* Pl. Orig. Compl, pg. 4-5, Dkt. # 1 ("Officers strategically parked their patrol vehicles, effectively blocking the exit and mitigating the risk of flight.").
[43] *Compare* Exhibit No. 1, Supplemental Video No. 1, 00:01 – 00:09; *with* Exhibit No. 3, Critical Incident Video Briefing Video, 10:48 - 11:05 (depicting minivan next to Ramos's Prius, providing reference of proximity of path of vehicle).

was incapacitated.[44] In conjunction, the videos show that Ramos's car was ***very*** close to where the pedestrian officers that were scrambling behind the depicted police vehicles, and that Plaintiff's burden of proving that no reasonable officer would perceive the scrambling officers to be potentially in the path of the vehicle will be insurmountable.

19. Plaintiff will no doubt attempt to argue that Ramos's eventual right turn meant that the subject pedestrian officers positioned in front of his car were—when viewed from the comfort and hindsight of an office chair[45]—not in real danger. Pursuant to the controlling legal test, actual but-for danger is not relevant to the analysis, just as it would make no difference if a court later determined that a suspect's gun was actually loaded with blanks. The only thing that legally matters is whether a reasonable officer would *perceive* danger in the circumstances faced. As the Fifth Circuit put it when applying the *Hathaway* test last year, Plaintiff would "[need] to show that [the other officers] were far enough away from [Ramos's Prius] and its path, as it moved forward, that no reasonable officer could have ***thought*** anyone was in danger."[46] Such a finding would be arguably impossible here in light of the video evidence. Plaintiff's claim must consequently fail pursuant to an application of the binding *Hathaway* test.

ii. Officer Taylor had only a split second to make the decision to use deadly force to potentially save the lives of his fellow police officers scrambling backwards—satisfying the temporal prong of the *Hathaway* test.

20. The temporal prong of the *Hathaway* test likewise obviates the existence of any actionable Fourth Amendment claim here, because the video footage reflects the split-second nature of the potential danger of Ramos's vehicle. The dash cam footage of Officer Cantu-

[44] Exhibit No. 1, Supplemental Video No. 1, 00:05 – 00:09.
[45] *See Stroik v. Ponseti*, 35 F.3d 155, 158–59 (5th Cir. 1994) ("[w]hat constitutes reasonable action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.").
[46] *Malbrough,* 814 Fed.Appx. at 805. (emphasis added).

Harkless,[47] as well as the helicopter video discussed *supra,* shows just how close Ramos's vehicle was to the police vehicles that the aforementioned four police officers sheltered in or behind to escape out of the perceived path of Ramos's suddenly-moving vehicle. Based on the footage, Ramos's vehicle was perhaps one—*maybe* two—car lengths away from the front of Officer Cantu-Harkless' police vehicle, and thus one-to-two car lengths away from the officers standing beside it.[48] No evidence is needed to understand how long it would take a modern motor vehicle to travel that short of a distance.[49] ***Because Ramos's vehicle could bridge that gap in a split second, Officer Taylor had even less time to make the incalculably difficult decision of whether to utilize deadly force to protect his fellow officers scrambling backwards away from the suddenly-moving car.*** Ramos's vehicle started moving at 11:01, and Officer Taylor's gunshot can be heard at 11:02.[50] The temporal prong, measured in the time the officer has to decide whether to use deadly force, applied here reflects the quintessential "split-second decision."[51] Plaintiff's incorporated video evidence thus nullifies any claim for which relief may be granted against Officer Taylor pursuant to the binding *Hathaway* test.

F. No law existed that was so clearly established that—"in the blink of an eye"—every reasonable officer would have known it immediately.

[47] *See* Exhibit No. 3, Critical Incident Video Briefing Video, 07:38 – 11:14. Available at http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020.
[48] *See e.g.* Exhibit No. 3, Critical Incident Video Briefing Video, 11:01.
[49] *See e.g.* Exhibit No. 3, Critical Incident Video Briefing Video, 11:01 – 11:02 (depicting Ramos's vehicle easily travelling the distance of one car length in less than one second).
[50] *Id*.
[51] *See Graham v. Connor*, 490 U.S. 386, 387 (1989) ("The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and ***its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation***.")(emphasis added).

21. To overcome qualified immunity, Plaintiff here must show that Officer Taylor's actions were unreasonable in light of clearly established law.[52] As noted by the Fifth Circuit in 2019, "excessive-force claims often turn on 'split-second decisions' to use lethal force. That means ***the law must be so clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately***."[53]

22. Courts "cannot deny qualified immunity without identifying a case in which an officer acting under similar circumstances was held to have violated the Fourth Amendment, and without explaining why the case clearly proscribed the conduct of that individual officer."[54] As the Fifth Circuit reiterated in a 2020 decision, "***[t]he Supreme Court strictly enforces the requirement to identify an analogous case and explain the analogy.***"[55] No such clearly established case precedent existed in April of 2020 that would have sprung into every reasonable officers' mind in the split second between when Officer Taylor's fellow officers began scrambling to escape the path of the vehicle at 11:01, and when he fired his weapon at 11:02 in the hopes of preventing them from being injured or killed.

23. The absence of the requisite clearly established law applicable to this case is reflected in *Irwin*, a January 2021 decision from the Northern District of Texas' Honorable Jane J. Boyle.[56] *Irwin* is factually proximate to this case. The *Irwin* Defendant-Officers saw the plaintiff drive into a fence, and exited their own vehicle with their firearms drawn to approach the car on foot.

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[52] *Wyatt v. Fletcher*, 718 F.3d 496, 502 (5th Cir. 2013) (citing *Michalik v. Hermann*, 422 F.3d 252, 258 (5th Cir. 2005)).
[53] *Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) (emphasis added) (*citing Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 582 (5th Cir. 2009)).
[54] *Joseph on behalf of Est. of Joseph v. Bartlett*, 981 F.3d 319, 345 (5th Cir. 2020); *see also Irwin v. Santiago,* No. 3:19-CV-2926-B, 2021 WL 75452, at *7 (N.D. Tex. Jan. 8, 2021).
[55] *Id.* at 346.
[56] *See generally Irwin v. Santiago*, No. 3:19-CV-2926-B, 2021 WL 75452, at *2 (N.D. Tex. Jan. 8, 2021).

"When Irwin's vehicle continued rolling forward despite the Defendant-Officers' commands, they collectively fired seven shots at the driver's side of Irwin's vehicle."[57] The Court noted that there was a genuine material dispute about whether or not the police officer—alleged to be in danger—was standing directly in the path of the vehicle, or whether the officer was instead only standing "to the side of the front" of the vehicle, and thus not directly in the vehicle's path.[58]

24. The *Irwin* court granted the Defendant-Officers the protections of Qualified Immunity, because the court found no significantly similar controlling legal precedents that would "provide notice that it is unlawful to shoot at a vehicle that is rolling forward, failing to heed officers' commands to stop, ***as an officer stands 'to the side of the front' of the vehicle.***"[59] Whether or not the police officers in this case were standing directly in the path of the vehicle, or merely "to the side of the front" of it, is thus irrelevant.

25. The *Irwin* court first considers the plaintiff's offering of *Lytle,* a Fifth Circuit decision holding that a jury could find a constitutional violation in Plaintiff's offered summary judgment narrative—the *Lytle* officer opened fire on a fleeing vehicle, with no bystanders anywhere near the path of the vehicle, and where the officer did not start shooting until the suspect's car "had made it three or four houses down the block."[60] In contrast, a reasonable officer in the place of Officer Taylor would absolutely perceive that his fellow officers were in the path of Ramos's vehicle based on their instinctual physical reactions to escape from the car seen on video. Moreover, Ramos's vehicle had also certainly not travelled three to four houses away before Officer Taylor discharged his weapon.

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[57] *Irwin v. Santiago*, No. 3:19-CV-2926-B, 2021 WL 75452, at *2 (N.D. Tex. Jan. 8, 2021)
[58] *Id.* at *5, 7.
[59] *Id.* at *7 (emphasis added).
[60] *Id.* at *6 (citing *Lytle v. Bexar Cty., Tex.*, 560 F.3d 404, 418 (5th Cir. 2009) (holding the cited facts as true because it was required to do so for the purposes of summary judgment).

26. The *Irwin* court next considers the plaintiff's offering of *Garner*, for the general overall notion of when deadly force is reasonable. The court rejected outright the practice of relying on *Garner* alone, rather than a factually analogous decision:

> [A]s reiterated in *Mullenix*, the Supreme Court has rejected the "use of *Garner*'s 'general' test for excessive force" as clearly established law. Rather, courts must determine "whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the situation [he] confronted[.]"[61]

The *Irwin* court also struck out on its own to find an applicable prior precedent, but ultimately determined that no such controlling precedent existed. The *Irwin* court's review of the controlling cases it did find only "further bolster[ed] the Court's conclusion that the Defendant–Officers did not have 'fair warning' that their conduct violated the Fourth Amendment."[62]

27. Finally, the *Irwin* court took note of a handful of out-of-circuit cases, but found them to be legally insufficient to put a police officer working within the confines of the Fifth Circuit on notice of the right at issue. "[T]he Fifth Circuit sets a high bar for out-of-circuit authority to clearly establish the law—there must be a 'robust' consensus among the other circuits. And the analogous cases from other circuits do not meet this bar."[63] In the time period between the 2018 conduct—analyzed in *Irwin*—and the early 2020 events of this case, no "'robust' consensus" has suddenly developed that would have provided sufficient legal notice to Officer Taylor. Officer Taylor is consequently entitled to the protections of Qualified Immunity as a matter of law.

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[61] *Id.* at *7 (citing *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)).
[62] *Id.* at *7 (citing *e.g. Sanchez*, 433 F. App'x at 273-75 (5th Cir. 2011) (per curium) (concluding the defendant–officers acted reasonably when they shot at the plaintiff's car as it accelerated in the direction of ***one of the officers, who was "positioned near the front of the car***"); *see also e.g. Est. of Shaw v. Sierra*, 366 F. App'x 522, 524 (5th Cir. 2010) (holding no constitutional violation occurred where the defendant–officers fired after the vehicle "accelerated toward [an officer] who was approaching the vehicle on foot" and standing "directly in front of [the] vehicle").
[63] *Irwin* at *7 *(*citing *Morrow v. Meachum*, 917 F.3d 870, 879–80 (5th Cir. 2019)).

III. CONCLUSION

28. The Complaint, videos, and other exhibits incorporated by reference reflect that Ramos's vehicle was pointed in the general direction of the pedestrian police officers standing mere feet away, and that Officer Taylor was forced to make a split-second decision about whether to protect his fellow police officers by using deadly force. Such evidence includes video footage of four different nearby police officers scrambling to escape the perceived path of Ramos's vehicle. Pursuant to the binding *Hathaway* test, Officer Taylor's actions consequently do not represent a Constitutional violation as a matter of law.

29. The research of defense counsel, bolstered by the *Irwin* court's own research, reflect that no analogous legal consensus was "so clearly established that—***in the blink of an eye"***—every reasonable officer would have known it immediately, within the confines of the Fifth Circuit, as of April of 2020. Because such right was not clearly established, Officer Taylor is entitled to the protections of Qualified Immunity.

IV. PRAYER

WHEREFORE PREMISES CONSIDERED, Defendant Christopher Taylor respectfully requests that the Court dismiss each of Plaintiff's claims against him, and for all other relief to which he may be justly entitled in either law or equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2021, a copy of Defendant's Motion was electronically filed on the CM/ECF system, which will automatically serve a Notice of Electronic Filing on the following attorneys of record:

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/s/ Blair J. Leake
Blair J. Leake

Exhibit 1: Video: helifootage 4-24-20.mp4

To be provided to the Court on a Flash Drive and to counsel via Drop Box link

Exhibit 2: Video: DashCam 4-24-20 (Hart).mp4

To be provided to the Court on a Flash Drive and to counsel via Drop Box link

Exhibit 3: Video: Critical Incident Briefing 4-24-20.mp4

To be provided to the Court on a Flash Drive and to counsel via Drop Box link

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS *Plaintiff*,	§ § § §	No. 1:20-cv-01256-RP
V.	§ §	
THE CITY OF AUSTIN AND CHRISTOPHER TAYLOR *Defendants*.	§ § §	JURY DEMANDED

CHRISTOPHER TAYLOR'S
ORIGINAL ANSWER

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW Defendant, **CHRISTOPHER TAYLOR** (Taylor) by and through his attorneys of record, and files this Answer to Plaintiff **BRENDA RAMOS'S** (Plaintiff Ramos) Original Complaint and in support thereof would respectfully show the Court as follows:

I. INTRODUCTION

1. On April 24, 2020, uniformed Officer Christopher Taylor of the Austin Police Department was on patrol near the intersection of E Riverside Drive and Wickersham Lane with his partner Officer Krycia. At around 6:30PM, a suspicious person call was put out via dispatch to the patrol officers of the Austin Police Department. Dispatch advised that a caller had reported that a Hispanic male and female were smoking cocaine and meth in a car parked at the Rosemont Apartments at Oak Valley on 2601 S. Pleasant Valley Drive. The car was described as a gold and black Toyota Prius.

2. As the call came in from dispatch, Taylor immediately recognized the vehicle description, and determined that this caller was likely reporting the whereabouts of Michael Ramos. Just two hours earlier, APD Officer Cantu-Harkless had briefed Taylor about Ramos at the APD daily shift meeting. At the briefing, Taylor was informed that Ramos was a known violent offender who had—***the night before***—successfully evaded pursuing officers in a vehicle believed to be stolen. Officers at the shift meeting were instructed to be on the lookout for Ramos as a person of interest in ***several*** recent criminal activities in the area, and were advised that he was suspected of driving a gold Toyota Prius with a black bumper. Two hours later, and equipped with this knowledge, Taylor assigned himself to this suspicious person call.

3. While Taylor was in the process of notifying dispatch that he would take the call, the dispatcher upgraded the call to "Gun Urgent"—which means that the suspect was reported to be armed and potentially dangerous. Once the call was upgraded, several other officers began to assign themselves to the call, and Officer Cantu-Harkless radioed patrol and confirmed that the call likely involved the same Michael Ramos being searched for by police. Due the serious nature of the call, officers made requests for extensive resources and backup. Officer Krycia requested that APD's police helicopter "AIR1" be deployed to the scene.[1] Another officer requested that a K9 Unit be deployed to the scene.

4. As Taylor approached the scene in his APD Patrol Vehicle on East Oltorf Street, he observed other officers who had assigned themselves to the call conducting an "approach plan" on the side of the road. Taylor parked and joined to listen to the approach plan. The officers decided that they would conduct a "felony car stop." To effectuate the felony stop and prevent Ramos from escaping again, the officers planned to use their patrol cars to block the only exit out

[1] AIR1 was not available to be immediately deployed to the scene.

of the parking lot. Because the suspect was seen holding a woman in the car at gunpoint, the officers determined that they should respond to the scene with their rifles drawn.

5. The officers made their approach down S Pleasant Valley and entered the parking lot of the Rosemont Apartments. Taylor and the other officers immediately identified the distinctive gold and black Prius. The Prius was reverse parked, facing forwards, and nearly directly across from parking lot exit. Having located the vehicle, the officers carried out their felony stop approach plan. Officer Hart arrived on scene first, quickly followed by Officer Cantu-Harkless and Officer Krycia. Officer Cantu-Harkless parked his patrol car almost directly in front of the Prius—canted slightly to the right. Officer Hart parked to the right of Officer Cantu-Harkless. Officer Krycia parked to the right of Officer Hart.

6. Taylor approached in his vehicle behind Officer Krycia and scanned the scene to determine where he could best use his patrol car to block any path Ramos could use to escape in his vehicle. Taylor briefly considered parking his car to the left of Officer Cantu-Harkness's patrol car on the raised grassy median, but decided against it after observing a rock in the median that would inhibit his ability to park on the grass. Simultaneously, Taylor observed that Ramos had no avenue to escape in his car to his right, because a parking lot full of cars blocked access to the street and because the parking lot reached a dead end at a large municipal dumpster.

7. Accordingly, Taylor parked his patrol car behind the other officers, exited, and took up a position on the passenger side of Officer Cantu-Harkless's patrol car with his rifle braced on the passenger side mirror. Immediately, Taylor observed that the Prius was a mere ten feet—or approximately one car length—away from the front of Officer Cantu-Harkless's patrol car.

8. Once positioned, Taylor could see a male in the driver's seat of the Prius and a female in the passenger seat who matched the report from dispatch. Officer Cantu-Harkless and Officer

Hart began to give numerous commands to the driver and the passenger to keep their hands up and visible. The driver slowly opened his door. Officer Cantu-Harkless then positively identified the searched-for Michael Ramos, and issued commands to step out of the vehicle. Ramos stepped out with his hands up and appeared to be complying with commands. Officer Cantu-Harkless commanded Ramos to lift up his shirt so that the officers on scene could see if Ramos had a gun in his waistband. Again, Ramos complied and made a quick movement that lifted up his shirt—allowing Taylor and the other officers to see if the reported gun was in his front waistband.

9. Officer Cantu-Harkless commanded Ramos to slowly turn around in a circle so that Taylor and the other officers could see if the reported gun was tucked into the back of his waistband. Ramos again complied, but Ramos made the decision to simultaneously walk back towards the driver's side door of the Prius. Ramos's decision to walk back towards the driver's door alarmed Taylor, and made him suspect that Ramos was considering getting back in the Prius. Taylor yelled for Ramos to "come towards us!" Officer Cantu-Harkless repeated this command seconds later, saying, "Michael Ramos, you are going to get impacted[2] if you don't listen, walk towards me." Michael Ramos replied by saying "what the fuck," and refused to comply with the commands issued to him. Taylor also noticed Ramos casting his gaze around the scene, and believed Ramos was potentially stalling and looking for an avenue of escape.

10. With Ramos demonstrating clear non-compliance—including by refusing to step away from the Prius—Taylor called out to his fellow officers "do we have a less lethal?" Taylor believed the situation potentially needed to be deescalated with a less lethal option ***before*** Ramos got back into the Prius—where the gun reported by dispatch might be hidden. Taylor also knew that, with APD officers blocking the only motor vehicle exit, if Ramos got back into his vehicle,

[2] Referring to a less than lethal projectiles.

the only possible way Ramos could flee the scene was by driving toward him and his fellow APD officers.

11. Officer Mitchell Pieper then walked up behind Taylor and Officer Hart, and declared that he possessed the "less lethal" shotgun.[3] Still fearing Ramos's reported gun or a dangerous flight attempt, Taylor immediately called out for Officer Pieper to "move up" so that he could be ready to impact Ramos.[4] By now, Ramos was leaning up against the side of the Prius driver's side door and continued to take small furtive steps towards its interior. Officer Hart similarly called for Officer Pieper to "go with it" and be prepared to impact Ramos. All the while, Ramos continued his movements toward the Prius, and had now placed the driver's door in-between himself and the APD officers. Officers called out "don't go back [to the car]" and Taylor called out to Officer Pieper "impact up, impact up," while Officer Hart also called out "impact up, get it ready."

12. Unfortunately, Ramos's position behind the car door deprived Officer Pieper of an angle to use the less lethal rounds to deescalate the situation, and Officer Pieper advised, "I can't, I don't have an angle, I'm going to have to go to the right." Taylor, still trying to deescalate the situation, told Officer Pieper to "take a deep breath, and reposition to the right side of that car." As Officer Pieper repositioned, Officer Cantu-Harkless loudly commanded Ramos to "get on your knees." Michael Ramos responded, "what the fuck you trippin' on, dog" and refused to comply. Simultaneously, Officer Taylor and several other officers yelled out "impact him" to gain control of the scene.

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[3] Less lethal options have been shown to reduce the likelihood of serious injuries compared to alternative force options. *See* John M. MacDonald, PhD, *The Effect of Less-Lethal Weapons on Injuries in Police Use-of-Force Events*, AM J. PUBLIC HEALTH, (Dec. 2009) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2775771/.

[4] "Impact" in this context is a verb used to describe discharing a less lethal round at a suspect.

13. Officer Pieper, now repositioned farther to the right, screamed, "walk towards us or I'm going to impact you!" Michael Ramos shouted, "[i]mpact me? For what?" Officer Pieper yelled, "walk towards us! Comply with us! Comply with us!" Ramos remained where he was, non-compliant. Officer Pieper screamed, "impacting!" and hit Michael Ramos with a less lethal round in the left thigh.

14. Taylor saw the less lethal round hit Ramos, and saw a furious looking Ramos ***immediately*** get back into the Prius—despite officer's screaming at him to "get out of the car."[5] Taylor, ***now closely watching Ramos***, saw Ramos lean forward and reach down toward the floorboard of the car. At that moment, Taylor believed Michael Ramos was reaching for a gun, and prepared himself. As Ramos sat up straight in the driver seat, Taylor did not see a gun, but instead saw Ramos shift the vehicle into drive.

15. In mere seconds, Taylor had to synthesize and consider the facts that: (1) Ramos had a history of violence; (2) APD had been called to the scene because Ramos was reported to have held a woman at gunpoint; (3) Ramos had successfully fled from police the night before; (4) Ramos was potentially high on cocaine and/or methamphetamine; and (5) Ramos was actively non-compliant and verbally confrontational; and (6) Ramos's only plausible avenue of escape in his vehicle ***was to drive through—and over—him or his fellow APD officers***. Thus, APD Officer Christopher Taylor reasonably believed at that moment that Michael Ramos had just armed himself with a deadly weapon—his vehicle—and that Ramos was an individual that would plausibly run over him or his fellow police officers in his desperation to escape custody.

16. Taylor further reasonably believed that he and his fellow APD officers were in direct danger due to their proximity to Ramos's projected path of escape, because the Prius was reverse parked and facing directly towards the officers positioned on the left side of Officer Cantu-

[5] By this moment the female passenger had fled from the car.

Harkless's patrol car. Taylor also knew that because the Prius was merely one car length away, he would only have a split second to react if Ramos accelerated the car forward to escape. Due to the extremely short distance between the nearby police officers and the Prius, ***Taylor knew that any hesitation to act on his part could result in serious injury or death for the nearby police officers. His decision was thus limited to two options: either to act immediately, or to not act at all and risk his fellow officer's lives.*** Unfortunately, Ramos made the decision to drive forward to flee. When he did, Officer Taylor—in the split-second available to him—chose the option that he believed was necessary to save his fellow officers' lives.

II. ORIGINAL ANSWER

17. With respect to Paragraph 1 of Plaintiff Ramos's Original Complaint, Taylor admits that he has been sued for the shooting death of Ramos on April 24, 2020. Taylor denies that he knew Ramos did not have a gun at the moment he made the decision to shoot. Taylor further denies that Ramos was "unarmed" as Ramos had armed himself with a vehicle—a deadly weapon.[6]

18. With respect to Paragraph 2 of Plaintiff Ramos's Original Complaint, Taylor admits that cell phone video and police video captured the incident, the contents of which speak for themselves. Taylor denies that the Austin Police Department "dehumanizes" the citizens it serves.

19. With respect to Paragraph 3 of Plaintiff Ramos's Original Complaint, Taylor denies that his fears were irrational for the reasons stated herein. Taylor denies that he violated Ramos's civil rights.

[6] *See* TEX. PEN. CODE § 1.07 (17)(B) ("Deadly weapon means: anything that in the manner of its use or intended use is capable of causing death or serious bodily injury"); *see also Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005) ("A motor vehicle may become a deadly weapon if the manner of its use is capable of causing death or serious bodily injury.") (citations omitted).

20. With respect to Paragraph 4 of Plaintiff Ramos's Original Complaint, Taylor admits that Ramos has sued him and the City of Austin. Taylor denies that he was "unjustified" in taking the actions he did.

21. With respect to Paragraph 5 of Plaintiff Ramos's Original Complaint, Taylor has no knowledge of the stated events.

22. With respect to Paragraph 6 of Plaintiff Ramos's Original Complaint, admit.

23. With respect to Paragraph 7 of Plaintiff Ramos's Original Complaint, Taylor admits he was an Austin police officer at the time of the incident.

24. With respect to Paragraphs 8 – 11 of Plaintiff Ramos's Original Complaint, admit.

25. With respect to Paragraph 12 of Plaintiff Ramos's Original Complaint, Taylor denies that he shot Ramos without justification. Further, Taylor denies that he or any other APD officer at the scene could have known Ramos did not have a gun until they arrested him and searched the Prius. Taylor denies any insinuation by Plaintiff that he or any APD officer at the scene of the incident had reason to believe Ramos was being "swatted." Taylor admits that a caller reported a suspicious person with a gun matching Ramos's description. The recorded contents of the 911 call to dispatch speak for itself.

26. With respect to Paragraph 13 of Plaintiff Ramos's Original Complaint, Taylor admits that former APD Chief Brian Manley gave numerous recorded statements to the press about this incident, the contents of which speak for itself. Taylor denies Ramos's assertion in footnote seven that APD's decision to block Ramos's only exit avenue for his vehicle with police personnel and patrol cars means that Taylor irrationally believed Ramos intended to use the Prius as a deadly weapon to escape. This assertion rests on a logical fallacy. Rather, if APD personnel are blocking the ***only escape for a vehicle*****,** then any attempt to escape with a vehicle would be

inherently dangerous because Ramos's only escape plan would have involved driving through APD officers.

27. With respect to Paragraph 14 of Plaintiff Ramos's Original Complaint, Taylor admits that Chief Manley made a report to the Attorney General. Taylor admits that numerous officers were shouting commands at Ramos, but Taylor denies these orders were conflicting. All officers were essentially commanding Ramos to come towards them with his hands up. It was only after Ramos moved back towards the Prius that officers began telling him to get on his knees. Taylor admits that the video recordings captured audio of officer commands, the contents of which speak for themselves. Taylor admits that Ramos was verbally combative and insisted that the officers disarm. Taylor denies Plaintiff's assertion in footnote eight that it is "confounding" that officers desired to use less lethal force to deescalate the situation. Taylor also denies Plaintiff's footnoted insinuation that Ramos was complying with officer commands, or that the officers could have known that Ramos did not have a gun in the Prius, or somewhere else on his person other than his waistband. The 911 call gave any reasonable police officer sufficient reason to fear that Ramos was in possession of a gun.

28. With respect to Paragraph 15 of Plaintiff Ramos's Original Complaint, Taylor denies Ramos was not an ongoing threat to officer safety. Officers had reason to fear that Ramos had a gun in the car, and had personally observed Ramos being verbally combative, non-compliant, and continuously making furtive movements back towards the open car door. Taylor denies Plaintiff's characterization that Ramos "simply" got back in his car. Ramos took this action after a less lethal means of subdual failed, and officers had every reason to believe that Ramos got back into his car with the intention to flee the scene or retrieve a firearm. Taylor further denies

Plaintiff's characterization of Ramos's driving behavior. Taylor admits that he never saw a gun in Ramos's possession. Taylor admits that Ramos was shot in the head.

29. With respect to Paragraph 16 of Plaintiff Ramos's Original Complaint, Taylor has no knowledge of the 2016 study referenced by Ramos. Taylor denies that he has witnessed actions by City of Austin officials that lead him to suspect the City has a policy or custom of institutional racism in policing.

30. With respect to Paragraph 17 of Plaintiff Ramos's Original Complaint, Taylor recalls hearing about these statements by the Austin City Counsel indirectly. Taylor denies that he has witnessed actions by Austin Police Department officers that lead him to suspect the Department has a policy or custom of institutional racism in policing.

31. With respect to Paragraph 18 – 19 of Plaintiff Ramos's Original Complaint, Taylor recalls that he was made aware of this report. Taylor denies that he has witnessed actions by Austin Police Department officers that lead him to suspect the Department has a policy or custom of institutional racism in policing.

32. With respect to Paragraph 20 of Plaintiff Ramos's Original Complaint, Taylor admits he has seen officers use foul language, but denies direct knowledge of the specific behavior referenced by Plaintiff Ramos. Taylor admits that he was made aware of the general nature of the independent investigator's report. Otherwise, denied.

33. With respect to Paragraph 21 of Plaintiff Ramos's Original Complaint, ***Taylor denies that race had anything to do with his decision to use deadly force against Ramos.*** Taylor denies that the decision to use deadly force against Ramos was unjustified for the reasons stated herein. Taylor denies that he has witnessed actions by APD officers or City Officials that lead him to suspect the City of Austin has a custom or policy of institutional racism.

34. With respect to Paragraphs 23 – 25 of Plaintiff Ramos's Original Complaint, Taylor admits he was acting under color of law when he made the decision to shoot Ramos. Taylor denies that he observed Ramos driving away from APD officers when he made the decision to shoot. Taylor denies that he did not reasonably believe that Ramos posed an immediate threat of serious injury or death to his fellow APD officers. Taylor denies Ramos's assertion that the use of lethal force was not justified under the law within the Fifth Circuit or the Supreme Court of the United States, and further denies that the law clearly established that his conduct was unconstitutional. Otherwise, denied.

35. With respect to Paragraphs 26 – 31 of Plaintiff Ramos's Original Complaint, Taylor denies that he has witnessed behavior to the extent that leads him to believe that the City of Austin has a custom or policy of: (1) racism in policing; (2) inadequate training as to a citizen's constitutional rights; (3) inadequate supervision of officers; (4) failing to intervene to stop excessive force; (5) failing to investigate allegations of excessive force; or (6) failing to punish excessive force.

36. With respect to Paragraphs 29 – 30 of Plaintiff Ramos's Original Complaint, Taylor has no knowledge of the subjective state of mind of the City of Austin or former Chief Brian Manley. Otherwise, denied.

37. With respect to Paragraph 31 of Plaintiff Ramos's Original Complaint, Taylor denies that Ramos's civil rights were violated, and further denies that his actions were taken pursuant to an impermissible or unconstitutional City custom or policy.

38. With respect to Paragraphs 32 – 34 of Plaintiff Ramos's Original Complaint, Taylor denies Plaintiff Ramos is entitled to any recovery against him for her alleged damage model.

III. JURY DEMAND

39. Defendant Christopher Taylor demands a jury trial.

IV. AFFIRMATIVE DEFENSES & IMMUNITIES

40. Taylor files this Answer subject to his pending motion to dismiss.

41. Taylor denies any deprivation under color of statute, ordinance, custom, or abuses of any rights, privileges, or immunities secured to Ramos by the United States Constitution, state law, or 42 U.S.C. § 1983, *et seq*.

42. Taylor hereby invokes the doctrine of qualified and official immunity, and asserts he discharged his obligations and public duties in good faith, and would show that his actions were objectively reasonable in light of the law and with the information possessed at that time.

43. The incident in question and the resulting harm to Ramos were caused or contributed to by Ramos's own illegal conduct.

44. Pleading further, alternatively, and by way of affirmative defense, Taylor would show that at the time and on the occasion in question, Ramos failed to use ***any*** degree of care or caution that a person of ordinary prudence would have used under the same or similar circumstances, and that such failure was the producing cause or the sole proximate cause of the incident in question and the alleged damages that arise therefrom. Taylor invokes the comparative responsibility provisions of the Texas Civil Practice & Remedies Code.[7]

45. Taylor further pleads that in the unlikely event that any liability is found on the part of Taylor, that such liability be reduced by the percentage of the causation found to have resulted from the acts or omissions of Ramos.

46. Taylor pleads that he had legal justification for each and every action taken by him relating to this incident.

[7] *See* TEX. CIV. PRAC & REM. CODE ANN. § 33.001.

47. Taylor asserts the limitations and protections of Chapter 41 of the Texas Civil Practice & Remedies Code, and the due process clause of the United States Constitution.

48. Taylor asserts the limitations and protections of Chapter 101 of the Texas Civil Practice & Remedies Code.

V. PRAYER

49. WHEREFORE, PREMISES CONSIDERED, Defendant Christopher Taylor prays that upon a final hearing of this cause that the Court enter judgment that Plaintiff Ramos take nothing by this suit against Taylor, that all costs of court be assessed against Plaintiff, and for all further relief Taylor is entitled to in either law or equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2021, a copy of Defendant Taylor's Original Answer to Plaintiff's Complaint was electronically filed on the CM/ECF system, which will automatically serve a Notice of Electronic Filing on the following attorneys of record:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS Plaintiff, V. THE CITY OF AUSTIN AND CHRISTOPHER TAYLOR Defendants.	§ § § § § § § § §	No. 1:20-cv-01256-RP JURY DEMANDED

DEFENDANT CHRISTOPHER TAYLOR'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND SUPPORTING BRIEF

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES Defendant, Christopher Taylor (hereinafter "Officer Taylor"), the individual defendant in the above-entitled and numbered cause, and moves that this Court dismiss Plaintiff's First Amended Complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted, and in support would respectfully show the Court as follows:

I. SUMMARY OF THE ARGUMENT

1. The videos incorporated into Plaintiff's First Amended Complaint reflect that Officer Christopher Taylor's conduct did not constitute a violation of the Fourth Amendment as a matter of law. The Fifth Circuit mandates the use of its two-prong *Hathaway* test for analyzing cases where pedestrian officers shoot into vehicles. The *Hathaway* test thus must be applied to this case's facts to determine if no reasonable police officer would have believed Ramos posed a threat to the officers standing in front of his car.

2. The *Hathaway* test's prongs deal with (1) time, and (2) perceived proximity, respectively. Applied here, Officer Taylor had (1) a split second—the amount of time it takes for a car to travel approximately one-to-two car lengths—to decide whether to use deadly force to stop a car that (2) ***his fellow police officers were actively scrambling away from to escape the car's path***. Pursuant to such test, reasonable officers witnessing those circumstances could have considered Ramos's car a potentially deadly threat to the officers scrambling away from it, and that using deadly force to stop that deadly threat would not be unreasonable.

3. Officer Christopher Taylor is also entitled to Qualified Immunity. The Supreme Court strictly enforces the requirement to identify an analogous case and explain the analogy for the purposes of satisfying the "clearly established law" prong of Qualified Immunity. *Irwin* was decided in January 2021 on largely similar facts—after commands to stop were refused, police officers fired at the driver of a car driving toward the general direction of the police officers. The *Irwin* court searched through pre-existing controlling case law, found no factually similar analogous cases, and granted the Officer-Defendants Qualified Immunity as a result. Officer Taylor likewise lacked any such pre-existing precedents that could legally operate to strip him of the protections of Qualified Immunity in the case at bar.

II. ARGUMENTS & AUTHORITIES

A. Standard for Dismissal under Rule 12(b)(6).

4. A motion to dismiss pursuant to Rule 12(b)(6) challenges a plaintiff's complaint on the basis that it fails to state a claim upon which relief may be granted.[1] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[2] "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.[3] "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."[4] "To withstand a Rule 12(b)(6) motion, [a] complaint must allege 'more than labels and conclusions,'" and "a formulaic recitation of the elements of a cause of action will not do."[5]

5. For the purposes of Rule 12(b)(6), a complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"[6] A "complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief – including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'"[7] "Conversely, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum

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[1] *See* FED. R. CIV. P. 12(b)(6).
[2] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
[3] *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).
[4] *Id*. (quoting *Twombly* at 556).
[5] *Norris v. Hearst Tr.*, 500 F.3d 454, 464 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).
[6] *Iqbal*, 556 U.S. at 678.
[7] *Cuvillier v. Sullivan*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).

expenditure of time and money by the parties and the court."[8] A court need not "strain to find inferences favorable to the plaintiffs."[9]

B. Standard for Qualified Immunity.

6. Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss an action barred by Qualified Immunity.[10] It is Plaintiff's burden to plead and prove specific facts overcoming Qualified Immunity for each applicable claim.[11] Courts use a two-prong analysis to determine whether an officer is entitled to Qualified Immunity.[12] A plaintiff must show (1) the official violated a constitutional right; and (2) the constitutional right was "clearly established" at the time of the defendant's alleged misconduct.[13] If Plaintiff fails to satisfy either prong here, Officer Taylor is immune from suit as a matter of law.[14]

7. A right is clearly established when "the contours of the right [are] sufficiently clear [such] that a reasonable official would understand that what he is doing violated that right."[15] Because Qualified Immunity shields "all but the plainly incompetent or those who knowingly violate the law***," the Fifth Circuit considers Qualified Immunity "the norm," and admonishes***

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[8] *Id.* (quotation and alteration omitted).
[9] *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 361 (5th Cir. 2004) (quoting *Westfall v. Miller*, 77 F.3d 868, 870 (5th Cir. 1996)).
[10] *See Bustillos v. El Paso Cnty. Hosp. Dist.*, 226 F. Supp. 3d 778, 793 (W.D. Tex. 2016) (Martinez, J.) (dismissing a plaintiff's claim based on qualified immunity).
[11] *See Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009); *see also Elliot v. Perez,* 751 F.2d 1472, 1479 (5th Cir. 1985).
[12] *Cole v. Carson*, No. 14-10228, 2019 WL 3928715, at *5 (5th Cir. Aug. 20, 2019), as revised (Aug. 21, 2019).
[13] *Reed v. Taylor*, 923 F.3d 411, 414 (5th Cir. 2019).
[14] *Zarnow v. City of Wichita Falls*, 500 F.3d 401, 407 (5th Cir. 2007).
[15] *Werneck v. Garcia*, 591 F.2d 386, 392 (5th Cir. 2009) (citations omitted); *see also Freeman v. Gore*, 483 F.3d 404, 411 (5th Cir. 2007) (the court applies an objective standard "based on the viewpoint of a reasonable official in light of the information available to the defendant and the law that was clearly established at the time of defendant's actions."); *see also Kinney v. Weaver*, 367 F.3d 337, 349-50 (5th Cir. 2004), quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

courts to "deny a defendant [Qualified] immunity only in rare circumstances."[16] Officer Taylor raises the defense of Qualified Immunity here in response to all of Plaintiff's claims alleged against him.[17] It is thus Plaintiff's burden to plead and prove that Officer Taylor is not entitled to such protections. Plaintiff's Complaint—especially when viewed alongside the videos it incorporates—fails to meet that burden.

C. Videos of the subject incident have been incorporated by reference for this Court's consideration—and take precedence over the Complaint itself.

8. Pursuant to controlling Fifth Circuit and Supreme Court precedents, "court[s] may take into account documents incorporated into the complaint by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned" when analyzing a 12(b)(6) motion to dismiss.[18] In addition to documents, videos may also be incorporated by reference, including but not limited to body cam and dash cam videos as part of motions to dismiss §1983 claims.[19]

9. The first page of Plaintiff's First Amended Complaint references "Austin police dashcam and body-worn camera videos" of the subject incident, and provides hyperlinks for the Court to retrieve and view such videos.[20] One of the hyperlinks directs to a City of Austin website that contains the cited videos in a manner obviously intended for public consumption, making the videos inherently "matters of public record" that this Court may consider for the purposes of this

[16] *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (internal quotation marks omitted) (emphasis added).
[17] *See generally* Pl. First Amd. Compl., Dkt. # 5.
[18] *Meyers v. Textron, Inc.*, 540 Fed.Appx. 408, 409 (5th Cir. 2013) (per curiam) (*citing Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (also citing § 1357 Motion to Dismiss Practice Under Rule 12(b)(6)).
[19] *Scott v. White*, No. 1:16-CV-1287-RP, 2018 WL 2014093, * 1 (W.D. Tex. April 30, 2018).
[20] Pl. First Amd. Compl., pg. 1, fn. 1 – 2, Dkt. # 5.

motion.[21] If an allegation in a complaint is contradicted by the contents of an exhibit incorporated by reference into the complaint, then "***indeed the exhibit and not the allegation controls***."[22] Accordingly, this Court may consider the subject incident videos to be both relevant and controlling when determining whether or not Plaintiff's First Amended Complaint contains a claim against Officer Taylor for which relief may be granted.

D. Plaintiff has failed to state a claim pursuant to the Fourteenth Amendment for which relief may be granted.

10. Plaintiff has no recourse under the Fourteenth Amendment, and her claims brought pursuant to it should be dismissed.[23] "The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it."[24] The Fourteenth Amendment guarantees substantive due process rights associated with trial, conviction, and ensuing incarceration, ***but not*** due process rights associated with unreasonable search and seizure under the Fourth Amendment.[25] All claims arising from the use of excessive force "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."[26] "A viable Fourth Amendment claim essentially precludes any Fourteenth

[21] Pl. First Amd. Compl, pg. 1, fn. 2, Dkt. # 5.
[22] *See U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 377 (5th Cir. 2004) (emphasis added) (*citing Simmons v. Peavy–Welsh Lumber Co.*, 113 F.2d 812, 813 (5th Cir.), cert. denied, 311 U.S. 685 (1940).
[23] *See* Pl. First Amd. Compl, pg. 11, Dkt. # 5.
[24] *Albright v. Oliver*, 510 U.S. 266, 274 (1994).
[25] *See Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 919, fn. 8 (2017) (fn. 8 citing *Jackson v. Virginia,*443 U.S. 307, 318 (1979)) (emphasis added).
[26] *Albright*, at 276, (Ginsburg, J., concurring) (discussing use of force); *Duckett v. City of Cedar Park*, 950 F.2d 272, 278 (5th Cir. 1992) (discussing probable cause).

Amendment claim predicated on the same injury."[27] Plaintiff has thus failed to allege a Fourteenth Amendment claim for which relief may be granted.

E. An application of this case's facts to the mandatory two-prong *Hathaway* test precludes the existence of a Fourth Amendment violation, and thus Plaintiff has no claim against Officer Taylor for which relief may be granted.

11. The video footage incorporated by reference reveals no actionable Fourth Amendment violation as a matter of law pursuant to *Hathaway* and its progeny. To state an excessive force claim, a plaintiff must show "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness was ***clearly unreasonable***."[28] District Courts—including this one—across the Fifth Circuit have recognized that the two-prong *Hathaway* test is binding in "cases that involve [pedestrian officers] shooting at vehicles" ***for the purposes of the reasonableness inquiry***.[29]

12. The Fifth Circuit has reliably upheld and applied this two-prong legal test since its inception in *Hathaway*.[30] In *Hathaway*, the Fifth Circuit "surveyed the relevant case law and identified two 'central' factors in the reasonableness inquiry in these kinds of cases: (1) the

[27] *See Pineda v. W. Tex. Cmty. Supervision*, 2020 WL 466052, at *5 (W.D. Tex. Jan. 27, 2020).
[28] *Ontiveros v. City of Rosenberg*, 565 F.3d 379, 382 (5th Cir. 2009) (emphasis added).
[29] *Dudley v. Bexar County*, 5:12-CV-357-DAE, 2014 WL 6979542, at *5 (W.D. Tex. Dec. 9, 2014) (noting "[i]n cases that involve shooting at vehicles, there are two "central" factors in the reasonableness inquiry: (1) the limited time [the] officer[] ha[s] to respond to the threat from the vehicle; and (2) the closeness of the officers to the projected path of the vehicle.") (internal quotes removed); *see also Irwin*, 2021 WL 75452, at *5 (noting "[f]or cases involving deadly force by a pedestrian-officer against an individual fleeing by vehicle, the Fifth Circuit has identified two more specific considerations: (1) the limited time an officer has to respond to the threat from the vehicle; and (2) the closeness of [an] officer to the projected path of the vehicle.") (internal quotes removed); *see also Malbrough v. City of Rayne*, 2019 WL 1120064, at *11 (W.D. La. Mar. 11, 2019), aff'd sub nom. *Malbrough v. Stelly*, 814 Fed. Appx. 798 (5th Cir. 2020).
[30] *See Hathaway v. Bazany*, 507 F.3d 312, 321 (5th Cir. 2007) (adopting the temporal and proximity test) (adopting in part *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005)); *see also e.g. Sanchez v. Edwards*, 433 Fed. Appx. 272, 275 (5th Cir. 2011).

limited time an officer has to respond to the threat from the vehicle; and (2) the closeness of the officer to the projected path of the vehicle."[31]

13. The two-prong test was most recently applied by the Fifth Circuit in *Malbrough* less than one year ago to date.[32] Therein, the Fifth Circuit reiterated that there are "two factors in determining that the officer's use of deadly force was reasonable [in cases involving shooting at vehicles]: (1) the limited time the officer had to respond, and (2) the officer's proximity to the path of the vehicle."[33]

i. The proximity prong of the *Hathaway* test bears out that a reasonable officer from Officer Taylor's vantage point would have considered his fellow officers to be in the possible path of Ramos's vehicle.

14. It is easier to conceptualize the *Hathaway* test here by considering the two factors inversely. The second proximity prong considers how close the endangered officers or bystanders were positioned relative to the *possible* path of the vehicle. The word "*possible"* must be emphasized, because the Fifth Circuit mandates that, for the purposes of the *Hathaway* test, the "[potentially endangered person's] location matters, but it's not relevant whether, in hindsight, he was ever in real danger. We must ask whether it would have ***appeared*** to a reasonable officer on the scene that [the Defendant-Officer,] other officers, or bystanders were in danger."[34] In the case at bar, the incorporated video footage clearly reflects that "it would have ***appeared*** to a reasonable officer"—from the perspective of Officer Taylor—the "other officers…were in danger."

[31] *Sanchez*, 433 Fed. Appx. at 275.
[32] *Malbrough v. Stelly*, 814 F. App'x 798, 803-04 (5th Cir. 2020).
[33] *Id.* at 804.
[34] *Id.* at 804 – 05. (emphasis in original)

15. The dash camera footage of APD Officer Valerie Taveres is particularly instructive regarding what a reasonable officer would have perceived from Officer Taylor's vantage point.[35] Taveres' dash cam footage depicts a rear view of four nearby pedestrian police officers standing to the left of Officer Taylor when he utilized deadly force in their defense. These four officers would have been in—or at least in close proximity to—the direct path of Ramos's vehicle if he had continued driving straight forward rather than turning. It is the proximity of those four officers who must be legally considered for evaluating the *Hathaway* proximity prong.

16. After standing relatively motionless for several minutes, the four police officers at 7:02 begin scrambling backwards away from Ramos's vehicle as soon as it begins to move.[36] Their body language and instinctual reactions seen on video make it undeniable that they believe they might possibly be in the path of Ramos's vehicle—and thus in danger of being run over by it. More importantly here, it is undeniable that another officer witnessing such instinctual reactions would perceive that the threat to those officers was real.

17. The officers are discussed from left to right herein. As soon as Ramos's car takes off, the first officer jumps inside the leftmost police vehicle through the front driver side door to get out of the way of Ramos's car. The second officer quickly scrambles backwards to get behind the same leftmost police vehicle, ostensibly using it as a protective barrier to put the vehicle between him and Ramos's car. The third and fourth officers likewise scramble backwards to get out of the way of Ramos's car, one of whom shelters behind a different police vehicle for protection from Ramos's oncoming vehicle.[37] A reasonable police officer who perceives his fellow officers reacting to a suspect's vehicle lurching forward by jumping into—and sheltering behind—nearby

[35] *See* Exhibit No. 2, Supplemental Video No. 2, 03:46 – 7:23. Available at http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020 .
[36] *See* Exhibit No. 2, Supplemental Video No. 2, 07:02 – 7:08.
[37] *Id.*

vehicles would very plausibly believe those officers were in the path of the vehicle. Such a belief would be even more plausible for an officer who was dealing with a suspect who the officer knew[38] was refusing commands, acting verbally confrontational,[39] believed to have been recently pointing a gun at a nearby woman,[40] and thought to have recently ingested crack cocaine.[41] People do not scramble to get out of the way of cars headed away from them.

18. The Court also has for its consideration a top-down helicopter view of the scene soon after the shooting.[42] As the view rotates, the short, 9-second helicopter video immediately depicts the four police vehicles that arrived and were positioned specifically to block the only motor vehicle exit out of the apartment parking lot.[43] A reasonable officer would operate under the belief that—because the only motor vehicle exit was blocked by police vehicles and the officers standing next to them—Ramos's options were necessarily limited to submitting to arrest, resisting, fleeing on foot, ***or driving through and over*** the nearby police officers with his car to escape. The helicopter video also depicts a minivan parked directly in front of the strategically

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[38] *See Escarcega v. Jordan*, 701 F. App'x 338 (5th Cir. 2017) (holding that "a reasonable officer, ***with knowledge that [the plaintiff 'had committed several dangerous offenses' and was potentially within arm's reach of one or more guns***], could have perceived [the plaintiff] as posing an immediate threat to the safety of officers and the public," and affirming the officer's Qualified Immunity.);

[39] Pl. First Amd. Compl, pg. 5, Dkt. # 5 ("the male subject initially complied with commands but eventually became non-compliant and verbally confrontational.").

[40] Pl. First Amd. Compl, pg. 3, Dkt. # 5 (providing a transcription of the 911 call, where the caller tells the dispatcher that Ramos "has a gun. He has a gun to this lady.").

[41] Pl. First Amd. Compl, pg. 3, Dkt. # 5 (providing a transcription of the 911 call, where the caller tells the dispatcher that Ramos is "in the car and smoking crack."); *see also Alpha v. Hooper*, 440 F.3d 670, 671 (5th Cir. 2006) (In civil rights actions wherein ***officer shot at suspect driver driving toward him***, the court held that the officer's suspicion that the plaintiff had ingested ***methamphetamines***—and evidence that the plaintiff had indeed ingested methamphetamines—was ***relevant and admissible*** evidence in the Qualified Immunity context.).

[42] *See* Exhibit No. 1, Supplemental Video No. 1, 00:01 – 00:09. Available at http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020.

[43] *Id.*; *see also See* Pl. First Amd. Compl, pg. 4-5, Dkt. # 5 ("Officers strategically parked their patrol vehicles, effectively blocking the exit and mitigating the risk of flight.").

positioned police vehicles—perhaps one-to-two car lengths in front of them—which is clearly the same minivan parked directly to the right of Ramos's Prius when he put his car in gear and drove forward.[44] Ramos's vehicle can be seen where it eventually came to a stop after Ramos was incapacitated.[45] In conjunction, the videos show that Ramos's car was ***very*** close in proximity to where the pedestrian officers were scrambling behind the police vehicles to get out of the way, and that Plaintiff's burden of proving that no reasonable officer would perceive the scrambling officers to be potentially in the path of the vehicle will be insurmountable.

19. Plaintiff will no doubt attempt to argue that Ramos's car's eventual right turn meant that the subject pedestrian officers positioned in front of his car were—when viewed from the comfort and hindsight of an office chair[46]—not in real danger. Pursuant to the controlling legal test, actual but-for danger is not relevant to the analysis, just as it would make no difference if a court later determined that a suspect's gun was actually loaded with blanks. The only thing that legally matters is whether a reasonable officer would *perceive* danger in the circumstances faced. As the Fifth Circuit put it when applying the *Hathaway* test last year, Plaintiff would "[need] to show that [the other officers] were far enough away from [Ramos's Prius] and its path, as it moved forward, that no reasonable officer could have ***thought*** anyone was in danger."[47] Such a finding would be arguably impossible here in light of the video evidence. Plaintiff's claim must consequently fail pursuant to an application of the binding *Hathaway* test.

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[44] *Compare* Exhibit No. 1, Supplemental Video No. 1, 00:01 – 00:09; *with* Exhibit No. 3, Critical Incident Video Briefing Video, 10:48 - 11:05 (depicting minivan next to Ramos's Prius, providing reference of proximity of path of vehicle).
[45] Exhibit No. 1, Supplemental Video No. 1, 00:05 – 00:09.
[46] *See Stroik v. Ponseti*, 35 F.3d 155, 158–59 (5th Cir. 1994) ("[w]hat constitutes reasonable action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.").
[47] *Malbrough,* 814 Fed.Appx. at 805. (emphasis added).

ii. Officer Taylor had only a split second to make the decision to use deadly force to potentially save the lives of the nearby police officers scrambling out of the car's path—satisfying the temporal prong of the *Hathaway* test.

20. The temporal prong of the *Hathaway* test likewise obviates the existence of any actionable Fourth Amendment claim here, because the video footage reflects the split-second nature of the potential danger of Ramos's vehicle. The dash cam footage of Officer Cantu-Harkless,[48] as well as the helicopter video discussed *supra,* shows just how close Ramos's vehicle was to the police officers who scrambled to get out of the car's path. Based on the footage, Ramos's vehicle was perhaps one—*maybe* two—car lengths away from the front of Officer Cantu-Harkless' police vehicle, and thus one-to-two car lengths away from the officers standing beside it.[49] No evidence is needed to understand how long it would take a modern motor vehicle to travel that short of a distance.[50] ***Because Ramos's vehicle could bridge that gap in a split second, Officer Taylor had even less time to make the incalculably difficult decision of whether to utilize deadly force to protect the nearby officers scrambling backwards away from the suddenly-moving car.*** Ramos's vehicle started moving at 11:01, and Officer Taylor's gunshot can be heard at 11:02.[51] The temporal prong, measured in the time the officer has to decide whether to use deadly force, applied here reflects the quintessential "split-second decision" that federal law gives police officers breathing room to decide under the protections of Qualified Immunity.[52] Plaintiff's incorporated video evidence thus nullifies any claim for which

[48] *See* Exhibit No. 3, Critical Incident Video Briefing Video, 07:38 – 11:14. Available at http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020.
[49] *See e.g.* Exhibit No. 3, Critical Incident Video Briefing Video, 11:01.
[50] *See e.g.* Exhibit No. 3, Critical Incident Video Briefing Video, 11:01 – 11:02 (depicting Ramos's vehicle easily travelling the distance of one car length in less than one second).
[51] *Id*.
[52] *See Graham v. Connor*, 490 U.S. 386, 387 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and ***its calculus must embody an allowance for the fact that police officers are often forced to make split-***

relief may be granted against Officer Taylor pursuant to the binding *Hathaway* test under both the proximity and temporal prongs.

F. No law existed that was so clearly established that—"in the blink of an eye"—every reasonable officer would have known it immediately.

21. To overcome Qualified Immunity, Plaintiff here must show that Officer Taylor's actions were unreasonable in light of clearly established law.[53] As noted by the Fifth Circuit in 2019, "excessive-force claims often turn on 'split-second decisions' to use lethal force. That means ***the law must be so clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately***."[54]

22. Courts "cannot deny qualified immunity without identifying a case in which an officer acting under similar circumstances was held to have violated the Fourth Amendment, and without explaining why the case clearly proscribed the conduct of that individual officer."[55] As the Fifth Circuit reiterated in a 2020 decision, "***[t]he Supreme Court strictly enforces the requirement to identify an analogous case and explain the analogy.***"[56] No such clearly established case precedent existed in April of 2020 that would have sprung into every reasonable officers' mind in the split second between when Officer Taylor's fellow officers began scrambling to escape the path of the vehicle at 11:01, and when he fired his weapon at 11:02 in the hopes of preventing them from being injured or killed.

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second decisions about the amount of force necessary in a particular situation.")(emphasis added).

[53] *Wyatt v. Fletcher*, 718 F.3d 496, 502 (5th Cir. 2013) (citing *Michalik v. Hermann*, 422 F.3d 252, 258 (5th Cir. 2005)).

[54] *Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) (emphasis added) (citing *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 582 (5th Cir. 2009)).

[55] *Joseph on behalf of Est. of Joseph v. Bartlett*, 981 F.3d 319, 345 (5th Cir. 2020); *see also Irwin v. Santiago,* No. 3:19-CV-2926-B, 2021 WL 75452, at *7 (N.D. Tex. Jan. 8, 2021).

[56] *Joseph on behalf of Est. of Joseph v. Bartlett*, 981 F.3d at 346.

23. The absence of the requisite clearly established law applicable to this case is reflected in *Irwin*, a January 2021 decision from the Northern District of Texas' Honorable Jane J. Boyle.[57] *Irwin* is factually proximate to this case. The *Irwin* Defendant-Officers saw the plaintiff drive into a fence, and exited their own vehicle with their firearms drawn to approach the car on foot. "When Irwin's vehicle continued rolling forward despite the Defendant-Officers' commands, they collectively fired seven shots at the driver's side of Irwin's vehicle."[58] The Court noted that there was a genuine material dispute about whether or not the police officer alleged to be in danger was standing directly in the path of the vehicle, or whether the officer was instead only standing "to the side of the front" of the vehicle, and thus not directly in the vehicle's path.[59]

24. The *Irwin* court granted the Defendant-Officers the protections of Qualified Immunity, because the court found no significantly similar controlling legal precedents that would "provide notice that it is unlawful to shoot at a vehicle that is rolling forward, failing to heed officers' commands to stop, ***as an officer stands 'to the side of the front' of the vehicle.***"[60] Whether or not the police officers in the case at bar were standing ***directly*** in the path of Ramos's vehicle, or merely "to the side of the front" of it, is thus irrelevant.

25. The *Irwin* court first considered the plaintiff's offering of *Lytle,* a Fifth Circuit decision holding that a jury could find a constitutional violation in the plaintiff's offered summary judgment narrative—the *Lytle* officer opened fire on a fleeing vehicle, with no bystanders anywhere near the path of the vehicle, and where the officer did not start shooting until the

[57] *See generally Irwin v. Santiago*, No. 3:19-CV-2926-B, 2021 WL 75452, at *2 (N.D. Tex. Jan. 8, 2021).
[58] *Irwin v. Santiago*, No. 3:19-CV-2926-B, 2021 WL 75452, at *2 (N.D. Tex. Jan. 8, 2021)
[59] *Id.* at *5, 7.
[60] *Id.* at *7 (emphasis added).

suspect's car "had made it three or four houses down the block."[61] In contrast, a reasonable officer in the place of Officer Taylor would absolutely perceive that his fellow officers were in the path of Ramos's vehicle based on their instinctual physical reactions to escape from the car seen on video. Moreover, Ramos's vehicle had also certainly not travelled three to four houses away before Officer Taylor discharged his weapon.

26. The *Irwin* court next considered the plaintiff's offering of *Garner*, for the general overall notion of when deadly force is reasonable. The court rejected outright the practice of relying on *Garner* alone, rather than a factually analogous decision:

> [A]s reiterated in *Mullenix*, the Supreme Court has rejected the "use of *Garner*'s 'general' test for excessive force" as clearly established law. Rather, courts must determine "whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the situation [he] confronted[.]"[62]

The *Irwin* court also struck out on its own to find an applicable prior precedent, but ultimately determined that no such controlling precedent existed. The *Irwin* court's review of the controlling cases it did find only "further bolster[ed] the Court's conclusion that the Defendant–Officers did not have 'fair warning' that their conduct violated the Fourth Amendment."[63]

27. Finally, the *Irwin* court took note of a handful of out-of-circuit cases, but found them to be legally insufficient to put a police officer working within the confines of the Fifth Circuit on notice of the right at issue. "[T]he Fifth Circuit sets a high bar for out-of-circuit authority to clearly establish the law—there must be a 'robust' consensus among the other circuits. And the

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[61] *Id.* at *6 (citing *Lytle v. Bexar Cty., Tex.*, 560 F.3d 404, 418 (5th Cir. 2009) (holding the cited facts as true because it was required to do so for the purposes of summary judgment).
[62] *Id.* at *7 (citing *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)).
[63] *Id.* at *7 (citing *e.g. Sanchez*, 433 F. App'x at 273-75 (5th Cir. 2011) (per curium) (concluding the defendant–officers acted reasonably when they shot at the plaintiff's car as it accelerated in the direction of ***one of the officers, who was "positioned near the front of the car***"); *see also e.g. Est. of Shaw v. Sierra*, 366 F. App'x 522, 524 (5th Cir. 2010) (holding no constitutional violation occurred where the defendant–officers fired after the vehicle "accelerated toward [an officer] who was approaching the vehicle on foot" and standing "directly in front of [the] vehicle").

analogous cases from other circuits do not meet this bar."[64] In the time period between the 2018 conduct—analyzed in *Irwin*—and the early 2020 events of this case, no "'robust' consensus" has suddenly developed that would have provided sufficient legal notice to Officer Taylor that shooting at a driver who is driving toward officers scrambling to get out of the way would be unconstitutional—and especially not to the extent that every officer would know it "in the blink of an eye." Officer Taylor is consequently entitled to the protections of Qualified Immunity as a matter of law.

III. CONCLUSION

28. The First Amended Complaint, videos, and other exhibits incorporated by reference reflect that a reasonable officer in Officer Taylor's position would perceive the nearby police officers to potentially be in the path of Ramos's vehicle—if for no other reason than seeing those nearby officers undeniably scrambling to get out of the way once the car started to move. The incorporated video footage also shows that those nearby officers were standing approximately one car length away from Ramos's vehicle when it lurched forward. A modern motor vehicle can travel one car length in a heartbeat, which is the correspondingly the same amount of time Officer Taylor had to make the split-second decision about whether to protect those nearby police officers by using deadly force. Pursuant to the binding *Hathaway* Fifth Circuit test, Officer Taylor's actions consequently do not represent a Constitutional violation as a matter of law.

29. The research of defense counsel, bolstered by the *Irwin* court's own research, reflect that no analogous legal consensus existed that was "so clearly established that—***in the blink of an eye"***—every reasonable officer would have known it immediately, within the confines of the

[64] *Irwin* at *7 *(*citing *Morrow v. Meachum*, 917 F.3d 870, 879–80 (5th Cir. 2019)).

Fifth Circuit, as of April of 2020. Because such right was not clearly established, Officer Taylor is entitled to the protections of Qualified Immunity.

IV. PRAYER

WHEREFORE PREMISES CONSIDERED, Defendant Christopher Taylor respectfully requests that the Court dismiss each of Plaintiff's claims against him, and for all other and further relief to which he may be justly entitled in either law or equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2021, a copy of Defendant's Motion was electronically filed on the CM/ECF system, which will automatically serve a Notice of Electronic Filing on the following attorneys of record:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS	§	
Plaintiff,	§	**CIVIL ACTION NO. 1:20-cv-1256-RP**
v.	§	
CITY OF AUSTIN AND CHRISTOPHER TAYLOR,	§	
Defendants.	§	

DEFENDANT CITY OF AUSTIN'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant City of Austin files this Motion to Dismiss Plaintiff's First Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure as follows:

I. NATURE OF THE LAWSUIT

Plaintiff brings this civil rights action as a result of injuries and damages she alleges she sustained as the result of the death of her son, Mike Ramos, during an officer-involved shooting in a parking lot of an apartment complex in Austin, Texas on April 24, 2020. Plaintiff filed her First Amended Complaint against the City and Officer Christopher Taylor alleging various constitutional violations under 42 U.S.C. §1983. (Doc. 5). In particular, Plaintiff alleges that the City's "institutionally racist and aggressive policing culture" and policies led to Ramos's death. Plaintiff also asserts that the City's inadequate training, supervision, investigation and discipline constituted a deliberate indifference to a deprivation of constitutional rights in this case.

For the reasons set forth below, the Court should dismiss all of Plaintiff's claims against the City since Plaintiff's allegations fail to state a claim upon which relief can be granted. *See* Fed. R.

Civ. P. 12(b)(6).

II. MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

In reviewing a motion to dismiss, the "court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (internal quotes and citations omitted). To overcome a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *see also Culberson v. Lykos*, 790 F.3d 608, 616 (5th Cir. 2015). A plaintiff's lawsuit will not survive a motion to dismiss if the facts pleaded do not raise the right to relief "above the speculative level," even if the facts are viewed in the light most favorable to the plaintiff. *Twombly*, 550 U.S. at 555. "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Taylor v. Books A Million*, 296 F.3d 376, 378 (5th Cir. 2002) (quoting *Fernandez–Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993)).

III. PLAINTIFF'S SECTION 1983 CLAIMS AGAINST THE CITY SHOULD BE DISMISSED.

A. Insufficient Facts to Establish a Policy or Practice

Contrary to federal pleading requirements, Plaintiff failed to plead an express policy of the Austin Police Department that led to any of the alleged constitutional violations. It is well-settled that to bring a Section 1983 suit against a city, a plaintiff must allege the implementation or execution of a policy or custom that was officially adopted by the city. Specifically, "[a]

plaintiff must identify: '(1) an official policy (or custom), of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy or custom.'" *Valle v. City of Houston*, 613 F.3d 536, 541-42 (5th Cir. 2010) (quoting *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002). Liability can attach only through "acts directly attributed to it through some official action or imprimatur." *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009) (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)) (internal quotations removed). *Respondeat superior* liability is insufficient to establish constitutional liability against a city. *See Monell v. Dep't of Social Service of City of New York*, 436 U.S. 658 (1978).

Moreover, the Fifth Circuit has recently confirmed that to survive a motion to dismiss, a plaintiff's *Monell* pleadings "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ratliff v. Aransas County*, 948 F.3d 281, 285 (5th Cir. 2020), quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In *Ratliff*, the Fifth Circuit affirmed the dismissal of the plaintiff's *Monell* claim when the complaint failed to establish an official custom or policy of excessive force because the only facts the plaintiff alleged with any specificity related to the incident which was the subject of the lawsuit. *Id.* "[T]o plead a practice so persistent and widespread as to practically have the force of law, [the plaintiff] must do more than describe the incident that gave rise to his injury." *Id.*, quoting *Pena v. Rio Grande City*, 879 F.3d 613, 622 (5th Cir. 2018).

Plaintiff cites to investigative reports regarding alleged racist behavior of individuals within the Austin Police Department and the Austin City Council's criticism of Department leadership's alleged inadequate implementation of measures to eradicate police bias and racism. (Doc. 5, ¶¶ 16-21). Any argument that the findings of these investigative reports constitutes a

pattern tantamount to official policy fails. A plaintiff may show a "persistent, widespread practice of City officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Piotrowski*, 237 F.3d at 579 (quoting *Webster v. City of Houston*, 735 F.2d 838, (5th Cir. 1984) (en banc)). However, "[a]ctions of officers or employees of a municipality do not render the municipality liable under section 1983 unless they execute official policy as above defined." *Id.*

Plaintiff's Amended Complaint does not contain sufficient factual allegations to sustain such a claim. "A pattern requires similarity and specificity; '[p]rior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question.'" *Peterson v. City of Fort Worth*, 588 F.3d 838, 851-52 (5th Cir. 2009)(quoting *Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 383 (5th Cir. 2005). A pattern sufficient to support a *Monell* claim cannot be established by previous bad acts of the municipality unless those bad acts are specific and similar to the violation in question. *Id.; see also Crawford v. Caddo Parish Coroner's Office*, 2019 WL 943411, Feb. 25, 2019 (W.D. Louisiana)(Rule 12(b)(6) motion granted when plaintiff failed to allege specific facts to demonstrate policy or pattern of depriving African-Americans of fair and unbiased criminal procedures).

Here, Plaintiff's allegation of a pattern or custom of a "racist and violent policing culture" consists of an investigative report's documentation of a former assistant police chief's use of racist language and "anecdotal history" of other racist or sexist language of APD personnel. (Doc. 5, ¶ 20) None of these prior bad acts are specific and similar to the alleged violation in this case, i.e., Taylor's use of deadly force on Ramos. Plaintiff makes no allegations that any alleged pattern or practice of APD consisted of prior bad acts which were specific and similar to Taylor's use of

deadly force. Plaintiff's Amended Complaint fails to allege non-conclusory facts sufficient to establish an actual policy or custom of the Austin Police Department. As a result, this claim fails as a matter of law.

B. Insufficient Facts to Establish Moving Force Causation

Plaintiff's Amended Complaint alleges unconstitutional conduct by Officer Taylor, and the Amended Complaint is filled with general conclusions that Taylor acted pursuant to policies, practices, and customs of the City. The Amended Complaint contains a number of specific factual allegations regarding the incident itself and the actions of the officer along with detailed facts about Ramos's death. The Plaintiff also asserts that the City fostered an "institutionally racist and aggressive policing culture." The Amended Complaint, however, does not contain any specific non-conclusory facts to support the Plaintiff's claim that the alleged "policing culture" was the moving force of the alleged constitutional violation committed by Officer Taylor.

Plaintiff alleges that the "institutionally racist and aggressive policing culture" is demonstrated by several studies and reports that concluded that Austin police officers used more violence in minority neighborhoods and that African-Americans and Hispanics were more likely to be searched and arrested by APD officers during traffic stops. (Doc. 5, ¶¶ 17-19) However, the facts of this incident as alleged in the Amended Complaint did not involve a traffic stop or the search of a minority suspect during a traffic stop. Instead, as set forth in the Amended Complaint, this incident arose out of the Austin Police Department's response to a 911 call about a man pointing a gun at a woman while they were in a vehicle parked in an apartment complex parking lot. (Doc. 5, ¶ 12)

In order to hold a municipality liable under Section 1983 for the misconduct of one of its employees, a plaintiff must initially allege that an official policy or custom "was a cause in fact of

the deprivation of rights inflicted. *Spiller v. City of Texas City, Police Dept.*, 130 F.3d 162, 167 (5th Cir. 1997), quoting *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994). The description of a policy or custom and its relationship to the underlying constitutional violation, moreover, cannot be conclusory, it must contain specific facts. *Spiller*, 130 F.3d at 167.

In *Spiller*, the Fifth Circuit affirmed the trial court's dismissal under Fed. R. Civ. P. 12 (b)(6) of a plaintiff's §1983 claim against a municipality for the alleged wrongful arrest of the plaintiff for disorderly conduct. *Spiller*, 130 F.3d at 167. The plaintiff contended that the police department had policies of operating "in a manner of total disregard for the rights of African American citizens" and "engag[ing] in conduct toward African American citizens without regard to probable cause to arrest." *Id.* The Fifth Circuit found that the plaintiff's complaint failed to allege specific non-conclusory facts to demonstrate how these alleged policies were causally connected to the officer's alleged misconduct. *Id.*

The Plaintiff in this case likewise fails to allege specific non-conclusory facts that demonstrate that the officer's alleged constitutional violation was caused by the City's alleged policy or custom of racially disproportionate traffic stops. Plaintiff's conclusory allegations of moving force causation are clearly insufficient to support a *Monell* claim. Plaintiff makes the conclusory allegation that her son's death "is a direct result of the racism that has permeated policing in Austin," but offers no specific facts to support a claim that the alleged racism was the moving force of her son's death.

The Plaintiff's only other factual allegations regarding the City's alleged policies and customs are citations to investigative reports regarding alleged racist behavior of individuals within the Austin Police Department and the Austin City Council's criticism of Department leadership's alleged inadequate implementation of measures to eradicate police bias and racism. (Doc. 5, ¶¶ 20-

21). Yet, again, Plaintiff alleges no specific, non-conclusory facts which demonstrate that bias or racism played any role in this incident much less was the moving force of the death of Ramos. Plaintiff's Amended Complaint points to no action or statement of Officer Taylor or others that demonstrates that any "racist culture" of the Austin Police Department was the moving force of Taylor's decision to use deadly force on Ramos. As a result, Plaintiff's claim against the City fails as a matter of law.

C. Inadequate Training and Supervision Policies.

Plaintiff also alleges that the City had a policy, practice or custom of "[t]raining officers to use excessive force against Black people by purposefully using racist training materials…" (Doc. 5, ¶ 28a) "A municipality's culpability for a deprivation of right is at its most tenuous where the claim turns upon a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). Failure-to-train claims require sufficient factual allegations to allow the court to draw the reasonable inference that: (1) the municipality's training procedures were inadequate; (2) the municipality was deliberately indifferent in adopting its training policy; and (3) the inadequate training policy directly caused the constitutional violation. *See Sanders-Burns v. City of Plano*, 594 F.3d 366, 381 (5th Cir. 2010). Further, a failure to train claim cannot be based upon a single incident. Rather, a plaintiff must demonstrate "at least a pattern of similar incidents in which the citizens were injured . . . to establish the official policy requisite to municipal liability under section 1983." *Snyder v. Trepagier*, 142 F.3d 791, 798 (5th Cir. 1998) (quoting *Rodrigues,* 871 F.2d at 554-55.

For liability to attach based upon an inadequate training claim, the plaintiff "must allege with specificity how a particular training program is defective." *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005). With either a failure to train or failure to supervise claim, the plaintiff must show: "(1) the supervisor either failed to supervise or train the subordinate

official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Goodman v. Harris County,* 571 F.3d 388, 395 (5th Cir. 2009); *Waters v. City of Hearne,* 2015 WL 10767483, (W.D. Tex. January 14, 2015)(insufficient allegations of inadequate training or policy of racially profiling ethnic minorities for purpose of investigative stops).

Here, Plaintiff has not included any specific, non-conclusory facts which support a claim for either failure to train or supervise. The Amended Complaint fails to identify an actual, specific training policy, describe any training procedures, and fails to provide *any* factual support to show a plausible conclusion that the City was indifferent to unconstitutional police action. Plaintiff's Amended Complaint contains no factual allegations regarding the City's existing training policies or the training or supervision provided to Officer Taylor. Similarly, the Amended Complaint contains no facts regarding deliberate indifference in adopting its policies, and no non-conclusory facts that show that any such training or supervision directly caused the alleged constitutional violation. Therefore, this claim should be dismissed.

D. Inadequate Disciplinary Policies.

Plaintiff alleges that the City had inadequate disciplinary policies by "[h]abitually condoning excessive force against people of color…" and "requiring that administrative investigations exonerate officers of excessive force." (Doc. 5.1, ¶28 (a)(d)). Again, Plaintiff's Amended Complaint provides only conclusory allegations with no specific factual allegations about the City's disciplinary policies. Plaintiff has not alleged any prior complaints against the individual defendant or any pattern of complaints by other citizens. Plaintiff has not presented non-conclusory factual allegations about deliberate indifference in adopting the disciplinary policies.

Absent these kinds of allegations, Plaintiff fails to state a claim upon which relief can be granted. *See Piotrowski*, 237 F.3d at 581-82. Finally, there are no non-conclusory factual allegations to show that the alleged inadequate disciplinary or investigatory policies were the moving force behind Plaintiff's alleged constitutional injuries. Therefore, this claim should be dismissed.

PRAYER

Defendant City of Austin respectfully requests that the Court grant its Motion to Dismiss and dismiss all claims against the City of Austin with prejudice and with all costs assessed to the Plaintiffs.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this 2nd day of April, 2021

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS *Plaintiff*,	§ § § §	No. 1:20-cv-01256-RP
V.	§ §	
THE CITY OF AUSTIN AND CHRISTOPHER TAYLOR *Defendants*.	§ § §	JURY DEMANDED

CHRISTOPHER TAYLOR'S ANSWER
TO PLAINTIFF'S FIRST AMENDED COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW Defendant, **CHRISTOPHER TAYLOR** (Taylor) by and through his attorneys of record, and files this Answer to Plaintiff **BRENDA RAMOS'S** (Plaintiff Ramos) First Amended Complaint and in support thereof would respectfully show the Court as follows:

I. INTRODUCTION

1. On April 24, 2020, uniformed Officer Christopher Taylor of the Austin Police Department was on patrol near the intersection of E Riverside Drive and Wickersham Lane with his partner Officer Krycia. At around 6:30PM, a suspicious person call was put out via dispatch to the patrol officers of the Austin Police Department. Dispatch advised that a caller had reported that a Hispanic male and female were smoking cocaine and meth in a car parked at the Rosemont Apartments at Oak Valley on 2601 S. Pleasant Valley Drive. The car was described as a gold and black Toyota Prius.

2. As the call came in from dispatch, Taylor immediately recognized the vehicle description, and determined that this caller was likely reporting the whereabouts of Michael Ramos. Just two hours earlier, APD Officer Cantu-Harkless had briefed Taylor about Ramos at the APD daily shift meeting. At the briefing, Taylor was informed that Ramos was a known violent offender who had—***the night before***—successfully evaded pursuing officers in a vehicle believed to be stolen. Officers at the shift meeting were instructed to be on the lookout for Ramos as a person of interest in ***several*** recent criminal activities in the area, and were advised that he was suspected of driving a gold Toyota Prius with a black bumper. Two hours later, and equipped with this knowledge, Taylor assigned himself to this suspicious person call.

3. While Taylor was in the process of notifying dispatch that he would take the call, the dispatcher upgraded the call to "Gun Urgent"—which means that the suspect was reported to be armed and potentially dangerous. Once the call was upgraded, several other officers began to assign themselves to the call, and Officer Cantu-Harkless radioed patrol and confirmed that the call likely involved the same Michael Ramos being searched for by police. Due the serious nature of the call, officers made requests for extensive resources and backup. Officer Krycia requested that APD's police helicopter "AIR1" be deployed to the scene.[1] Another officer requested that a K9 Unit be deployed to the scene.

4. As Taylor approached the scene in his APD Patrol Vehicle on East Oltorf Street, he observed other officers who had assigned themselves to the call conducting an "approach plan" on the side of the road. Taylor parked and joined to listen to the approach plan. The officers decided that they would conduct a "felony car stop." To effectuate the felony stop and prevent Ramos from escaping again, the officers planned to use their patrol cars to block the only exit out

[1] AIR1 was not available to be immediately deployed to the scene.

of the parking lot. Because the suspect was seen holding a woman in the car at gunpoint, the officers determined that they should respond to the scene with their rifles drawn.

5. The officers made their approach down S Pleasant Valley and entered the parking lot of the Rosemont Apartments. Taylor and the other officers immediately identified the distinctive gold and black Prius. The Prius was reverse parked, facing forwards, and nearly directly across from parking lot exit. Having located the vehicle, the officers carried out their felony stop approach plan. Officer Hart arrived on scene first, quickly followed by Officer Cantu-Harkless and Officer Krycia. Officer Cantu-Harkless parked his patrol car almost directly in front of the Prius—canted slightly to the right. Officer Hart parked to the right of Officer Cantu-Harkless. Officer Krycia parked to the right of Officer Hart.

6. Taylor approached in his vehicle behind Officer Krycia and scanned the scene to determine where he could best use his patrol car to block any path Ramos could use to escape in his vehicle. Taylor briefly considered parking his car to the left of Officer Cantu-Harkness's patrol car on the raised grassy median, but decided against it after observing a rock in the median that would inhibit his ability to park on the grass. Simultaneously, Taylor observed that Ramos had no avenue to escape in his car to his right, because a parking lot full of cars blocked access to the street and because the parking lot reached a dead end at a large municipal dumpster.

7. Accordingly, Taylor parked his patrol car behind the other officers, exited, and took up a position on the passenger side of Officer Cantu-Harkless's patrol car with his rifle braced on the passenger side mirror. Immediately, Taylor observed that the Prius was a mere ten feet—or approximately one car length—away from the front of Officer Cantu-Harkless's patrol car.

8. Once positioned, Taylor could see a male in the driver's seat of the Prius and a female in the passenger seat who matched the report from dispatch. Officer Cantu-Harkless and Officer

Hart began to give numerous commands to the driver and the passenger to keep their hands up and visible. The driver slowly opened his door. Officer Cantu-Harkless then positively identified the searched-for Michael Ramos, and issued commands to step out of the vehicle. Ramos stepped out with his hands up and appeared to be complying with commands. Officer Cantu-Harkless commanded Ramos to lift up his shirt so that the officers on scene could see if Ramos had a gun in his waistband. Again, Ramos complied and made a quick movement that lifted up his shirt—allowing Taylor and the other officers to see if the reported gun was in his front waistband.

9. Officer Cantu-Harkless commanded Ramos to slowly turn around in a circle so that Taylor and the other officers could see if the reported gun was tucked into the back of his waistband. Ramos again complied, but Ramos made the decision to simultaneously walk back towards the driver's side door of the Prius. Ramos's decision to walk back towards the driver's door alarmed Taylor, and made him suspect that Ramos was considering getting back in the Prius. Taylor yelled for Ramos to "come towards us!" Officer Cantu-Harkless repeated this command seconds later, saying, "Michael Ramos, you are going to get impacted[2] if you don't listen, walk towards me." Michael Ramos replied by saying "what the fuck," and refused to comply with the commands issued to him. Taylor also noticed Ramos casting his gaze around the scene, and believed Ramos was potentially stalling and looking for an avenue of escape.

10. With Ramos demonstrating clear non-compliance—including by refusing to step away from the Prius—Taylor called out to his fellow officers "do we have a less lethal?" Taylor believed the situation potentially needed to be deescalated with a less lethal option ***before*** Ramos got back into the Prius—where the gun reported by dispatch might be hidden. Taylor also knew that, with APD officers blocking the only motor vehicle exit, if Ramos got back into his vehicle,

[2] Referring to a less than lethal projectiles.

the only possible way Ramos could flee the scene was by driving toward him and his fellow APD officers.

11. Officer Mitchell Pieper then walked up behind Taylor and Officer Hart, and declared that he possessed the "less lethal" shotgun.[3] Still fearing Ramos's reported gun or a dangerous flight attempt, Taylor immediately called out for Officer Pieper to "move up" so that he could be ready to impact Ramos.[4] By now, Ramos was leaning up against the side of the Prius driver's side door and continued to take small furtive steps towards its interior. Officer Hart similarly called for Officer Pieper to "go with it" and be prepared to impact Ramos. All the while, Ramos continued his movements toward the Prius, and had now placed the driver's door in-between himself and the APD officers. Officers called out "don't go back [to the car]" and Taylor called out to Officer Pieper "impact up, impact up," while Officer Hart also called out "impact up, get it ready."

12. Unfortunately, Ramos's position behind the car door deprived Officer Pieper of an angle to use the less lethal rounds to deescalate the situation, and Officer Pieper advised, "I can't, I don't have an angle, I'm going to have to go to the right." Taylor, still trying to deescalate the situation, told Officer Pieper to "take a deep breath, and reposition to the right side of that car." As Officer Pieper repositioned, Officer Cantu-Harkless loudly commanded Ramos to "get on your knees." Michael Ramos responded, "what the fuck you trippin' on, dog" and refused to comply. Simultaneously, Officer Taylor and several other officers yelled out "impact him" to gain control of the scene.

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[3] Less lethal options have been shown to reduce the likelihood of serious injuries compared to alternative force options. *See* John M. MacDonald, PhD, *The Effect of Less-Lethal Weapons on Injuries in Police Use-of-Force Events*, AM J. PUBLIC HEALTH, (Dec. 2009) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2775771/.

[4] "Impact" in this context is a verb used to describe discharing a less lethal round at a suspect.

13. Officer Pieper, now repositioned farther to the right, screamed, "walk towards us or I'm going to impact you!" Michael Ramos shouted, "[i]mpact me? For what?" Officer Pieper yelled, "walk towards us! Comply with us! Comply with us!" Ramos remained where he was, non-compliant. Officer Pieper screamed, "impacting!" and hit Michael Ramos with a less lethal round in the left thigh.

14. Taylor saw the less lethal round hit Ramos, and saw a furious looking Ramos ***immediately*** get back into the Prius—despite officer's screaming at him to "get out of the car."[5] Taylor, ***now closely watching Ramos***, saw Ramos lean forward and reach down toward the floorboard of the car. At that moment, Taylor believed Michael Ramos was reaching for a gun, and prepared himself. As Ramos sat up straight in the driver seat, Taylor did not see a gun, but instead saw Ramos shift the vehicle into drive.

15. In mere seconds, Taylor had to synthesize and consider the facts that: (1) Ramos had a history of violence; (2) APD had been called to the scene because Ramos was reported to have held a woman at gunpoint; (3) Ramos had successfully fled from police the night before; (4) Ramos was potentially high on cocaine and/or methamphetamine; and (5) Ramos was actively non-compliant and verbally confrontational; and (6) Ramos's only plausible avenue of escape in his vehicle ***was to drive through—and over—him or his fellow APD officers***. Thus, APD Officer Christopher Taylor reasonably believed at that moment that Michael Ramos had just armed himself with a deadly weapon—his vehicle—and that Ramos was an individual that would plausibly run over him or his fellow police officers in his desperation to escape custody.

16. Taylor further reasonably believed that he and his fellow APD officers were in direct danger due to their proximity to Ramos's projected path of escape, because the Prius was reverse parked and facing directly towards the officers positioned on the left side of Officer Cantu-

[5] By this moment the female passenger had fled from the car.

Harkless's patrol car. Taylor also knew that because the Prius was merely one car length away, he would only have a split second to react if Ramos accelerated the car forward to escape. Due to the extremely short distance between the nearby police officers and the Prius, ***Taylor knew that any hesitation to act on his part could result in serious injury or death for the nearby police officers. His decision was thus limited to two options: either to act immediately, or to not act at all and risk his fellow officer's lives.*** Unfortunately, Ramos made the decision to drive forward to flee. When he did, Officer Taylor—in the split-second available to him—chose the option that he believed was necessary to save his fellow officers' lives.

II. FIRST AMENDED ANSWER

17. With respect to Paragraph 1 of Plaintiff Ramos's First Amended Complaint, Taylor admits that he has been sued for the shooting death of Ramos on April 24, 2020. Taylor denies that he knew Ramos did not have a gun at the moment he made the decision to shoot. Taylor further denies that Ramos was "unarmed" as Ramos had armed himself with a vehicle—a deadly weapon.[6]

18. With respect to Paragraph 2 of Plaintiff Ramos's First Amended Complaint, Taylor admits that cell phone video and police video captured the incident, the contents of which speak for themselves. Taylor denies that the Austin Police Department "dehumanizes" the citizens it serves.

19. With respect to Paragraph 3 of Plaintiff Ramos's First Amended Complaint, Taylor denies that his fears were irrational for the reasons stated herein. Taylor denies that he violated Ramos's civil rights.

[6] *See* TEX. PEN. CODE § 1.07 (17)(B) ("Deadly weapon means: anything that in the manner of its use or intended use is capable of causing death or serious bodily injury"); *see also Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005) ("A motor vehicle may become a deadly weapon if the manner of its use is capable of causing death or serious bodily injury.") (citations omitted).

20. With respect to Paragraph 4 of Plaintiff Ramos's First Amended Complaint, Taylor admits that Ramos has sued him and the City of Austin. Taylor denies that he was "unjustified" in taking the actions he did.

21. With respect to Paragraph 5 of Plaintiff Ramos's First Amended Complaint, Taylor has no knowledge of the stated events.

22. With respect to Paragraph 6 of Plaintiff Ramos's First Amended Complaint, admit.

23. With respect to Paragraph 7 of Plaintiff Ramos's First Amended Complaint, Taylor admits he was an Austin police officer at the time of the incident.

24. With respect to Paragraphs 8 – 11 of Plaintiff Ramos's First Amended, admit.

25. With respect to Paragraph 12 of Plaintiff Ramos's First Amended Complaint, Taylor denies that he shot Ramos without justification. Further, Taylor denies that he or any other APD officer at the scene could have known Ramos did not have a gun until they arrested him and searched the Prius. Taylor denies any insinuation by Plaintiff that he or any APD officer at the scene of the incident had reason to believe Ramos was being "swatted." Taylor admits that a caller reported a suspicious person with a gun matching Ramos's description. The recorded contents of the 911 call to dispatch speak for itself.

26. With respect to Paragraph 13 of Plaintiff Ramos's First Amended Complaint, Taylor admits that former APD Chief Brian Manley gave numerous recorded statements to the press about this incident, the contents of which speak for itself. Taylor denies Ramos's assertion in footnote seven that APD's decision to block Ramos's only exit avenue for his vehicle with police personnel and patrol cars means that Taylor irrationally believed Ramos intended to use the Prius as a deadly weapon to escape. This assertion rests on a logical fallacy. Rather, if APD personnel are blocking the ***only escape for a vehicle*****,** then any attempt to escape with a vehicle would be

inherently dangerous because Ramos's only escape plan would have involved driving through APD officers.

27. With respect to Paragraph 14 of Plaintiff Ramos's First Amended Complaint, Taylor admits that Chief Manley made a report to the Attorney General. Taylor admits that numerous officers were shouting commands at Ramos, but Taylor denies these orders were conflicting. All officers were essentially commanding Ramos to come towards them with his hands up. It was only after Ramos moved back towards the Prius that officers began telling him to get on his knees. Taylor admits that the video recordings captured audio of officer commands, the contents of which speak for themselves. Taylor admits that Ramos was verbally combative and insisted that the officers disarm. Taylor denies Plaintiff's assertion in footnote eight that it is "confounding" that officers desired to use less lethal force to deescalate the situation. Taylor also denies Plaintiff's footnoted insinuation that Ramos was complying with officer commands, or that the officers could have known that Ramos did not have a gun in the Prius, or somewhere else on his person other than his waistband. The 911 call gave any reasonable police officer sufficient reason to fear that Ramos was in possession of a gun.

28. With respect to Paragraph 15 of Plaintiff Ramos's First Amended Complaint, Taylor denies Ramos was not an ongoing threat to officer safety. Officers had reason to fear that Ramos had a gun in the car, and had personally observed Ramos being verbally combative, non-compliant, and continuously making furtive movements back towards the open car door. Taylor denies Plaintiff's characterization that Ramos "simply" got back in his car. Ramos took this action after a less lethal means of subdual failed, and officers had every reason to believe that Ramos got back into his car with the intention to flee the scene or retrieve a firearm. Taylor

further denies Plaintiff's characterization of Ramos's driving behavior. Taylor admits that he never saw a gun in Ramos's possession. Taylor admits that Ramos was shot in the head.

29. With respect to Paragraph 16 of Plaintiff Ramos's First Amended Complaint, Taylor has no knowledge of the 2016 study referenced by Ramos. Taylor denies that he has witnessed actions by City of Austin officials that lead him to suspect the City has a policy or custom of institutional racism in policing.

30. With respect to Paragraph 17 of Plaintiff Ramos's First Amended Complaint, Taylor recalls hearing about these statements by the Austin City Counsel indirectly. Taylor denies that he has witnessed actions by Austin Police Department officers that lead him to suspect the Department has a policy or custom of institutional racism in policing.

31. With respect to Paragraph 18 – 19 of Plaintiff Ramos's First Amended Complaint, Taylor recalls that he was made aware of this report. Taylor denies that he has witnessed actions by Austin Police Department officers that lead him to suspect the Department has a policy or custom of institutional racism in policing.

32. With respect to Paragraph 20 of Plaintiff Ramos's First Amended Complaint, Taylor admits he has seen officers use foul language, but denies direct knowledge of the specific behavior referenced by Plaintiff Ramos. Taylor admits that he was made aware of the general nature of the independent investigator's report. Otherwise, denied.

33. With respect to Paragraph 21 of Plaintiff Ramos's First Amended Complaint, ***Taylor denies that race had anything to do with his decision to use deadly force against Ramos.*** Taylor denies that the decision to use deadly force against Ramos was unjustified for the reasons stated herein. Taylor denies that he has witnessed actions by APD officers or City Officials that lead him to suspect the City of Austin has a custom or policy of institutional racism.

34. With respect to Paragraph 22 of Plaintiff Ramos's First Amended Complaint, Taylor has no direct knowledge of these recent studies referenced by Ramos. Taylor denies that he witnessed any behavior or curriculum in the Academy that "inculcated or indoctrinated" him or any of his fellow cadets into a racist policing culture.

35. With respect to Paragraph 23 of Plaintiff Ramos's First Amended Complaint, Taylor denies that he was unjustified in using deadly force against Ramos for the reasons stated herein. Taylor again further denies that Ramos's race had anything to do with Taylor's decision to use deadly force against Ramos. Otherwise, denied.

36. With respect to Paragraphs 24 – 26 of Plaintiff Ramos's First Amended Complaint, Taylor admits he was acting under color of law when he made the decision to shoot Ramos. Taylor denies that he observed Ramos driving away from APD officers when he made the decision to shoot. Taylor denies that he did not reasonably believe that Ramos posed an immediate threat of serious injury or death to his fellow APD officers. Taylor denies Ramos's assertion that the use of lethal force was not justified under the law within the Fifth Circuit or the Supreme Court of the United States, and further denies that the law clearly established that his conduct was unconstitutional. Otherwise, denied.

37. With respect to Paragraphs 27 – 31 of Plaintiff Ramos's First Amended Complaint, Taylor denies that he has witnessed behavior to the extent that leads him to believe that the City of Austin has a custom or policy of: (1) racism in policing; (2) inadequate training as to a citizen's constitutional rights; (3) inadequate supervision of officers; (4) failing to intervene to stop excessive force; (5) failing to investigate allegations of excessive force; or (6) failing to punish excessive force. Taylor further denies that he was unjustified in using force against the

individual referenced by Ramos in Paragraph 29, or that former Chief of Police Brian Manley or his agents unreasonably "cleared" his actions related to this incident. Otherwise, denied.

38. With respect to Paragraph 32 of Plaintiff Ramos's First Amended Complaint, Taylor denies that Ramos's civil rights were violated, and further denies that his actions were taken pursuant to an impermissible or unconstitutional City custom or policy.

39. With respect to Paragraphs 33 – 35 of Plaintiff Ramos's First Amended Complaint, Taylor denies Plaintiff Ramos is entitled to any recovery against him for her alleged damage model.

III. JURY DEMAND

40. Defendant Christopher Taylor demands a jury trial.

IV. AFFIRMATIVE DEFENSES & IMMUNITIES

41. Taylor files this Answer subject to his pending motion to dismiss Plaintiff's First Amended Complaint.

42. Taylor denies any deprivation under color of statute, ordinance, custom, or abuses of any rights, privileges, or immunities secured to Ramos by the United States Constitution, state law, or 42 U.S.C. § 1983, *et seq*.

43. Taylor hereby invokes the doctrine of qualified and official immunity, and asserts he discharged his obligations and public duties in good faith, and would show that his actions were objectively reasonable in light of the law and with the information possessed at that time.

44. The incident in question and the resulting harm to Ramos were caused or contributed to by Ramos's own illegal conduct.

45. Pleading further, alternatively, and by way of affirmative defense, Taylor would show that at the time and on the occasion in question, Ramos failed to use ***any*** degree of care or

caution that a person of ordinary prudence would have used under the same or similar circumstances, and that such failure was the producing cause or the sole proximate cause of the incident in question and the alleged damages that arise therefrom. Taylor invokes the comparative responsibility provisions of the Texas Civil Practice & Remedies Code.[7]

46. Taylor further pleads that in the unlikely event that any liability is found on the part of Taylor, that such liability be reduced by the percentage of the causation found to have resulted from the acts or omissions of Ramos.

47. Taylor pleads that he had legal justification for each and every action taken by him relating to this incident.

48. Taylor asserts the limitations and protections of Chapter 41 of the Texas Civil Practice & Remedies Code, and the due process clause of the United States Constitution.

49. Taylor asserts the limitations and protections of Chapter 101 of the Texas Civil Practice & Remedies Code.

V. PRAYER

50. WHEREFORE, PREMISES CONSIDERED, Defendant Christopher Taylor prays that upon a final hearing of this cause that the Court enter judgment that Plaintiff Ramos take nothing by this suit against Taylor, that all costs of court be assessed against Plaintiff, and for all further relief Taylor is entitled to in either law or equity.

[7] *See* TEX. CIV. PRAC & REM. CODE ANN. § 33.001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April 2021, a copy of Defendant Taylor's First Amended Answer to Plaintiff's Complaint was electronically filed on the CM/ECF system, which will automatically serve a Notice of Electronic Filing on the following attorneys of record:

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Brenda Ramos, on behalf of herself and the Estate of Mike Ramos, Plaintiff,	§	
v.	§	Case no. 1:20-cv-1256
City of Austin and **Christopher Taylor**, Defendants.	§	

Plaintiff's Response to Officer Taylor's Motion to Dismiss

I. Introduction

Ms. Ramos's First Amended Complaint [doc. 5] clearly states a section 1983 civil rights claim against Defendant Officer Christopher Taylor upon which relief can be granted. This Court should deny Officer Taylor's FRCP 12(b)(6) motion because it is based on Taylor's unproven allegations rebutting Ms. Ramos's allegations.

Officer Taylor asks this Court to accept his version of events: that a vehicle driving *away* from him and other officers was also driving towards him and other officers. But a 12(b)(6) motion is the proper vehicle for disputing Plaintiff's well-pled facts.

II. Legal Standard

In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept all well pleaded facts as true and view them in the light most favorable to Ms. Ramos. *See Baker v. Putnal*, 75 F. 3d 190, 196 (5th Cir. 1996). The issue is not whether Ms. Ramos will prevail but whether she is entitled to pursue her complaint and offer evidence in support of her claims. *See Doe v. Hillsborough Indep. Sch. Dist*., 81 F.3d 1395, 1401 (5th Cir. 1996). Rule 12(b motions are disfavored and are rarely granted. *See Bernal v. Freeport-McMoran, Inc*., 197 F.3d 161, 164 (5th

Cir. 1999). In fact, dismissal or judgment should not be granted unless it appears beyond doubt that Plaintiff can prove no set of facts in support of their claims which would entitle them to relief.

Government officials are not entitled to qualified immunity if they (1) "violated a statutory or constitutional right"; and (2) "the right was clearly established at the time of the challenged conduct." *Turner v. Lt. Driver*, 848 F.3d 678, 685 (5th Cir. 2017). Accordingly, to establish that Mike Ramos's constitutional right was violated, Plaintiff need only provide sufficient allegations so that the Court may infer that "(1) an injury that (2) resulted directly and only from the use of force that was excessive to the need and that (3) the force used was objectively unreasonable." *Flores v. City of Palacios,* 381 F.3d 391, 396 (5th Cir. 2004). In cases of officers shooting at vehicles, the reasonableness inquiry involves two "central" factors in the: (1) "the limited time the officers had to respond" and (2) "the closeness of the officers to the projected path of the vehicle." *Hathaway v. Bazany*, 507 F.3d 312, 321 (5th Cir. 2007) (quoting *Waterman v. Batton*, 393 F.3d 471, 477, 479 (4th Cir. 2005)) (internal quotations omitted).

"An officer's acts are objectively reasonable unless reasonable officials in the officer's circumstances would have then known that the officer's conduct violated the plaintiff's asserted constitutional rights." *Id.* at * 15–16 (quoting *Thompson v. Upshur Cnty*., 245 F.3d 447, 457 (5th Cir. 2001)); *see also Dudley v. Bexar Cty., No. 5:12-CV-357-DAE,* 2014 U.S. Dist. LEXIS 169913 at * 18, 2014 WL 6979542 (W.D. Tex. Dec. 9, 2014) ("Under the second prong of the qualified immunity analysis, the Court must determine whether the right was clearly established at the time the violation occurred"). The Fifth Circuit has held that:

> it has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a

> fleeing felon who does not pose a sufficient threat of harm to the officer or others. This holds as both a general matter, and in the more specific context of shooting a suspect fleeing in a motor vehicle.

Lytle v. Bexar Cty. Tex., 560 F.3d 404, 417–18 (5th Cir. 2009).

III. Ms. Ramos has alleged a plausible claim pursuant to the Fourth and Fourteenth Amendments

The Court should not dismiss Ms. Ramos's Amended Complaint unless it appears beyond doubt that she can prove no set of facts in support of her claims which would entitle her to relief. *Ashcroft v. Iqbal* simply requires that Ms. Ramos's Complaint be plausible on its face, do more than offer labels and conclusion, and offer some factual basis in support of her claim. *See* 129 S. Ct. 1937, 1949 (2009). Ms. Ramos's Complaint does just that.

"Because [Mike Ramos] died as a result of [Officer Taylor's] alleged conduct, and his death clearly constitutes an "injury," [Ms. Ramos's argument] will focus on whether [Officer Taylor's] conduct was clearly unreasonable." *See Cullum v. Siemens,* No. SA-12-CV-49-DAE, 2013 U.S. Dist. LEXIS 153378 at *14–15, 2013 WL 5781203 (W.D. Tex. Oct. 25, 2013) (citing *Ramirez v. Knoulton,* 542 F.3d 124, 128 (5th Cir. 2008)). Accepting all well pleaded facts as true and viewing them in the light most favorable to Ms. Ramos, it is clear that Mike Ramos was attempting to drive away from Officer Taylor, the other officers, and bystanders at the time Officer Taylor shot and killed him. As much as Officer Taylor wants this Court to believe that "these four officers ***would*** have been in—or at least in close proximity to—the direct path of Ramos's vehicle ***if*** he had continued driving straight forward rather than turning," this is not the place for re-writing Ms. Ramos's allegations. *See* Taylor's Motion to Dismiss [Doc. 9] ¶ 15. Mike Ramos ***did*** turn his vehicle and ***was*** heading away from Officer Taylor and his fellow officers when Officer Taylor shot and killed

him. But this Court does not have to look to the truth of this easily established fact to deny Officer Taylor's motion, it need only look to Ms. Ramos's Amended Complaint.

Given the facts of this case, there is a plausible claim that Officer Taylor's conduct was clearly unreasonable and a violation of Mike's constitutional rights. *See Dudley v. Bexar Cty*., No., 2014 U.S. Dist. LEXIS 169913 at * 17–18 (finding that "a factfinder could conclude that [the officer] violated the constitution" by shooting at a vehicle which was "attempting to drive away from [the officer] at the time he began shooting").

IV. Officer Taylor's violation of Mike's constitutional rights was a violation of clearly established law.

Officer Taylor relies on *Hathaway* in support of his argument for Qualified Immunity. Taylor's Motion to Dismiss [Doc. 9] ¶ 14–19. In *Hathaway*, the Fifth Circuit upheld the Western District of Texas District Court's granting of summary judgment on qualified immunity grounds.[1] *Hathaway*, 507 at 316. The officer in *Hathaway* fatally shot a driver who was accelerating toward the officer, and "when [the officer] realized that he was not going to be able to get out of the [driver's] path, he decided to fire his weapon." *Id.*

Compare with the facts of *Lytle*. In *Lytle*, the officer filed a motion to dismiss based on qualified immunity. *Lytle v. Bexar Cty. Tex*., 560 F.3d at 408. The district court treated the officer's motion as one for summary judgment and denied the motion, concluding that a genuine issue of material fact precluded granting summary judgment on qualified immunity. *Id.* Agreeing with the district court that the parties "genuinely disputed the direction and distance that the [vehicle] had traveled at the moment [the officer] fired," the Firth Circuit dismissed the

[1] The finding of qualified immunity in *Hathaway* was during summary judgment and not in a motion to dismiss.

appeal. *Id.* at 408, 418. "The Court found that, although the car may have posed an immediate and significant threat of harm to the officer when it was reversing in his direction, by the time he shot at the vehicle, the vehicle was no longer a threat." *Dudley v. Bexar Cty*., 2014 U.S. Dist. LEXIS 169913 at * 15 (citing *Lytle v. Bexar Cty. Tex*., 560 F.3d at 413).

In *Dudley v. Bexar Cty,* an officer shot at a vehicle that was driving away from the officer and which remained "at least five or six feet away" from the officer at all times. *Id.* at *16. The officer argued that *Hathaway* was controlling, however the District Court for the Western District of Texas found *Hathaway* distinguishable and "that the present case is closer in facts to Lytle than it is to Hathaway." *Id.* at * 17–18. In denying summary judgment, the Court found that "viewed in the light most favorable to Plaintiffs—show that Plaintiffs were attempting to drive away from [the Officer] at the time he began shooting."

Officer Taylor also cited *Irwin* in his motion, claiming it controls in "the absence of the requisite clearly established law." Taylor's Motion to Dismiss [Doc. 9] ¶ 24–27. In *Irwin*, again on summary judgment, the District Court for the Northern District of Texas found that officers were entitled to qualified immunity when they shot at a vehicle which was moving slowly *towards* the officers. *Irwin v. Santiago,* No. 3:19-CV-2926-B, 2021 U.S. Dist. LEXIS 4254 at * 2021 WL 75452 (N.D. Tex. Jan. 8, 2021) (emphasis added). Putting aside the fact that there is clearly established law on point and that an exactly analogous case is not required when the conduct is so clearly egregious that no reasonable officer could have concluded that the conduct was permissible, *Irwin* is clearly distinguishable as Mike Ramos was driving *away* from the officers. *See also Taylor v. Rojas, No. 19–1261,* 592 U. S. ____ (Nov. 2, 2020).

Irwin and *Hathaway* could not be more inapplicable to the instant case since the well-plead facts, taken as true, establish that Mike Ramos was driving slowly away from officers when Officer Taylor shot and killed him. The facts are much more akin to *Dudley* or *Lytle* in which qualified immunity was denied for officers who shot at individuals in vehicles moving away from them. "Accordingly, if a jury were to accept [Ms. Ramos's] version of the facts, it could conclude that [Officer Taylor] had violated [Mike Ramos's] clearly established constitutional right to be free from an unreasonable seizure" and Officer Taylor would not enjoy qualified immunity. *See Dudley v. Bexar Cty.*, 2014 U.S. Dist. LEXIS 169913 at * 18 (internal quotations omitted). Officer Taylor's motion should be denied.

V. Conclusion

Officer Taylor's authorities were decided on summary judgment and he has jumped ahead to summary judgment by arguing the substantive facts of this case. These are inappropriate arguments for the instant motion. Viewing the facts in the light most favorable to Ms. Ramos and taking all well-plead facts in her Amended Complaint as true, it is clear that Ms. Ramos has established a plausible claim that Mike Ramos's constitutional rights were violated, and that Officer Taylor's qualified immunity should be denied. For these reasons, the Court should deny the City of Austin's Motion to Dismiss.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed via the court's CM/ECF system on April 13, 2021, which will serve all counsel of record.

Rebecca Ruth Webber

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Brenda Ramos, on behalf of herself and	§	
the Estate of Mike Ramos,	§	
Plaintiff,	§	
v.	§	Case no. 1:20-cv-1256-RP
	§	
City of Austin and	§	
Christopher Taylor,	§	
Defendants.	§	

Response to City of Austin's Motion to Dismiss Plaintiff's First Amended Complaint

Plaintiff respectfully asks the Court to consider her response to the City's original Motion to Dismiss (Doc. 6) as her response to the City's Motion to Dismiss Plaintiff's First Amended Complaint.

Respectfully submitted,
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I certify that a true and correct copy of the foregoing was filed via the court's CM/ECF system on April 16, 2021, which will serve all counsel of record.

Rebecca Ruth Webber

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS	§	
Plaintiff,	§	**CIVIL ACTION NO. 1:20-cv-1256-RP**
v.	§	
CITY OF AUSTIN AND CHRISTOPHER TAYLOR,	§	
Defendants.	§	

DEFENDANT CITY OF AUSTIN'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant City of Austin files this Reply in support of its Motion to Dismiss Plaintiff's First Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure as follows:

I. INTRODUCTION

Far from a "boilerplate FRCP 12(b) motion" as the Plaintiff claims, the City's Motion to Dismiss actually identifies the flaws in Plaintiff's Amended Complaint including the total absence of non-conclusory facts regarding the City's alleged policies and moving force causation. The Plaintiff's response does nothing to ameliorate these flaws and, as a result, the Court should dismiss the Plaintiff's claims against the City.

A. Insufficient Facts to Establish a Policy or Practice

Plaintiff's Response, like her Amended Complaint, recites investigative reports regarding alleged racist behavior of individuals within the Austin Police Department and the Austin City Council's criticism of department leadership's alleged inadequate implementation of measures to

eradicate police bias and racism. Plaintiff's reliance on reports regarding APD traffic stops and discretionary arrests such as driving with an invalid license and marijuana possession, as well as inappropriate comments by APD personnel, hardly constitutes a pattern tantamount to official policy sufficient to state a claim for relief under *Monell.*

A plaintiff may show a "persistent, widespread practice of City officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Piotrowski*, 237 F.3d at 579 (quoting *Webster v. City of Houston*, 735 F.2d 838, (5th Cir. 1984) (en banc)). However, "[a] pattern requires similarity and specificity; '[p]rior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question.'" *Peterson v. City of Fort Worth*, 588 F.3d 838, 851-52 (5th Cir. 2009)(quoting *Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 383 (5th Cir. 2005). A pattern sufficient to support a *Monell* claim cannot be established by previous bad acts of the municipality unless those bad acts are specific and similar to the violation in question. *Id.*

None of the prior bad acts described in the Amended Complaint are specific and similar to the alleged violation in this case, i.e., Taylor's use of deadly force on Ramos. Plaintiff provides no specific facts to support her allegations that any alleged pattern or practice of APD consisted of prior bad acts which were specific and similar to Taylor's use of deadly force. Plaintiff's Amended Complaint fails to allege non-conclusory facts sufficient to establish an actual policy or custom of the Austin Police Department. As a result, this claim fails as a matter of law.

B. Insufficient Facts to Establish Moving Force Causation

Plaintiff's Response makes many pronouncements that APD's alleged racist culture caused Ramos's death, but fails to identify actual facts alleged in the Amended Complaint which support

moving force causation. The Amended Complaint does not contain any specific non-conclusory facts to support the Plaintiff's claim that the alleged "policing culture" was the moving force of the alleged constitutional violation committed by Officer Taylor. It takes more than a conclusory allegation that "[Ramos's] tragic death is a direct result of the racism that has permeated policing in Austin" to adequately allege specific facts to support the causation element of a *Monell* claim.

In order to hold a municipality liable under Section 1983 for the misconduct of one of its employees, a plaintiff must initially allege that an official policy or custom "was a cause in fact of the deprivation of rights inflicted. *Spiller v. City of Texas City, Police Dept.*, 130 F.3d 162, 167 (5th Cir. 1997), quoting *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994). The description of a policy or custom and its relationship to the underlying constitutional violation, moreover, cannot be conclusory, it must contain specific facts. *Spiller*, 130 F.3d at 167.

Plaintiff's Response does not address *Spiller*, where the Fifth Circuit held that allegations that a police department had policies of operating "in a manner of total disregard for the rights of African American citizens" and "engag[ing] in conduct toward African American citizens without regard to probable cause to arrest" failed to allege specific non-conclusory facts to demonstrate how these alleged policies were causally connected to the officer's alleged misconduct. *Id.* Plaintiff attempts to distinguish *Crawford v. Caddo Parish Coroner's Office*, 2019 WL 943411, Feb. 25, 2019 (W.D. Louisiana), by arguing that the allegations in *Crawford* were only conclusory, while the Complaint in this case "explains how each of the six policies have resulted in unconstitutional action." (Doc. 6, p. 8) The problem is that Plaintiff's Amended Complaint does not explain factually how APD's alleged policies were the moving force of **Taylor's** alleged unconstitutional action.

Plaintiff's conclusory allegations of moving force causation are clearly insufficient to

support a *Monell* claim. Plaintiff makes the conclusory allegation that her son's death "is a direct result of the racism that has permeated policing in Austin," but offers no specific facts to support a claim that the alleged racism was the moving force of her son's death. Plaintiff pronounces that Officer Taylor followed APD's "racist policies," yet alleges no specific, non-conclusory facts which demonstrate that bias or racism played any role in this incident much less was the moving force of the death of Ramos. Plaintiff's Amended Complaint points to no action or statement of Officer Taylor or anyone else connected to the Austin Police Department that demonstrates that any "racist culture" of the Austin Police Department was the moving force of Taylor's decision to use deadly force on Ramos. As a result, Plaintiff's claim against the City fails as a matter of law.

PRAYER

Defendant City of Austin respectfully requests that the Court grant its Motion to Dismiss and dismiss all claims against the City of Austin with prejudice and with all costs assessed to the Plaintiffs.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this 23rd day of April, 2021.

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/s/ H. Gray Laird III
H. GRAY LAIRD III

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS Plaintiff, V. THE CITY OF AUSTIN AND CHRISTOPHER TAYLOR Defendants.	§ § § § § § § § §	No. 1:20-cv-01256-RP JURY DEMANDED

DEFENDANT CHRISTOPHER TAYLOR'S REPLY IN SUPPORT OF DEFENDANT TAYLOR'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES Defendant, Christopher Taylor (hereinafter "Officer Taylor"), and hereby replies to the response of Brenda Ramos (hereinafter "Plaintiff") for judgment on the pleadings. Pursuant to Federal Rule of Civil Procedure 12(b)(6), Plaintiff's First Amended Complaint fails to state a claim upon which relief can be granted and should be dismissed.

I. ARGUMENTS AND AUTHORITIES

A. Plaintiff failed to provide any legal authority or argument explaining how she is entitled to relief pursuant to the Fourteenth Amendment.

1. Officer Taylor's motion challenged Plaintiff's claims for relief pursuant to the Fourteenth Amendment.[1] Namely, the claims Plaintiff described would fall under the purview of the Fourth Amendment, if any. Plaintiff referenced a Fourteenth Amendment claim in one subheading of her Response, but failed to provide argument or legal authority demonstrating what Fourteenth Amendment right was violated, nor what remedy is afforded to Plaintiff to redress the alleged violation.[2] Plaintiff's claims for relief pursuant to the Fourteenth Amendment should be denied accordingly.

B. Plaintiff crucially misrepresented *Irwin* by suggesting that the District Court assumed as true that the suspect drove directly *toward* the officers, and thus that the officers were in the direct path of the vehicle.

2. Plaintiff would have this Court believe that *Irwin* deals with court-accepted facts wherein the defendant police officers "shot at a vehicle which was moving slowly *toward*s the officers," and thus that the officers were in the direct path of the vehicle.[3] It does not. Plaintiff's misrepresentation is crucially important, because the reality is that the *Irwin* court specifically accepted the facts as portrayed by the *Irwin* plaintiff, and those facts largely mirror Plaintiff's best-case-presentation of the facts when viewed through the lens of what is depicted on the subject video footage in her Complaint.

3. Contrary to Plaintiff's representation, the *Irwin* court discussed in plain detail how the *Irwin* plaintiff's version of the events portrayed both of the defendant police officers as ***not*** being positioned directly in front of the vehicle, and specifically ***not*** standing in the path of the vehicle:

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[1] Def. Taylor's Motion to Dismiss, 6–7, Dkt. # 9.
[2] Pl. Resp. to Def. Taylor's Motion to Dismiss, 3, Dkt. # 12.
[3] *Id* at 5 (emphasis original).

> In his response to the Defendant–Officers' motion, [the *Irwin* plaintiff] states that ***neither of the Defendant–Officers was "positioned directly in front of or in the pathway of [his] vehicle."*** He claims that Officer Santiago was "***to the side of the front***" of his vehicle, and that he could have continued driving forward without hitting Officer Santiago.[4]

4. The *Irwin* court also acknowledged that it accepted those facts as true for the purposes of both the motion for summary judgment overall, and more importantly the clearly established law prong of Qualified Immunity:

> ***[W]ith respect to Officer Santiago's proximity to the path of Irwin's vehicle, genuine factual disputes remain.*** Namely, based on the summary-judgment evidence, the Court cannot determine the distance between Officer Santiago and Irwin's vehicle at the moment the Defendant–Officers began firing. Although the parties provide Officer Santiago's body-camera footage, this footage fails to demonstrate how far in front of and how far to the side of Irwin's vehicle Officer Santiago stood. Further, the footage depicts Officer Santiago's shadow to the side of Irwin's vehicle when the Defendant–Officers began shooting, ***suggesting he was not in the path of vehicle***. Finally, Irwin claims that Officer Santiago was not in the vehicle's path. ***Viewing all of this evidence in the light most favorable to Irwin, a jury could conclude that the Defendant–Officers were unreasonable in their belief that Officer Santiago stood in the vehicle's path.***[5]

5. Officer Taylor maintains that the nearby officers' physical reactions seen on video make it clear that those officers reacted as if they were directly in the path of the vehicle. More importantly, any officer from Officer Taylor's vantage point who saw those reactions in real time would have reasonably believed that the nearby scrambling officers believed they were suddenly in danger. Officer Taylor acknowledges and understands, however, that this Court is required to assume reasonable alternative facts presented by Plaintiff for the purposes of this motion. Even working under such constraints, a comparison of the police videos that Plaintiff voluntarily included within her First Amended Complaint makes it undeniable that—***at the very least***—***nearby officers were standing "'to the side of the front of' [Ramos's] vehicle," just like under***

[4] *Irwin v. Santiago*, No. 3:19-CV-2926-B, 2021 WL 75452, at *2 (N.D. Tex. Jan. 8, 2021) (internal citations omitted) (emphasis added); *see also Mullenix v. Luna*, 577 U.S. 7, 11 (2015).
[5] *Irwin* at *6 (emphasis added).

the facts assumed by the Irwin court.[6] While *Irwin* is not controlling on this Court, it does demonstrate that a sister court already plumbed the legal depths on functionally the same fact pattern and found a legally dispositive absence of clearly established law, as required by the Qualified Immunity analysis.[7] Consequently, this Court may even assume that the nearby pedestrian officers were ***not*** in the direct path of Ramos's vehicle—as Plaintiff contends—and still come to the same determination as in *Irwin* that no prior controlling precedents existed that would have put Officer Taylor on notice for the purposes of Qualified Immunity.

C. The *Lytle* suspect was travelling *in the opposite direction away the officers*, and was *several blocks away* when shots were fired into the *back* of the car. No reasonable viewer of the subject videos included within Plaintiff's Complaint could—with a straight face—claim that the same is true here.

6. Plaintiff's attempt to cast this case as a sequel to *Lytle* must fail based on a comparison of the most crucial facts at issue.[8] In *Lytle*, the suspect drove in the completely opposite direction away from the police officers and, "made it three or four houses down the block" before the defendant–officer ***fired at the Lytle plaintiff's vehicle's rear window***.[9] Ramos was—at most—mere feet away from nearby pedestrian officers when Officer Taylor fired his weapon to protect them. Ramos certainly was not travelling in the opposite direction away from the officers, because he did not reverse the car backwards into the apartment building behind him. If nothing else, the subject videos demonstrate that Officer Taylor certainly did not fire at the ***rear*** of Ramos's vehicle.

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[6] *Irwin* at *7 (emphasis added).
[7] *Irwin* at *7 ("[*Lytle*] does not provide notice that it is unlawful to shoot at a vehicle that is rolling forward, failing to heed officers' commands to stop, as an officer stands "to the side of the front" of the vehicle.").
[8] *Ibid.*
[9] *See Lytle v. Bexar Cnty.,* 560 F.3d 404, 408–418 (5th Cir. 2009) ("he twice fired at the rear of the Taurus").

7. There is also the glaring issue of who was fired upon. In *Lytle*, the defendant-officer was said to not even be shooting at the driver—and thus not even to have been firing at the operator of the deadly weapon.[10] No such claim is made herein by Plaintiff, nor does the video evidence suggest that Officer Taylor used forced against any person other than the driver of the vehicle—and thus the operator of the potentially deadly weapon capable of killing the nearby pedestrian officers.

8. The video evidence contained within Plaintiff's First Amended Complaint is dispositive in terms of ruling out *Lytle* as analogous binding case law. Ramos was ***not*** travelling directly away from the officers. Ramos was ***not*** several houses away from officers when he acted to protect the nearby pedestrian officers. Officer Taylor ***did not*** shoot at the back of Ramos's car, and ***he only used force against the operator of the vehicle***—the deadly weapon at issue. None of those crucial facts align with *Lytle*—whether applying the required *Hathaway* factors or otherwise—and using it as a sufficiently analogous case precedent here would be folly. "The law must be so clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately."[11] As demonstrated in *Irwin*, no controlling case law existed that every reasonable officer would have known in the blink-of-an-eye moment in time Officer Taylor was limited to when being tasked with making an extremely stressful decision. Qualified Immunity thus shields him from liability in this case.

D. Plaintiff cited the subject videos and provided hyperlinks to the same. Plaintiff's claims that the videos she cited are not part of her Complaint ring hollow.

[10] *Lytle,* 560 F.3d at 418 (5th Cir. 2009) (the court assumed as true the plaintiff's contention that the police officer was "not aiming for the driver.").
[11] *Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) (emphasis added) (citing *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 582 (5th Cir. 2009)).

9. Officer Taylor did not rewrite Plaintiff's Complaint,[12] nor has Officer Taylor asked this Court to consider anything beyond what is contained within it.[13] Plaintiff very clearly cited and provided this Court with a legally sanctioned method of incorporating the contents of the subject videos into her pleading, namely by directing this Court to a hyperlink for it to view the subject videos.[14] This Court's consideration of the subject videos is thus as inescapable as the Court's consideration the language of the Complaint itself.[15] If anyone is attempting to rewrite Plaintiff's Complaint, it is Plaintiff herself, as she attempts to whitewash it of the video content she voluntarily included therein.

II. CONCLUSION

10. The Complaint, incorporated videos, and other incorporated exhibits therein reflect that a reasonable officer in Officer Taylor's position would believe Ramos's vehicle posed a serious danger to the pedestrian police officers, who are quite clearly shown on video scrambling to get out of Ramos's vehicle's path as it lurched forward. The Complaint and incorporated content also reflect that the nearby officers were positioned very close to the vehicle, forcing Officer Taylor to make a split-second decision about whether to act to protect the lives of his fellow police officers fleeing the path of Ramos's car. Pursuant to the binding *Hathaway* test and its progeny—which deal in (1) time to act, and (2) perceived proximity—Officer Taylor's actions consequently do not represent a Constitutional violation as a matter of law.

11. The research of defense counsel, bolstered by the *Irwin* court's own research, reflect that no analogous legal consensus was "so clearly established that—***in the blink of an eye"***—every

[12] Pl. Resp. to Def. Taylor's Motion to Dismiss, 3–4, Dkt. # 12.
[13] *Id* at 6.
[14] Pl. First Amd. Compl., pg. 1. Fn. 1–2, Dkt. #5.
[15] See *U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 377 (5th Cir. 2004) (holding that when an exhibit is included by reference in a Complaint, then "indeed the exhibit and not the allegation controls" for the purposes of ruling on a motion to dismiss for failure to state a claim.)

reasonable officer would have known it immediately, as of April of 2020, based on controlling precedents then in existence. Unlike *Lytle*, Officer Taylor did not fire at the rear of a car headed in the opposite direction away from officers, he did not aim at anyone but the driver, and he did not shoot at a car that had travelled several house-lengths away from those in danger of being run over. Any attempt to analogize *Lytle* and this case must fail. Because the alleged rights at issue were not clearly established—as demonstrated by *Irwin*—Officer Taylor is entitled to the protections of Qualified Immunity as a matter of law.

III. PRAYER

WHEREFORE PREMISES CONSIDERED, Defendant Christopher Taylor respectfully requests that his Motion to Dismiss be in all things granted, and for such other relief, general or special, legal or equitable, to which he may justly be entitled.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT CHRISTOPHER TAYLOR

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April 2021, a copy of Defendant's Reply was electronically filed on the CM/ECF system, which will automatically serve a Notice of Electronic Filing on the following attorneys of record:

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/s/ Blair J. Leake
Blair J. Leake

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS *Plaintiff,*	§	
v.	§	CIVIL ACTION NO. 1:20-cv-01256-RP
THE CITY OF AUSTIN and CHRISTOPHER TAYLOR, *Defendants.*	§	

DEFENDANT TAYLOR'S ADVISORY TO THE COURT REGARDING THE MOTION TO DISMISS

TO THE HONORABLE ROBERT PITMAN:

1. Counsel for Defendant Christopher Taylor respectfully bring this Court's attention to new case law precedent, *Irwin v. Santiago*,[1] decided by the Fifth Circuit on October 21, 2021. On March 19th, 2021, Defendant Taylor filed his Motion to Dismiss Plaintiff's First Amended Complaint and Supporting Brief.[2] The Fifth Circuit's relevant decision in *Irwin* was accordingly not rendered until after Defendant's motion to dismiss had already been filed.

2. Defendant Taylor does not file this Advisory for the purpose of supplementing his arguments to the original motion to dismiss. Instead, the undersigned counsel submit this Advisory merely to fulfill defense counsel's duties to the Court, namely by bringing to its attention a relevant Fifth Circuit decision that was decided while the Motion to Dismiss remained pending with this

[1] *Irwin v. Santiago*, 21-10020, 2021 WL 4932988, at *1 (5th Cir. Oct. 21, 2021).
[2] Def. Mot. to Dismiss, pg. 1 – 17, Dkt. # 7.

Court. Defendant Taylor has attached a copy of the *Irwin* decision to this Advisory as an exhibit for this Court's quick reference.

3. Defendants have conferenced with all counsel of record. All counsel are unopposed to the filing of this Advisory to the Court.

Respectfully submitted,

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Sincerely,

WRIGHT & GREENHILL, P.C.

By: /s/ Stephen B. Barron

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ATTORNEYS FOR DEFENDANT CHRISTOPHER TAYLOR

CERTIFICATE OF CONFERENCE

Counsel for the defense has complied with the Court's requirement to confer. On November 29, 2021, Defense counsel conferred with all counsel of record. Upon conference, counsel is unopposed.

/s/ Stephen B. Barron
Stephen B. Barron

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November 2021, a true and correct copy of the above and foregoing Motion was electronically filed with the Clerk of the Court using the CM/ECF system, which will automatically serve a Notice of Electronic Filing on the following counsel of record:

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2021 WL 4932988
Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

Thomas IRWIN, Plaintiff—Appellant,
v.
J. SANTIAGO, Officer, in His Individual Capacity; R. Roberts, Officer, in His Individual Capacity, Defendants—Appellees.

No. 21-10020
|
FILED October 21, 2021

Appeal from the United States District Court for the Northern District of Texas, USDC No. 3:19-CV-2926, Jane J. Boyle, U.S. District Judge

Attorneys and Law Firms

Niles Stefan Illich, Scott H. Palmer, James Painter Roberts, Attorney, Scott H. Palmer, P.C., Addison, TX, for Plaintiff—Appellant

Scott Douglas Levine, Banowsky & Levine, P.C., Dallas, TX, for Defendants—Appellees.

Before Dennis, Higginson, and Costa, Circuit Judges.

Opinion

James L. Dennis, Circuit Judge:*

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

***1** In this case, two police officers shot Thomas Irwin as he was leaving the scene of a traffic incident against their orders to stop. Irwin's vehicle approached but narrowly avoided one of the two officers. As Irwin passed by that officer, both officers shot his vehicle five times, shattering the driver's side window and rendering two serious but non-fatal wounds. Irwin filed a § 1983 suit claiming excessive force. On a summary judgment motion from the officers, the district court held that there was a material issue of fact as to whether the officers' use of deadly force was objectively reasonable under the circumstances, in particular because it was unclear whether Irwin's vehicle posed an immediate threat given the distance and suddenness of the event. However, the court also held that there was no law clearly establishing that the officers' conduct was objectively unreasonable, and therefore the officers were entitled to qualified immunity. We AFFIRM.

I.

On June 8, 2018, Irwin was driving under the influence of alcohol and marijuana in Garland, Texas, when, after being distracted by his girlfriend's children in the backseat, he ran off the road, hit a tension wire, and drove a short distance into a cemetery enclosed by a chain-link fence.[1]

1 Both parties relied on video evidence taken from Officer Santiago's bodycam and from a nearby gas station. They may be viewed at:
(1) https://www.ca5.uscourts.gov/opinions/unpub/21/21-10020BodyCam.mp4;
(2) https://www.ca5.uscourts.gov/opinions/unpub/21/21-10020Surveillance.mp4.

After coming to a stop, Irwin reversed back out into the street. Stopped in traffic just ahead of Irwin were Garland City Police Officers J. Santiago and R. Roberts. As Irwin was reversing, the officers got out of their marked vehicle with their weapons drawn. Officer Roberts approached Irwin's vehicle from the rear on the driver's side, while Officer Santiago approached from the front. Both officers gave Irwin verbal commands to stop his vehicle.

At this point, Irwin's account and the officers' diverge. According to Irwin, as his vehicle came to a stop after he reversed back into the street, Officer Santiago was standing "toward the front driver's side" and Officer Roberts was "toward the back driver's side." Neither officer "was positioned directly in front or in the pathway of Irwin's vehicle." Irwin then turned his steering wheel to the right, away from Officer Santiago and toward the sidewalk. He began to "slowly roll his vehicle forward." Officer Santiago was near the left side of the vehicle as it passed by on the curb, while Officer Roberts stood in the roadway to the back of Irwin's vehicle and in the adjacent lane. As Irwin passed near Officer Santiago, having already driven past Officer Roberts, both officers began shooting. Multiple bullets struck Irwin's vehicle, shattering the driver's side front window. Two bullets hit Irwin in the arm and leg. Irwin continued driving away and was later apprehended in a parking lot. As a result of the shooting, Irwin now has a metal plate in his right arm and a bullet still lodged in his left leg. He has been permanently disfigured.

***2** Irwin filed a § 1983 suit claiming, *inter alia*, that Officers Santiago and Roberts used excessive force in violation of the Fourth Amendment. The officers moved for summary judgment on Irwin's claims and on their defense of qualified immunity. After closely considering the evidence and the law, the district court held that there was a genuine dispute of material fact as to whether the officers were objectively unreasonable in using deadly force. Specifically, the court found that a reasonable jury could conclude from the evidence establishing the distance between Officer Santiago and Irwin's vehicle that the officer was under no immediate threat from Irwin and therefore the decision to shoot violated the Fourth Amendment.

The district court also held that, though a jury could conclude the officers violated the Fourth Amendment, that violation would not be one of "clearly established law" and therefore the officers were entitled to qualified immunity even under Irwin's version of the facts. The court therefore granted summary judgment to the officers. This appeal followed.

II.

We review grants of summary judgment *de novo*, applying the same standard as the district court. *Thompson v. Mercer*, 762 F.3d 433, 435 (5th Cir. 2014). "Summary judgment is appropriate where the record and evidence, taken in the light most favorable to the non-moving party, show 'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Id.* (quoting Fed. R. Civ. P. 56(a)). Since we, like the district court, must view the evidence in the light most favorable to the non-movant, we accept Irwin's version of the disputed facts and draw all inferences in his favor. *Tolan v. Cotton*, 572 U.S. 650 (2014). "If the defendant[s] would still be entitled to qualified immunity under this view of the facts, then any disputed fact issues are not material," and the district court's grant was proper. *Lytle v. Bexar County, Texas*, 560 F.3d 404, 409 (5th Cir. 2009).

III.

A defendant is entitled to qualified immunity if his conduct did not violate a right that was clearly established at the time. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). To be clearly established, it is not enough that the right, as a general matter, exists. The law must also establish that the particular conduct of the defendant that is at issue violates that right. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* at 640 (citation omitted).

A.

It has long been the case that using deadly force to stop a fleeing suspect can violate the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 20–21 (1985). Whether an officer's use of deadly force is unconstitutional depends on whether it is objectively reasonable under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989). Courts consider several factors in answering this question in the context of fleeing vehicles, the "most important" of which is "whether the suspect poses an immediate threat to the safety of the officers or others." *Id.* at 396; *see also Malbrough v.*

Stelly, 814 F. App'x 798, 803 (5th Cir. 2020). The district court identified this fact as the "primary dispute" in the case. Since the only pedestrians in the area at the time the officers shot Irwin were the officers themselves, the question narrowed ever further: whether Irwin posed an immediate threat to the officers.

In our circuit, there are two particular facts that have emerged as highly relevant to determining whether a moving vehicle poses an immediate threat to a police officer: "the limited time the officers had to respond and 'the closeness of the officers to the projected path of the vehicle.' " *Hathaway v. Bazany*, 507 F.3d 312, 321 (5th Cir. 2007) (quoting *Waterman v. Batton*, 393 F.3d 471, 479 (4th Cir. 2005)). In this case, the district court found that only seventeen seconds elapsed between the officers exiting their vehicle and discharging their weapons as Irwin drove by Officer Santiago. The court also found that the evidence of how close Officer Santiago was to the path of the vehicle was genuinely disputed, and that, viewed in the light most favorable to Irwin, the evidence could be construed to show that Officer Santiago was outside the path of Irwin's vehicle even though he was still close to the front of it as Irwin began moving.

***3** We agree with the district court that a reasonable factfinder could conclude from this evidence that Officer Santiago may not have been in immediate danger of harm by Irwin's operation of his vehicle in disobedience of the Officers' orders to stop, and therefore a material dispute about the objective reasonableness of the Officers' conduct existed. The district court did not err in denying summary judgment to the Officers on the merits of Irwin's Fourth Amendment claim.

B.

Turning to the qualified immunity inquiry, we conclude that the district court did not err in deciding that there is no clearly established law demonstrating that the officers' conduct constituted an excessive use of force. The particular facts that are material here—Irwin's failure to heed officers' commands to stop, Officer Santiago's position, and the brief period of time it took for the Officers to perceive and react to the direction of Irwin's vehicle—are not sufficiently analogous to the facts of our cases finding excessive force such that officers Santiago and Roberts would have been "on notice" that their conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Irwin presents, and we have only been able to find, circuit precedent establishing a Fourth Amendment violation where an officer was positioned *behind* a vehicle that was *moving away from him* as he fired. In *Lytle*, it was assumed for the purposes of summary judgment that the officer shot a vehicle driving away from him that was "three to four houses down the block." 560 F.3d at 409. Similarly, in *Flores v. City of Palacios*, a police officer approached a parked car from behind. While still at some distance, the car started to pull away and the officer shot it in the rear bumper. 381 F.3d 391, 395, 399 (5th Cir. 2004).

In contrast, Officer Santiago was standing "toward the front" of Irwin's vehicle as it started to move forward, and then stood at its side as he fired. This is significant because the projected path of Irwin's vehicle was in the officer's direction, at least generally, whereas in *Lytle* and *Flores* the vehicle was moving away from the officer. Considering that there are also cases where an officer shot at a car moving directly at him and no Fourth Amendment violation was found, *see* *Hathaway*, 507 F.3d at 316, 322; *Sanchez v. Edwards*, 433 F. App'x 272, 274–75 (5th Cir. 2011),[2] we think that it was not a matter of clearly established law that Officers Santiago and Roberts were unreasonable in firing on Irwin's vehicle.

2 We do not suggest that these cases require the district court to have held that the officers did *not* violate the Fourth Amendment. These cases contain significant factual differences from the case here. In both *Hathaway* and *Sanchez*, for instance, the plaintiff's vehicles ultimately struck the officers, confirming that they were indeed in the path of the oncoming vehicle. *Hathaway*, 507 F.3d at 316; *Sanchez*, 433 F. App'x at 274. There is no such evidence here, and we do not pass judgment on the district court's determination of the genuineness of the factual disputes over the evidence.

We therefore AFFIRM the district court's grant of summary judgment for the defendants on the basis of qualified immunity.

All Citations

Not Reported in Fed. Rptr., 2021 WL 4932988

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Brenda Ramos, On Behalf Of	§	
Herself and The Estate of	§	
Mike Ramos	§	
Plaintiff,	§	
	§	**Civil Action No. 1:20-cv-01256-RP**
v.	§	
	§	
The City of Austin and	§	
Christopher Taylor,	§	
Defendants.	§	

PLAINTIFF'S RESPONSE TO DEFENDANT TAYLOR'S ADVISORY TO THE COURT REGARDING THE MOTION TO DISMISS

TO THE HONORABLE ROBERT PITMAN:

1. Defendant Taylor provided a recent advisory to the Court of the Fifth Circuit's unpublished opinion in *Irwin v. Santiago*, No. 21-10020, 2021 U.S. App. LEXIS 31692, 2021 WL 4932988 (5th Cir. Oct. 21, 2021). This development re-opened the door to further address the qualified immunity issues Defendant Taylor raised in his 12(b)(6) motion. (Doc. 12).[1] I am presently in trial in Chicago in a case that began November 12, 2021, and I anticipate continuing for the better part of another two weeks—up until December 17, 2021—but I want to notify the Court now of Plaintiff's intention to seek leave to amend

[1] *Irwin v. Santiago* upheld a Northern District decision Taylor relied upon in his Motion to Dismiss (Doc. 12). Plaintiff will seek leave to address *Irwin* more fully, as well to address other recent 2021 *published* Fifth Circuit opinions, and two Supreme Court *per curiam* opinions that may implicate qualified immunity jurisprudence. For example, qualified immunity cases decided concurrent with or subsequent to the Defendant's motion include: *Batyukova v. Doege*, 994 F.3d 717 (5th Cir. 2021); *Roque v. Harvel*, 993 F.3d 325 (5th Cir. 2021); *Tucker v. City of Shreveport*, 998 F.3d 165, 172 (5th Cir. 2021); and *Poole v. Shreveport*, 13 F.4th 420 (5th Cir. 2021). Both *Tucker* and *Poole* collect the cases. The Supreme Court also issued two *per curiam* opinions: *City of Tahlequah v. Bond*, 211 L.Ed.2d 170 (2021) and *Rivas-Villegas v. Cortesluna*, 211 L.Ed.2d 164 (2021).

her Complaint and also to file additional responsive briefing to address recent qualified immunity case law.[2]

2. It is now public knowledge that the Grand Jury indicted Defendant Taylor for first-degree murder for the death of Michael Ramos arising out of the events of this case. Significantly, the Grand Jury also recently indicted Taylor for first-degree murder and third-degree felony deadly conduct, along with a second police officer, Karl Krycia arising out of the events in the DeSilva case. Officer Karl Krycia also participated in events that led to the shooting death of Michael Ramos. These parallel criminal indictments bear on the factual and legal landscape of this case as well as the evidence available to the Plaintiff and she intends to address these developments in her amended Complaint and additional briefing.

3. Indeed, the parties are in the final stages of drafting a stipulation they intend to file with the Court to proceed with certain discovery, pending the outcome of the criminal case(s).[3] Therefore, Plaintiff intends to ask the Court to hold consideration of the Motion to Dismiss in light of these events and to request limited discovery to proceed on the qualified immunity issues.[4]

---

[2] The Scheduling Order allows for the parties to file motions to amend or supplement pleadings by February 18, 2022. (Doc. 18).

[3] Discovery in this civil case is complicated and will be protracted because the facts continue to evolve along with these criminal investigations. Evidence remains unavailable to the Plaintiff due to the pending investigations, prosecutorial privileges, and discovery limitations. The police released select videos, but not all. The original, unedited videos have not been made available. The autopsy has not been released. The officers' and witness statements have not been released. The Defendant has not served his initial disclosures.

[4] "The court's decision whether to hold a preliminary hearing or to defer the matter to trial on the merits may be set aside on appeal only for abuse of discretion." 2 Moore's Federal Practice - Civil § 12.50 (2021); *see generally, Cano v. Assured Auto Grp., Sunpath, Ltd*., No. 3:20-CV-3501-G, 2021 U.S. Dist. LEXIS 133338 at 23–24, 2021 WL 3036933 (N.D. Tex. July 19, 2021) (deferring consideration of a Rule 12(b)(6) motion until after limited discovery is completed and the plaintiff has the opportunity to file an amended complaint based upon the evidence developed in discovery).

4. As soon as I return from the trial in Chicago, I will be able to prepare the appropriate motions. In the interim, I respectfully request the Court's indulgence as Plaintiff prepares to file these motions.

Respectfully submitted,

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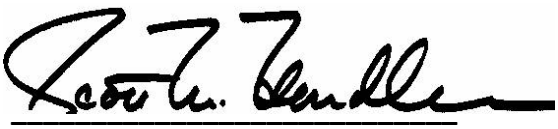
I hereby certify that on the 8th day of December 2021, a true and correct copy of the above and foregoing advisory was electronically filed via the Court's CM/ECF system, which will automatically serve all counsel of record.



Scott M. Hendler

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS *Plaintiff,*	§	
v.	§	CIVIL ACTION NO. 1:20-cv-01256-RP
THE CITY OF AUSTIN and CHRISTOPHER TAYLOR, *Defendants.*	§	

DEFENDANT CHRISTOPHER TAYLOR'S MOTION TO STAY DISCOVERY BASED ON THE PENDING QUALIFIED IMMUNITY THRESHOLD DETERMINATION

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES Defendant Christopher Taylor, and, pursuant to Fed. R. Civ. P. 26(c) and otherwise under federal law, files this, his Motion to Stay Discovery Based on the Pending Qualified Immunity Threshold Determination, and would respectfully show the Court as follows:

I. FACTUAL BACKGROUND

1. This lawsuit arises out of Defendant APD Officer Christopher Taylor's discharge of his firearm in the line of duty in a manner that resulted in the death of a suspect, decedent Mike Ramos.

2. On April 24, 2020, Officer Taylor and other Austin Police Department officers were dispatched to Decedent's location after a 911 caller reported that Decedent was in a vehicle and holding a gun up to a woman, and because Decedent had been identified as being wanted for arrest related to other felony crimes recently committed in and around Austin.

3. After being surrounded by officers—some on foot, and some in their patrol vehicles—Decedent was issued verbal commands that he largely refused to follow. The officers attempted to use non-lethal force to subdue Decedent by impacting him with a bean bag round so that he could be arrested, but such attempts failed. Immediately after the non-lethal force options failed, Decedent got back in his vehicle, shifted his transmission from park to drive, and drove forward in the general direction of the surrounding officers.

4. Due to the fact that a fleeing driver surrounded by pedestrians must necessarily drive toward—and likely over—one of more of the surrounding pedestrians to successfully flee, Officer Taylor reasonably believed that Decedent's act of suddenly driving forward would likely result in one or more officers being run over by Decedent's vehicle. With less than a mere second to make his decision, Officer Taylor discharged his firearm to incapacitate Decedent to hopefully stop him from injuring or killing the police officers in the vehicle's path. Officer Taylor's quick action successfully incapacitated Decedent and prevented his vehicle from injuring or killing any of the nearby pedestrian officers. Tragically, however, Decedent did not survive the encounter.

II. PROCEDURAL BACKGROUND

5. Plaintiffs filed their Original Complaint on December 30, 2020 based on the events described herein.[1] Plaintiffs later filed a First Amended Complaint on March 19, 2021.[2]

6. On March 19, 2021, Officer Taylor filed a 12(b)(6) motion to dismiss based on Qualified Immunity.[3] Officer Taylor filed an amended version of his motion to dismiss in response to Plaintiff's First Amended Complaint on March 30, 2021.[4] A Response brief and a Reply brief have been filed.[5] Officer Taylor's Qualified Immunity motion to dismiss is currently pending before this Court, as is the City of Austin's motion to dismiss on *Monell* grounds.[6]

7. Officer Taylor reserves the right to pursue—if necessary—a stay of discovery on alternative grounds related to the need to allow contemporaneous parallel criminal proceedings to resolve before this civil suit may proceed. Nothing in this motion is meant to serve as a waiver of such right.

III. ARGUMENTS & AUTHORITIES

A. The Supreme Court and Fifth Circuit both mandate that discovery should not be allowed until the threshold issue of Qualified Immunity has first been resolved.

8. Qualified Immunity, once plead, is a threshold issue that must be resolved before discovery may commence. ***According to the Supreme Court, "[u]ntil this threshold immunity question is resolved, discovery should not be allowed."***[7] The Supreme Court has "repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in

[1] Pl. Orig. Compl, Dkt. # 1.
[2] Pl. 1st Am. Compl., Dkt. # 5.
[3] Def. Taylor's Mot. to Dismiss Pl.'s Compl., Dkt. # 7.
[4] Def. Taylor's Mot. to Dismiss Pl.'s 1st Am. Compl., Dkt. # 9.
[5] Pl.'s Resp. to Officer Taylor's Mot. to Dismiss, Dkt. # 12; *see also* Def. Taylor's Reply in Supp. of Mot. to Dismiss Pl.'s 1st Am. Compl., Dkt. # 19.
[6] Def. City of Austin's Mot. to Dismiss Pl.'s 1st Am. Compl., Dkt. # 10.
[7] *Siegert v. Gilley*, 500 U.S. 226, 231 (1991) (emphasis added) (citing *Gomez v. Toledo*, 446 U.S. 635 (1980), *Harlow v. Fitzgerald,* 457 U.S. 800 (1982)).

litigation."[8] As this Court has recognized, the Supreme Court mandates that "'[u]nless the plaintiff's allegations state a claim of violation of clearly established law, ***a defendant pleading Qualified Immunity is entitled to dismissal before the commencement of discovery***.'"[9]

9. The Fifth Circuit has likewise held that "until resolution of the threshold question of the application of an immunity defense, discovery should not be allowed."[10] "'One of the most salient benefits of qualified immunity is protection from pretrial discovery, which is costly, time-consuming, and intrusive.'"[11] "Even limited discovery on the issue of qualified immunity 'must not proceed until the district court first finds that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity.'"[12] Pursuant to such precedents, discovery in this case must be stayed until the threshold issue of Qualified Immunity has first been formally adjudicated.

B. District courts within the Fifth Circuit have regularly adhered to the controlling mandates to stay discovery until the Qualified Immunity threshold question has been adjudicated.

10. "A stay of discovery 'is common when a court is considering an immunity defense.'"[13] In 2013, Judge Sam Sparks of the Western District of Texas recognized that "discovery must not proceed 'until the district court *first* finds that the plaintiff's pleadings assert facts which, if true,

[8] *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991).
[9] *Gunter v. Wheeler*, No. A-17-CV-0136-RP, 2017 WL 3670017, at *10 (W.D. Tex. Aug. 23, 2017), quoting *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (emphasis added).
[10] *See e.g. Nieto v. San Perlita Indep. Sch. Dist.*, 894 F.2d 174, 177 (5th Cir. 1990); *see also Williamson v. U.S. Dep't of Agric.*, 815 F.2d 368, 383 (5th Cir. 1987) (stating the district court acted properly in staying discovery pending resolution of issues of absolute, qualified, and sovereign immunity); *Wicks v. Miss. State Employment Servs.*, 41 F.3d 991, 994 (5th Cir. 1995); *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012).
[11] *See Zapata v. Melson*, 750 F.3d 481, 484–85 (5th Cir. 2014) (quoting *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012)).
[12] *Thayer v. Adams*, 364 Fed. Appx 883, 892 (5th Cir. 2010) (quoting *Wicks v. Miss. State Employment Servs.*, 41 F.3d 991, 994 (5th Cir. 1995)).
[13] *Westbrook v. Dallas Cty., Texas*, No. 3:16-CV-1802-B, 2016 WL 7491847, at *3 (N.D. Tex. Dec. 28, 2016), citing *Goins v. City of Sansom Park*, 637 Fed. Appx. 838, 839 (5th Cir. 2016).

would overcome the defense of qualified immunity.'"[14] In 2016 in *Bickford*, Judge Alan Ezra ordered discovery stayed until this Court ruled on the lawsuit's pending immunity challenges.[15] In 2019, Magistrate Judge Susan Hightower of the Western District of Texas granted motions to stay discovery based on pending Qualified Immunity challenges in *Geraci* and in *Schanzle*, again in 2020 in *Hutchings,* and again in 2021 in *Thornburg* and in *Collins.*[16] Other Texas federal district courts likewise regularly grant motions to stay discovery based on pending Qualified Immunity challenges.[17] Louisiana federal district courts regularly grant such motions, as well, and Mississippi Courts have gone so far as to adopt a local rule that ***automatically*** stays discovery whenever a defendant files a motion asserting an immunity defense.[18] The requested relief has essentially become a matter of course pursuant to multiple controlling Fifth Circuit precedents.

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[14] *See Glanville v. Corr. Corp. of Am.*, No. A-13-CA-519-SS, 2013 WL 6667696, at *4 (W.D. Tex. Dec. 16, 2013) (quoting *Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 994 (5th Cir.1995) (citations omitted) (emphasis in original).

[15] *Bickford v. Boerne Indep. Sch. Dist.*, No. 5:15-CV-1146-DAE, 2016 WL 1430063, at *2 (W.D. Tex. Apr. 8, 2016)

[16] *See Geraci v. City of Austin,* 1:19-CV-340-LY-SH, 2019 WL 6050728, at *1 (W.D. Tex. Nov. 14, 2019); *Schanzle v. Haberman*, No. A-18-CV-00933-RP-SH, 2019 WL 3220007, at *2 (W.D. Tex. July 17, 2019); *Hutchings v. County of Llano, Tex.*, 1:20-CV-308-LY-SH< 2020 WL 2086553, at *2 (W.D. Tex. Apr. 330, 2020); Thornburg v. Williamson Cty., Texas, No. 1:21-CV-00172-LY-SH, 2021 WL 2227390, at *2 (W.D. Tex. June 2, 2021); *Collins v. Texas Dep't* of *Fam. & Protective Servs*., No. 1:20-CV-367-LY, 2021 WL 38192, at *2 (W.D. Tex. Jan. 5, 2021).

[17] *See e.g. Berry v. Texas Woman's Univ.*, No. 419CV00409RWSCAN, 2019 WL 12470120, at *1 (E.D. Tex. Nov. 6, 2019); *see also e.g. Jimerson v. Lewis*, No. 3:20-CV-2826-L-BH, 2021 WL 1605057, at *5 (N.D. Tex. Apr. 23, 2021); *see also e.g. Est. of Brown v. Ogletree,* No. CV H-11-1491, 2011 WL 13318528, at *2 (S.D. Tex. Sept. 14, 2011).

[18] *See e.g. Conway v. Vannoy*, No. CV 18-33-JWD-EWD, 2019 WL 2067939, at *4 (M.D. La. May 10, 2019); *see D.M. v. Forrest Cty. Sheriff's Dep't,* No. 2:20-CV-48-KS-JCG, 2020 WL 4873486, at *1 (S.D. Miss. Aug. 19, 2020), citing LU.Civ.R. 16(b)(3)(A) ("Local Rule 16 provides, in relevant part: 'Filing a ... motion asserting an immunity defense ... stays the attorney conference and disclosure requirements and ***all discovery***, pending the court's ruling on the motion, including any appeal.'").

C. The Fifth Circuit considers it to be an immediately-appealable abuse of discretion for a district court to allow discovery to proceed while a Qualified Immunity motion is pending and a stay of discovery has been requested.

11. The Fifth Circuit mandates that district courts follow a "careful procedure set forth in In *Backe, Wicks*, *Helton,* and *Lion Boulos*" for analyzing motions to stay discovery based on a pending Qualified Immunity challenge.[19] In *Wicks,* the Fifth Circuit considered a discrimination case with the plaintiff's governmental entity employer and the plaintiff's supervisor—Hazel Cook—as the two defendants. Supervisor Cook filed a motion to dismiss raising her defense of Qualified Immunity, as well as a "'Motion to Hold Discovery in Abeyance' pending the consideration of Cook's Qualified Immunity defense." The court granted a partial stay of discovery, but denied the requested stay of discovery as it pertained to Qualified Immunity specifically. Cook filed an interlocutory appeal of the district court's decision to allow discovery to commence despite her pending Qualified Immunity motion to dismiss.[20]

12. The Fifth Circuit noted that—as long as there is a Qualified Immunity threshold motion pending—the district court *must* engage in a two-step approach to any request to stay discovery based on the same. First, the district court must "make a determination as to whether plaintiff's pleadings assert facts which, if true, would overcome the defense of Qualified Immunity." Unless and until such determination has been formally made, "[d]iscovery…must not proceed."[21] As part of that process, the determination must be made as to whether or not the facts alleged "would demonstrate that [the defendant who raised Qualified Immunity] violated clearly

[19] *See Zapata v. Melson*, 750 F.3d 481, 484 (5th Cir. 2014) (citing *Backe v. LeBlanc*, 691 F.3d 645 (5th Cir.2012); *Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991 (5th Cir.1995); *Helton v. Clements*, 787 F.2d 1016 (5th Cir.1986); and *Lion Boulos v. Wilson*, 834 F.2d 504, 507–08 (5th Cir.1987)).
[20] *Wicks v. Miss. State Employment Servs., Inc.*, 41 F.3d 991, 993-95 (5th Cir. 1995).
[21] *Wicks* at 994.

established statutory or constitutional rights."[22] "[T]he district court should rule on the motion to dismiss before *any* discovery is allowed."[23] "The allowance of discovery without this threshold showing is immediately appealable as a denial of the true measure of protection of qualified immunity."[24]

13. Pursuant to *Wicks* and the other aforementioned precedents, Officer Taylor respectfully requests that this Court engage in the Fifth Circuit's requisite "careful procedure" by issuing an order staying discovery—at least until this Court has ruled on Officer Taylor's pending motion to dismiss that raises the defense of Qualified Immunity.

B. If this Court ultimately denies Officer Taylor's motion to dismiss, the Fifth Circuit requires that it amend its initial order to narrowly tailor discovery from that point forward to *only* allow the discovery necessary to make a determination on Qualified Immunity.

14. The second step of the requisite "careful procedure" only comes into play if a district court first formally holds that "the complaint alleges facts to overcome the defense of Qualified Immunity" by way of a formal order denying all pending Qualified Immunity dispositive motions.[25] Here, the Fifth Circuit's holdings discussed *supra* mean that discovery cannot commence as a matter of law unless or until this Court determines that Plaintiffs' Amended Complaint—including the video footage incorporated therein—collectively creates a fact issue for which relief may potentially be granted. In that scenario, the Fifth Circuit would require that the scope of discovery from that point forward be explicitly limited so as to be "narrowly tailored to uncover ***only*** those facts needed to rule on the immunity claim."[26] The limitations of discovery

[22] *Wicks* at 994.
[23] *Wicks* at 995.
[24] *Wicks* at 995.
[25] *Wicks* at 995.
[26] *Wicks* at 994–95 (citing *Lion Boulos v. Wilson,* 834 F.2d 504, 506 (5th Cir. 1987) (citing 28 USC § 1291 (1986)) (emphasis added).

must be crafted so as to "***only*** allow the discovery necessary to clarify those facts upon which the immunity defense turns."[27]

15. Applied here, if this Court ultimately denies Officer's Taylor's pending motion to dismiss, and without considering the effects of a potential interlocutory appeal, the Fifth Circuit would require that a subsequent order be issued limiting the scope of discovery from that point forward to only allow discovery questions and requests directed toward Officer Taylor that directly relate to the Qualified Immunity legal questions at issue.

16. To overcome Qualified Immunity, Plaintiffs must demonstrate facts proving that (1) Officer Taylor violated one of Decedent's Constitutional rights, ***and*** (2) that such Constitutional right was "clearly established" at the time of Officer Taylor's alleged misconduct.[28] To satisfy the first prong, Plaintiffs must show that the force Officer Taylor used was "clearly unreasonable," which in the context of a police officer shooting into a moving vehicle requires a court to consider "(1) the limited time an officer has to respond to the threat from the vehicle; and (2) the closeness of the officer to the projected path of the vehicle."[29] In the event that this Court ultimately denies Officer Taylor's pending motion to dismiss, Officer Taylor respectfully requests that this Court amend its initial order staying discovery by specifically and narrowly limiting the scope of discovery to only the subject matters that relate to the legal application of Officer Taylor's Qualified Immunity defense—such as the time duration Officer Taylor had to

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[27] *Wicks* at 995 (emphasis added).
[28] *See Reed v. Taylor*, 923 F.3d 411 (5th Cir. 2019).
[29] *See Hathaway v. Bazany*, 507 F.3d 312, 321 (5th Cir. 2007) (adopting the temporal and proximity test) (adopting in part *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005)); *see also e.g. Sanchez v. Edwards*, 433 Fed. Appx. 272, 275 (5th Cir. 2011).; *see also generally* Def. Taylor's Mot. to Dismiss Pl.'s 1st Am. Compl., Dkt. # 9, and Def. Taylor's Reply in Supp. of Mot. to Dismiss Pl.'s 1st Am. Compl., Dkt. # 19.

respond, and the perceived possible proximity of Decedent's vehicle's projected path to nearby officers from the perspective of Officer Taylor.

IV. PRAYER

17. WHEREFORE, PREMISES CONSIDERED, Defendant Taylor respectfully requests that this Court grant his motion to stay discovery until the pending threshold Qualified Immunity challenge has been formally granted or denied, and for all other relief to which Defendant Taylor may justly be entitled in law or equity.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT CHRISTOPHER TAYLOR

CERTIFICATE OF CONFERENCE

Counsel for Defendant Taylor has complied with the Court's requirement to confer. Over the course of several phone calls and email exchanges, counsel for Plaintiff and Defendant attempted to broker a compromise resolution, but the parties were unable to come to final terms on any such compromise.

/s/ Blair J. Leake
Blair J. Leake

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of December, 2021, a true and correct copy of the above and foregoing Motion was electronically filed with the Clerk of the Court using the CM/ECF system, which will automatically serve a Notice of Electronic Filing on the following counsel of record:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS *Plaintiff,*	§	
v.	§	CIVIL ACTION NO. 1:20-cv-01256-RP
THE CITY OF AUSTIN and CHRISTOPHER TAYLOR, *Defendants.*	§	

ORDER GRANTING DEFENDANT CHRISTOPHER TAYLOR'S MOTION TO STAY DISCOVERY BASED ON THE PENDING QUALIFIED IMMUNITY THRESHOLD DETERMINATION

CAME ON to be heard Defendant Christopher Taylor's Motion to Stay Discovery Based on the Pending Qualified Immunity Threshold Determination. After considering said Motion and the response of Plaintiff, if any, the Court is of the opinion that the Motion should be granted. Discovery as to Defendant Taylor shall hereby be stayed until the pending threshold Qualified Immunity challenge has been formally granted or denied.

It is therefore, ORDERED, ADJUDGED AND DECREED that Defendant Christopher Taylor's Motion to Stay Discovery is GRANTED.

SIGNED this _____ day of _____, 2022.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS, Plaintiff	§	
v.	§	NO. 1:20-CV-01256-RP
THE CITY OF AUSTIN and CHRISTOPHER TAYLOR, Defendants.	§	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO STAY DISCOVERY BASED ON THE PENDING QUALIFIED IMMUNITY THRESHOLD DETERMINATION

Plaintiff Brenda Ramos, on behalf of herself and the Estate of Mike Ramos, files this Response to Defendant Christopher Taylor's Motion to Stay Discovery Based on the Pending Qualified Immunity Threshold Determination [Doc. 32], and respectfully shows the Court as follows:

INTRODUCTION

Defendant Christopher Taylor ("Taylor") seeks a blanket stay on discovery pending this Court's determination of his qualified immunity defense. However, Taylor's base assertion that to the Court must determine his defense of qualified immunity before permitting any discovery is not enough to immunize him from the entirety of Plaintiff's discovery requests. The law does not support an all-encompassing stay in a case such as this, where discovery is necessary to answer the issue of qualified immunity. Moreover, Plaintiff has the right to conduct discovery as to Defendant City of Austin, who has no

qualified immunity defense to Plaintiff's claims. Plaintiff requests that this Court order limited discovery as to Taylor on the issue of qualified immunity and deny the motion to stay as to all discovery concerning Defendant City of Austin.

FACTUAL BACKGROUND

On April 24, 2020, Austin police responded to a 911 report about a man with a gun and a woman using drugs in a gold and black Prius in the parking lot of the Rosemont Apartments. Mike Ramos was the man in the driver's seat of the Prius. When police arrived at the apartment complex, they strategically positioned their patrol vehicles to the left side of the vehicle Mr. Ramos was in, intentionally blocking the only exit from the parking area. Officers immediately ordered Mr. Ramos and the woman to get out of the car and show their hands. Mr. Ramos complied with their commands. While doing so, he pleaded with the officers to tell him what was going on and that they not shoot him. Multiple officers then began shouting a cacophony of conflicting commands at Mr. Ramos [Doc. 5, audio recording]. Mr. Ramos complied by raising his shirt and turning in a circle, showing the officers that he did not have a weapon. In fact, police found no weapon, or anything that could have been mistaken for a weapon in the vehicle and Ramos never displayed anything that officers mistook for a weapon during the course of the incident. Mr. Ramos kept his hands up the entire time, but he was understandably reluctant to walk towards a group of officers with their weapons drawn and pointed at him. As Ramos continued to demand to know why the officers' weapons were trained on him, one of the officers shot him at close range with a bean bag -- a "less lethal munition."

Upon being shot with the bean bag, Mr. Ramos got into the driver's seat of the Prius and closed the door. He then started the car and pulled out of his parking spot, turning the car to the right, away from the group of officers and patrol vehicles stationed to his left. After he had turned away from police, Officer Taylor shot him with a rifle through the driver's side window, striking him in the back of the head and killing him. None of the other eight officers fired a shot.

Mr. Ramos never threatened the officers or bystanders in any manner or made any move to drive towards the group of officers or their vehicles. Rather, he was deliberately driving *away* from them. His actions did not threaten the safety of any nearby pedestrians. The fact that no other officer fired their weapon belies Officer Taylor's claim that shooting Mr. Ramos to death with a high-powered rifle was necessary to ensure his own safety and that of his fellow officers.

PROCEDURAL BACKGROUND

Plaintiff Brenda Ramos filed suit on behalf of her son Mike Ramos and his estate. Taylor filed a Rule 12(b)(6) motion to dismiss, alleging qualified immunity. [Doc. 7; Doc. 9]. While that motion was pending, the parties began discussing a plan for discovery, ultimately memorializing the intended scope of discovery in a letter sent by Taylor to Plaintiff and the City of Austin. *See* Ex. A. Consistent with that letter, Taylor circulated an unopposed "joint motion to stay discovery"[1] among the parties, limiting discovery as

[1] While Taylor titled the proposed motion as a Joint Motion to *Stay* Discovery, the motion actually just proposed to limit some discovery, not all.

to Taylor but no other parties. The Parties did not file the motion before defendant Taylor changed his position to seek a complete stay.

On November 29, 2021, Taylor filed an Advisory to the Court Regarding the Motion to Dismiss to highlight a recent, unpublished case, *Irwin v. Santiago*, No. 21-10020, 20201 WL 4932988 (5th Cir. Oct. 21, 2021). [Doc. 30]. In Plaintiff's Response to the "Advisory to the Court", Ms. Ramos stated that she intended to amend her complaint in light of Taylor's motion to dismiss and, consistent with the parties' earlier discussions, request "limited discovery to proceed on the qualified immunity issues," noting that the Austin Police Department had not released unedited video, the autopsy, and officer and witness statements regarding the incident and bearing on the qualified immunity claim. [Doc. 31 at p. 2]. On December 29, 2021, Taylor filed his Motion to Stay Discovery asking for a blanket stay of all discovery. [Doc. 32]. For the reasons stated below, the Court should deny that motion.

ARGUMENT & AUTHORITIES

Taylor asserts that a Court must always stay all discovery pending a resolution of a qualified immunity defense. But, the case law is not as simple and unequivocal as that.

In assessing a qualified immunity claim, the Supreme Court has developed a two-step process. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). First, the court must determine whether the facts, taken in the light most favorable to the party asserting the injury, show that the officer's conduct violated a federal right. *Wilson v. Layne*, 526 U.S. 603, 609–11 (1999). If the facts demonstrate the violation of a constitutional right, the court must then

decide whether the constitutional right was clearly established the right at the time of the alleged violation. *Wilson*, 526 U.S. at 609.

Plaintiff alleges that Taylor used excessive, deadly force in violation of Mr. Ramos's Fourth Amendment rights. Excessive force cases are necessarily fact-intensive; whether the force used is excessive or unreasonable depends on the facts and circumstances of each particular case. *Aguirre v. City of San Antonio,* 995 F.3d 395, 407 (5th Cir. 2021). For this reason, discovery is appropriate for the limited purpose of fleshing out the basis the qualified immunity claim. *See Saenz v. City of El Paso*, No. EP-14-CV-244-PRM, 2015 WL 4590309, at *6 (W.D. Tex. Jan. 26, 2015) (denying a global stay but recognizing that a "modest stay that balances the need to keep the case progressing towards resolution with [the officer defendant's] right to be free of the burdens of discovery until . . . the Court rules on his claim of qualified immunity" may be appropriate).

A. Plaintiff can show that limited discovery is necessary to rule on the issue of qualified immunity.

The Fifth Circuit has held that an assertion of qualified immunity shields a government official from discovery that is "avoidable or overly broad." *Lion Boulos v. Wilson*, 834 F.2d 504, 507 (5th Cir. 1987). But that does not shield a government actor asserting qualified immunity from *all* discovery entirely. Rather, a district court may allow limited discovery where the plaintiff alleges facts which, if proved, would overcome the defense of qualified immunity. *See Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 994 (5th Cir. 1995). (discovery should be "narrowly tailored to uncover only those

facts needed to rule on the immunity claim."). Recently, in *Welsh v. Collier,* this Court acknowledged this same general principal:

> Although the Supreme Court held in *Harlow* that discovery should not be allowed until the issue of immunity is resolved, ***not all discovery is forbidden***. Rather, only discovery that is either avoidable or over broad is not permitted. The Fifth Circuit has held that when the district court is unable to rule on the immunity defense without further clarification of the facts and when the discovery order is narrowly tailored to uncover only those facts needed to rule on the immunity claim an order allowing such limited discovery is neither avoidable nor overly broad.

No. A-20-CV-337-RP, 2020 WL 6293424, at *2 (W.D. Tex. Oct. 27, 2020) (emphasis added).[2]

This limited discovery is designed to avoid an unfair situation where an officer defendant uses a discovery stay based on qualified immunity as a shield and a sword. *See Est. of Sorrells v. City of Dallas*, 192 F.R.D. 203, 209 (N.D. Tex. 2000). Limited discovery as to qualified immunity prevents government defendants from hiding behind the shield of qualified immunity, denying access to evidence solely within their control, only to turn around and use that same evidence against plaintiffs to justify qualified immunity or denying plaintiffs evidence that would defeat a defendant's defense of qualified immunity. *See id.*[3]

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[2] Citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *Lion Boulos*, 834 F.2d at 507; *Wicks*, 41 F.3d at 994.

[3] *See also Castro v. United States*, 34 F.3d 106, 112 (2d Cir. 1994) ("Where the claimant's description of the events suggests that the defendants' conduct was unreasonable, and the facts that the defendants claim are dispositive are solely within the knowledge of the defendants and their collaborators, summary judgment can rarely be granted without allowing the plaintiff an opportunity for discovery as to the questions bearing on the defendants' claims of immunity."); *Smith v. Luther*, No. CIV.A. 4:96CV69-D-B, 1996 WL 671630, at *2 (N.D. Miss. Aug. 16, 1996) ("In this court's view, it is inappropriate for [the] defendants to gain shelter from discovery under the qualified immunity shield while simultaneously attacking plaintiff with documentary evidence from which he cannot defend himself because of the discovery stay.").

Plaintiff is entitled to discover the facts *underlying* Taylor's qualified immunity claim. First, Plaintiff cannot rely on Mr. Ramos to dispute Taylor's claims in this case, as Taylor's actions resulted in his violent death. And as Plaintiff established in her response to Taylor's Advisory to this Court [Doc. 31], neither Taylor nor the City of Austin has produced the unedited videos of the shooting, the autopsy, and officer and witness statements. These — and other — pieces of evidence are all necessary for this court to make a definitive ruling on Taylor's qualified immunity claim, which turns on the reasonableness of his actions under the circumstances. Resolving the qualified immunity issue will turn on the specific circumstances leading to Taylor's shooting Mr. Ramos, ostensibly to protect himself and the other officers present. Given this context, the timing of the rifle shot, the direction at which the bullet(s) entered Mr. Ramos's body, and all video footage are essential to determine the validity of Taylor's assertion of perceived danger[4] and whether the evidence supports his claim of qualified immunity.

To the extent that discovery as to qualified immunity overlaps with discovery on the merits, that is to be expected and is not an excuse to stay discovery. *See Cassanova v. Marullo*, Civ. A. No. 94-376, 1995 WL 448005 at *2 (E.D. La. July 27, 1995) ("the court will not involve the parties in an attempt to make such a separation" between excessive force

[4] Complete, unedited footage of the shooting is especially important because Taylor's Motion to Dismiss [Doc. 9] relies in large part on links to video footage incorporated into Plaintiff's complaint [Doc. 5]. However, this limited video footage is not the full story, and Taylor knows this. Discovery is necessary to obtain complete, unedited footage of the shooting before this Court can rule on qualified immunity. Taylor cannot simultaneously allege that the video footage supports his qualified immunity claim while also denying Plaintiff and this Court access to the unedited footage.

and qualified immunity discovery). The elements of Plaintiff's excessive force claim coincide in large part with the elements of Taylor's qualified immunity defense. *See Heitschmidt v. City of Houston*, 161 F.3d 834, 839 (5th Cir. 1998). To establish an excessive force claim Plaintiff must show that the force used by Taylor was objectively unreasonable. *See Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir. 1989). As discussed above, qualified immunity likewise turns on whether the defendant's actions were objectively unreasonable under the circumstances. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Given the potential overlap of these issues, it is impossible to separate discovery on the merits of Plaintiff's excessive force claim from discovery on Taylor's qualified immunity defense, and Taylor cannot use this overlap as a shield to impose a blanket stay on discovery. *See Est. of Sorrells*, 192 F.R.D. at 209-10.

The case law supports Plaintiff's right to conduct discovery in this case as to Taylor's claim of qualified immunity. "When the district court 'is unable to rule on the immunity defense without further clarification of the facts' and when the discovery order is 'narrowly tailored to uncover only those facts needed to rule on the immunity claim,'" then an order allowing limited discovery is neither avoidable nor overly broad. [5] *Wilson v. Sharp*, No. 17-84-SDD-EWD, 2017 WL 4685002, at * 2 (M.D. La. Oct. 17, 2017) (citing *Lion Boulos*, 834 F.2d at 507-508); *see also Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012). Taylor cannot rely on limited evidence of the shooting to establish qualified immunity,

[5] And in fact, a court of appeals lacks jurisdiction to review interlocutory discovery orders in qualified immunity cases where the discovery order is properly tailored and limited. *Zapata v. Melson*, 750 F.3d 481, 485 (5th Cir. 2014).

while also denying Plaintiff access to evidence that will prove that Taylor's basis for asserting qualified immunity is without merit. A blanket stay of discovery is not appropriate in this case.

B. Taylor already proposed an agreement to limited discovery.

Notably, Taylor already recognized the need for limited discovery in this case. On August 18, 2021, Taylor's counsel sent a letter to Plaintiff memorializing the terms of the parties' verbal agreement to compromise on discovery in lieu of litigating a formal motion to stay discovery.[6] *See* Ex. A, attached. The letter stated:

> **A. Scope of Deferred Discovery** – All parties agree to refrain from propounding any discovery that would necessarily require Defendant Christopher Taylor or Karl Krycia to testify under oath (such as a notice to testify at a deposition), provide substantive discovery responses (such as sworn interrogatory responses), or otherwise put Taylor or Kryica in a position that could force either individual to invoke his respective 5th Amendment privilege against self-incrimination at any time before the criminal proceedings for Taylor and Kyrcia have resolved. Such discovery requests, notices, and/or subpoenas shall be collectively referred to as "Deferred Discovery" henceforth.
> **B. Scope of Non-Deferred Discovery** – The parties may propound discovery and deposition notices to any parties and/or persons they respectively desire, to the extent permitted by applicable federal law and not prohibited by this Agreement.

See Ex. A, p. 2. Taylor's concern at the time was not to prevent Plaintiff from conducting any discovery whatsoever, but only to limit discovery that might conflict with his pending criminal charges for the murders of Mr. Ramos and Dr. Marius DeSilva and

[6] Plaintiff does not proffer the letter as a binding agreement, but only to note that Taylor had previously agreed to discovery that he now seeks to stay, presumably recognizing that such a stay is not automatic as he now seems to claim.

require him to make Fifth Amendment decisions prior to his criminal trial. *See* Ex. A at p. 2.

C. No limitations impede Plaintiff's right to conduct discovery against the City of Austin.

Taylor's request to stay discovery is also overbroad because it would also prevent discovery on Plaintiff's *Monell*[7] claim against the City of Austin. *See Est. of Sorrells v. City of Dallas*, 192 F.R.D. 203, 210 (N.D. Tex. 2000). But "qualified immunity is a right to immunity *from certain claims*, not from immunity from litigation in general." *Harris v. City of Balch Springs*, 33 F. Supp. 3d 730, 733 (N.D. Tex. 2014) (emphasis in original) (citing *Behrens v. Pelletier*, 516 U.S. 299, 312 (1996)). A municipality has no right of qualified immunity. *See Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999) ("Unlike government officials sued in their individual capacities, municipal entities and local governing bodies do not enjoy immunity from suit . . . under § 1983.").[8] This Court should therefore, at the very least, allow Plaintiff to conduct discovery as to her claims against the City of Austin. *See Beck v. Taylor County*, No. 3:98-CV-0994-D, 1998 WL 682265 at *1 (N.D. Tex. Sept. 29, 1998); *Gauglitz v. City of Dallas*, No. Civ.A. 3:95-CV-3123G, 1997 WL 786246 at *2 n. 3 (N.D. Tex. Dec. 15, 1997).

[7] *Monell v. Dept. of Social Servs. of City of New York*, 436 U.S. 658 (1978).

[8] *See also Owen v. City of Independence, Missouri*, 445 U.S. 622, 638 (1980); *Lynch v. Cannatella*, 810 F.2d 1363, 1371–72 (5th Cir. 1987).

CONCLUSION

The law does not support Taylor's request for an all-encompassing stay because discovery is necessary to answer the issue of qualified immunity — in particular whether Taylor was acting as a reasonable officer when he killed Mr. Ramos. Moreover, irrespective of the limitations on discovery as to Taylor's qualified immunity defense, Plaintiff has a right to conduct discovery as to Defendant City of Austin, who has no qualified immunity as to Plaintiff's claims. Plaintiff requests that this Court deny Taylor's motion to stay and, instead, order limited discovery as to Taylor on the issue of qualified immunity and allow all discovery as to Defendant City of Austin without limitation. Plaintiff further requests such other relief to which she may be justly and equitably entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **February 2, 2022**, a true and correct copy of this *Plaintiff's Response to Defendant's Motion to Stay Discovery Based on the Pending Qualified Immunity Threshold Determination* has been forwarded to the following via the Federal Rules of Civil Procedure.

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EXHIBIT A

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August 18, 2021

VIA EMAIL:
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Re: Civil Action No. 1:20-cv-01256-RP; *Brenda Ramos, on Behalf of Herself and the Estate of Mike Ramos vs. The City of Austin and Christopher Taylor*; in the U.S. District Court for the Western District of Texas, Austin Division
Our File No.: 10329-48074

Counsel:

I write this letter to memorialize the terms agreed to by the parties' respective counsel verbally in order to reach a compromise agreement regarding discovery in lieu of litigating a formal motion(s) to stay of discovery in this lawsuit.

In sum, the parties have agreed to move forward only with discovery that does not include any sworn deposition testimony or substantive written discovery responses (such as interrogatories) by Defendant Christopher Taylor or witness Karl Krycia. The parties believe that the agreed-to compromise will allow the parties to otherwise work up their respective cases, while also affording Defendant Taylor the ability to allow the parallel criminal proceeding to resolve before he is deposed and/or provides substantive written discovery responses in this case. The agreement also will allow settlement discussions to take place in a meaningful way prior to such criminal resolution. The terms of the agreement are set out *infra*, and will be further memorialized in an Unopposed Joint Motion to Stay Discovery to be drafted by the undersigned counsel.

Stay of Discovery Agreement

I. **Purpose:** The purpose of this Agreement is to allow the parties to progress this lawsuit forward by allowing certain discovery to commence immediately, while simultaneously not forcing Christopher Taylor to make a 5th Amendment decision prior to his criminal trial(s), nor force Officer Taylor to move to stay this lawsuit completely.

II. **Unopposed Joint Motion to Stay Discovery:** All parties agree to join an Unopposed Joint Motion to Stay Discovery, which shall track the terms and conditions herein. Counsel for Taylor agrees to draft such motion, circulate it, and obtain approval from all counsel of record prior to filing the motion.

III. **Deferred Discovery During Pendency of Criminal Discovery:**

A. **Scope of Deferred Discovery** – All parties agree to refrain from propounding any discovery that would necessarily require Defendant Christopher Taylor or Karl Krycia to testify under oath (such as a notice to testify at a deposition), provide substantive discovery responses (such as sworn interrogatory responses), or otherwise put Taylor or Kryica in a position that could force either individual to invoke his respective 5th Amendment privilege against self-incrimination at any time before the criminal proceedings for Taylor and Kyrcia have resolved. Such discovery requests, notices, and/or subpoenas shall be collectively referred to as "Deferred Discovery" henceforth.

B. **Scope of Non-Deferred Discovery** – The parties may propound discovery and deposition notices to any parties and/or persons they respectively desire, to the extent permitted by applicable federal law and not prohibited by this Agreement.

C. **Duration -** All parties further agree that the parties may later conduct or propound Deferred Discovery, but ***only after*** Taylor and Krycia's respective parallel criminal proceedings have resolved. Such terms are defined *infra*, and counsel for Taylor agrees to promptly notify all parties once such terms have been met and the parallel criminal proceedings have resolved.

D. **Good Faith Deadline Extensions –** The parties understand that this Agreement may potentially render certain current scheduling order deadlines unworkable, due to such deadlines being dependent on the timing of other parallel legal proceedings. The parties thus agree to, if necessary, work together in the future in good faith to extend any existing deadlines that cannot be met due to the existence of this Agreement and the prohibitions herein.

E. **Criminal Resolution Defined** – The parties agree that the parallel criminal proceedings shall be considered resolved in full for the purposes of this Agreement after:

1) The criminal proceedings related to the officer involved shooting of Mike Ramos have resolved via either a plea deal, or via a "Not Guilty" or "Guilty" verdict at the conclusion of the subject criminal trial; **and**

2) Taylor and Krycia either:

   a. Receive a "no bill" from the grand jury in the matter related to the officer involved shooting of Mauris DeSilva, **or**

   b. Are adjudicated "Not Guilty" or "Guilty" at the conclusion of the subject criminal trial, **or** resolve all related criminal charges via plea deals.

IV. No Waiver:

A. Deferred Discovery – The parties understand and agree that this Agreement does **not** constitute any waiver of Plaintiff's right to conduct the Deferred Discovery, but instead only affects the timing of when Deferred Discovery may first be propounded or requested.

B. Objections and Privileges – The parties further agree that this Agreement does **not** constitute any waiver of any parties' rights to object or invoke privileges in response to any discovery requests or questions.

C. Judicial Remedies – The parties further agree that this Agreement does **not** constitute a waiver by any party to formally move for any kind of judicial remedy or intervention in the future.

If you have any questions or wish to further discuss the terms of his Agreement, please contact me at your convenience. If you agree to the terms of this Agreement, please respond by sending an email to our office that provides permission to sign this Agreement on your behalf.

Regards,

WRIGHT & GREENHILL, P.C.

By: _____
Blair J. Leake

BJL/skh

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS, Plaintiff v. THE CITY OF AUSTIN and CHRISTOPHER TAYLOR, Defendants.	§ § § § § § § § § § § §	NO. 1:20-CV-01256-RP

ORDER DENYING DEFENDANT CHRISTOPHER TAYLOR'S MOTION TO STAY DISCOVERY BASED ON THE PENDING QUALIFIED IMMUNITY THRESHOLD DETERMINATION

Came to be heard on this day Defendant Christopher Taylor's Motion to Stay Discovery Based on the Pending Qualified Immunity Threshold Determination [Doc. 32]. The Court, having considered the Motion, Plaintiff's Response, the evidence, and the argument of counsel, if any, is of the opinion that the Motion should be DENIED.

It is, therefore, ORDERED, ADJUDGED and DECREED that Defendant Christopher Taylor's Motion to Stay Discovery Based on the Pending Qualified Immunity Threshold Determination is DENIED.

SIGNED on this _____ day of _____, 2022.

_____
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS *Plaintiff,*	§	
v.	§	CIVIL ACTION NO. 1:20-cv-01256-RP
THE CITY OF AUSTIN and CHRISTOPHER TAYLOR, *Defendants.*	§	

DEFENDANT CHRISTOPHER TAYLOR'S REPLY IN SUPPORT OF THE MOTION TO STAY DISCOVERY

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES Defendant Christopher Taylor, and files this, his reply in support of his Motion to Stay Discovery Based on the Pending Qualified Immunity Threshold Determination, and in support thereof would respectfully show the Court as follows:

I. SUMMARY OF THE ARGUMENT

1. The parties have not reached the summary judgment stage, and cases applicable to stays based on summary judgment motions have no bearing here. The 2021 Fifth Circuit *Irwin* decision establishes that any lawsuit based on an officer-involved shooting at a moving car's driver where officers were standing either to the front or side of the path of the car—and where the incident occurred before October 21, 2021—fail ***as a matter of law*** to overcome the second "clearly established law" prong of Qualified Immunity. Plaintiff's incorporated video footage and her own pleadings make it indisputably clear that APD officers were standing to the front and/or to the side of the path of Ramos's vehicle when the shots were fired. One video angle even depicts multiple officers scrambling to get out of the way of Ramos's car. When viewed through the lens of *Irwin* and every other similar Fifth Circuit precedent, Plaintiff's Complaint fails to state a claim upon which relief may be granted. Pursuant to *Wicks* and *Backe,* controlling law dictates that any order allowing discovery before making a threshold Qualified Immunity determination would amount to an immediately appealable abuse of discretion.

II. ARGUMENTS & AUTHORITIES

A. Plaintiff misrepresents Officer Taylor's requested relief—which was clearly represented during conferencing and in pleadings—and provides additional fictions as to who possesses other evidence, how this motion would affect obtaining it, and whether that evidence *could even be used* to rebut a 12(b)(6) motion.

2. Contrary to Plaintiff's drumbeat otherwise, Officer Taylor has asked for discovery to be temporarily stayed only "***as to Defendant Taylor***," as stated in Taylor's proposed order.[1] The limited scope of Taylor's requested stay—namely that it would not affect or hinder discovery between Plaintiff and the City—was also spelled out explicitly throughout conferencing between

[1] *See* Dkt. # 32.1, Order Granting Defendant Taylor's Motion to Stay Discovery Based on the Pending Qualified Immunity Threshold Determination, filed on 12/29/21 (emphasis added).

counsel.[2] Plaintiff's sudden suggestion that Defendant Taylor is attempting to enact a "blanket" stay of discovery is a fiction.

3. Plaintiff supplies this Court another fiction by suggesting that granting Officer Taylor's motion would prevent her from obtaining the discovery she supposedly needs to respond to Officer Taylor's Qualified Immunity threshold motion. It would not—and such line of reasoning amounts to a false dilemma fallacy. As demonstrated *supra*, the requested stay is limited to discovery propounded to Officer Taylor. Consequently, granting this motion would ***not*** prevent Plaintiff from obtaining the referenced unedited videos, statements, and autopsy records from the persons or entities *who actually possess them*: the City of Austin and the Travis County District Attorney's Office. Failing to vigorously pursue such materials from their actual custodians should not be blamed on Taylor or his motion. Plaintiff's cited discovery needs are thus unaffected by—*and wholly irrelevant to*—this motion. Officer Taylor cannot deny Plaintiff access to documents and footage he does not possess.

4. Plaintiff's alleged need for video footage, witness statements, and autopsy records is also wholly irrelevant to this motion for another reason. 12(b)(6) motions and responses are limited to the contents of a plaintiff's Complaint, with limited exceptions.[3] Parties thus ***cannot***—as a matter of law—normally use outside exhibits to bolster a response to a 12(b)(6) motion.[4] Applied here,

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[2] *See e.g.* **Exhibit No. 1**, email from defense counsel to plaintiff counsel specifying that this motion would not stay discovery as it pertains to City of Austin's *Monell* claim.

[3] *See e.g. Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019) (holding that the factual information to which the court considers a 12(b)(6) inquiry is generally limited to the (1) the facts set forth in the complaint, (2) documents attached to or incorporated by the complaint, and (3) matters of which judicial notice may be taken under Federal Rule of Evidence 201).

[4] Plaintiff chose to incorporate by reference certain video footage of the incident into her First Amended Complaint, Dkt. # 5, going so far as to include a hyperlink to facilitate the Court's retrieval and viewing of such footage. Officer Taylor did not use outside exhibits. He cited incorporated portions of Plaintiff's First Amended Complaint that she tactically chose to include

any discovery materials Plaintiff could theoretically obtain would presumably be unusable for bolstering a supplemental response to Officer Taylor's pending 12(b)(6) motion. Plaintiff's response is altogether silent as to why or how the records she allegedly needs—and can and should be obtaining from other sources—would fit those limited circumstance and thus be admissible to rebut Taylor's 12(b)(6) motion at issue here. Consideration of Officer Taylor's 12(b)(6) threshold motion should not be delayed just so that Plaintiff may obtain discovery *that cannot even legally be used to rebut it*.

B. Plaintiff's own cited case law belies her arguments, and instead demonstrates that discovery should be stayed as to Officer Taylor pursuant to Fifth Circuit precedent.

5. *Lion Boulos* is a case that permits the ordering of additional limited discovery almost exclusively in cases of summary judgments, *not* 12(b)(6) motions to dismiss. In *Lion Boulos,* the defendants had filed a "motion to dismiss or for summary judgment," which included affidavits as exhibits to support the summary judgment portion of the motion.[5] The Court's ultimate ruling that allowed additional limited discovery specifically hinged upon the existence of differing accounts found in the plaintiffs' affidavits and defendants' dueling affidavits—and thus necessarily on issues pertaining to the summary judgment portion of the motion, *not* the motion to dismiss portion.[6] In contrast, the grounds for a stay here pertain only to a 12(b)(6) motion to dismiss that challenges the existence of a claim for which relief may be granted pursuant to *Irwin* and the second prong of Qualified Immunity.

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therein. Parties making tactical decisions must endure the drawbacks of their decisions alongside their benefits. A party should also not be punished for citing part of a plaintiff's Complaint in the context of a 12(b)(6) motion.

[5] *Lion Boulos v. Wilson*, 834 F.2d 504, 506 (5th Cir. 1987).

[6] *Id.* at 507-09 (*see e.g.* "the district court was unable to resolve the second, largely factual issue based on the conflicting versions of the inspections recounted [in affidavits and declarations] by Boulos and Wilson.").

6. *Lion Boulos* is also a case where eligibility for immunity had not been legally established because the defendants were neither public employees nor officials, and instead were contract agents of the E.P.A.[7] While *Lion Boulos* may provide a way to skirt a total stay of discovery in certain unique circumstances that *almost always* involve motions for summary judgment, it does not provide such a path in a case like this one where the clearly established law prong is impossible to overcome as a matter of law—and where the defendant as a police officer is unquestionably allowed to assert a Qualified Immunity defense.

7. Plaintiff cites *Saenz* for the proposition that—in Plaintiff's own words—"discovery is appropriate for the limited purpose of fleshing out the basis of a qualified immunity claim."[8] However, the *Saenz* Court's holding did no such thing, and instead granted a stay of <u>*all*</u> discovery for the movant officer until after his threshold 12(b)(6) motion had been ruled upon.[9] At best, *Saenz* could be cited for the proposition that a global stay of *all* parties' discovery is inappropriate—which is not the relief requested by Officer Taylor.

8. Plaintiff's citation of *Wicks* does him no favors, as demonstrated *supra.* Plaintiff's citation of *Sorrells* likewise actually *supports* the granting of a stay, because it deals with limited discovery being allowed in response to a motion for summary judgment, <u>*not*</u> a 12(b)(6) motion to dismiss.[10] To that point, *Sorrells* includes a judicial brow beating that serves here to highlight the importance of—and difference between—12(b)(6) threshold challenges versus motions for summary judgment:

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[7] *Lion Boulos v. Wilson*, 834 F.2d 504, 509 (5th Cir. 1987).
[8] Pl.'s Resp. to Mot. to Stay Disc., Dkt. # 36, pg. 5.
[9] *Saenz v. City of El Paso, Tex.,* No. EP-14-CV-244-PRM, 2015 WL 4590309, at *6 (W.D. Tex. Jan. 26, 2015) (holding that "Defendant Officer Jose Flores need not respond to any outstanding discovery requests, and no new discovery requests may be propounded to him, until such time as the Court rules on his 'Motion to Dismiss Plaintiff's Second Amended Complaint.").
[10] *Est. of Sorrells v. City of Dallas*, 192 F.R.D. 203 (N.D. Tex. 2000).

> The course of this litigation reveals how far we have come from the proper procedural focus in a qualified immunity case. Defendants never asked plaintiffs to file a Rule 7(a) reply. ***Nor did they move for dismissal under Rule 12(b)(6).*** Undoubtedly, this is because defendants realize that plaintiffs have alleged facts which, if proved, would overcome their immunity defense. Defendants themselves recognize the importance of the underlying historical facts because their pending summary judgment motion is supported by the affidavits of six police officers who participated in the events giving rise to this suit. Yet they vigorously oppose plaintiffs' efforts to conduct any discovery until the issue of qualified immunity is decided. ***The absurdity of this scenario should be plain. The only reason the question of qualified immunity is still unresolved is because defendants chose not to engage it as a threshold matter.*** Instead, defendants first raised the issue in a fact-intensive motion for summary judgment.[11]

In contrast, Officer Taylor *has* filed a 12(b)(6) threshold challenge—the filing of which serves as the sole grounds for his motion to stay—and thus has followed the proper protocol of treating and asserting Qualified Immunity as a threshold matter as it was intended to be used, and thus should not be deprived of the stay of discovery that accompanies such an assertion.

9. Plaintiff's citation of *Wilson* and *Backe* similarly pull cherry-picked language untethered to the overall respective holdings therein. In *Wilson*, the Court ultimately *granted* the stay of discovery until the motion to dismiss was subsequently ruled upon, and held that "Fifth Circuit precedent permits discovery only after a determination has been made that the plaintiff has alleged facts sufficient to state a claim against the defendant."[12] More damning, *Backe* was an appeal where the defendants sought appellate review of a District Court order that permitted discovery before first resolving defendants' assertions of Qualified Immunity.[13] The *Backe* defendant had filed a 12(b)(6) challenge based on Qualified Immunity, but the "[D]istrict [C]ourt refused to rule on Appellants' threshold qualified immunity defense, concluding that '[a]lthough qualified

[11] *Sorrells*, 192 F.R.D. at 209.
[12] *Wilson v. Sharp*, No. CV 17-84-SDD-EWD, 2017 WL 4685002, at *2 (M.D. La. Oct. 18, 2017).
[13] *Backe v. LeBlanc*, 691 F.3d 645, 646 (5th Cir. 2012).

immunity might become a relevant defense to liability once the facts are known, it is too early to make that determination now.'"[14] The Fifth Circuit deemed this failure to rule on the threshold motion and allowance of general discovery to be a two-fold "***abuse of discretion***," and vacated and remanded the District Court's decision.[15] If nothing else, the overwhelming stay-supportive nature of most of the decisions cited by Plaintiff demonstrate that a denial of a threshold stay of discovery is the exception and <u>*not*</u> the rule.

C. The Fifth Circuit just examined an almost identical set of facts in *Irwin* and determined that no clearly established law existed, consequently requiring a finding of Qualified Immunity. Because of the parallels with *Irwin*, this motion must be evaluated under *Wicks*, where the allowance of *any* discovery would arguably be an immediately appealable abuse of discretion.

10. Factually—and thus by extension legally—this case tracks the 2021 Fifth Circuit decision in *Irwin*, which explicitly establishes that there was no clearly established law that would have put Officer Taylor on notice that his actions would constitute a violation of the Constitution. Officer Taylor originally cited the District Court's decision in *Irwin* in his motion to dismiss[16] and then later alerted the Court that the cited decision had just been affirmed in a new decision by the Fifth Circuit.[17]

11. The 2021 *Irwin* Fifth Circuit decision is dispositive for this motion. Plaintiff's pleadings indisputably fail to state a claim that could overcome Qualified Immunity—because *Irwin* constitutes controlling on-point precedent that negates Plaintiff's ability to prevail under the

[14] *Backe,* 691 F.3d at 647.
[15] *Id.* at 648-49. ("The district court doubly abused its discretion by (apparently) refusing to rule on LeBlanc's and Wiley's motions to dismiss and by failing to limit discovery to facts necessary to rule on their qualified immunity defense.").
[16] Def. Taylor's Mot. to Dismiss Pl.'s First Am. Compl., Dkt. # 9, pg. 14. Defendant incorporates by reference all portions of his motion to dismiss herein verbatim in order to assist the Court in determining whether a clearly established right was violated, and thus whether any discovery whatsoever would be permissible under Fifth Circuit law.
[17] Def. Taylor's Advisory to the Ct., Dkt. # 30.

clearly established law prong of Qualified Immunity as a matter of law. Plaintiff's demonstrable—and unavoidable—failure to state a claim upon which relief may be granted renders any discovery whatsoever impermissible.

12. "A defendant is entitled to qualified immunity if his conduct did not violate a right that was clearly established at the time."[18] The Fifth Circuit's new decision in *Irwin* assumed as true Plaintiff's version of the officer-involved shooting of a driver, namely that "***Officer Santiago was standing 'toward the front' of Irwin's vehicle as it started to move forward, and then stood at its side as he fired.***" This is factually identical to the case at bar, as Plaintiff's First Amended Complaint and incorporated videos depict Officer Taylor and other nearby officers to be to the front or side of Ramos's vehicle.[19] The Fifth Circuit determined that—after a review of applicable controlling precedents in existence at the time of the shooting—"***it was not a matter of clearly established law that Officers Santiago and Roberts were unreasonable in firing on Irwin's vehicle***," and that Qualified Immunity must be afforded to those officers.[20]

13. Because the Fifth Circuit found there to be a fact issue on the first prong, any subsequent incident under the same facts would constitute a violation of clearly established law, namely the law established by *Irwin*. The incident that forms the basis of this case occurred before *Irwin* was decided. Because (i) the *Irwin* circumstances are nearly identical to this case, and (ii) the subject incident here occurred before the 2021 *Irwin* decision itself, it is necessarily true that it was—just as in Irwin—*not* a matter of clearly established law that Officer Taylor was unreasonable in firing

[18] *Irwin v. Santiago*, No. 21-10020, 2021 WL 4932988, at *2 (5th Cir. Oct. 21, 2021) (citing *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).
[19] *Irwin*, 2021 WL 4932988 at *3.
[20] *Id.*

on Ramos's vehicle. To hold otherwise would be a snub of the Fifth Circuit's controlling *Irwin* precedent.

14. Procedurally, therefore, this case tracks *Wicks.* The denial of this motion would constitute an immediately appealable abuse of discretion, because one legal prong of Qualified Immunity is facially impossible for Plaintiff to overcome as a matter of law. In *Wicks,* the Fifth Circuit held that the plaintiff's "***allegations [in his Complaint] fail to suggest how [the defendant] violated his clearly-established first amendment rights***." Here Plaintiff's First Amended Complaint necessarily fails to show—pursuant to *Irwin*—how Officer Taylor violated Michael Ramos's clearly established Fourth Amendment rights in the case at bar.[21] The Fifth Circuit ultimately based their *Wicks* discovery opinion on the plaintiff's failure to state a claim violating any clearly established law, holding:

> Because we find that Wicks failed to meet the threshold pleading requirements for either of his claims, we hold that ***any discovery by Wicks, even that limited in scope, is improper and immediately appealable*** as a denial of the benefits of the qualified immunity defense.[22]

Based on the failure of Plaintiff's First Amended Complaint and its incorporated content to depict a violation of any clearly established law—as demonstrated by the legal research and findings by the Fifth Circuit in *Irwin*—there is no scenario where any discovery propounded to Officer Taylor would be legally permissible pursuant to *Lion Boulos*. Plaintiff's arguments for denial of the requested stay of discovery thus constitute an invitation for this Court to commit an immediately appealable abuse of discretion, and should be discarded.

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[21] *Wicks v. Mississippi State Emp. Servs.,* 41 F.3d 991, 996 (5th Cir. 1995) (emphasis added).
[22] *Id.* at 996–97 (emphasis added).

III. PRAYER

15. WHEREFORE, PREMISES CONSIDERED, Defendant Christopher Taylor respectfully requests that this Court grant his motion to temporarily stay civil discovery as it pertains to him, and for all other relief to which he may justly be entitled in law or equity.

Respectfully submitted,

WRIGHT & GREENHILL, P.C.
900 Congress Avenue, Suite 500
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(512) 476-4600
(512) 476-5382 – Fax

By: /s/ Blair J. Leake
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ATTORNEYS FOR DEFENDANT CHRISTOPHER TAYLOR

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February, 2022, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail and/or Regular U.S. Mail, in accordance with the Texas Rules of Civil Procedure, as follows:

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HENDLER FLORES LAW, PLLC
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City of Austin – Law Department
P.O. Box 1546
Austin, Texas 78767-1546

/s/ Blair J. Leake
Blair J. Leake

Exhibit 1

From: **Blair Leake** bleake@w-g.com
Subject: Re: Ramos
Date: August 11, 2021 at 3:09 PM
To: Scott Hendler shendler@hendlerlaw.com, Rebecca Webber rwebber@hendlerlaw.com
Cc: Sam Houston shouston@w-g.com, Stephen Barron sbarron@w-g.com, Laura Goettsche lgoettsche@hendlerlaw.com

BL

Scott & Rebecca,

I'm about to go out of town for approximately the next week. We have our motion to stay discovery based on the pending qualified immunity motion ready to file. I think we were planning on talking one more time about it, but the stars never aligned and I don't want to wait too terribly long to get this on file.

If you still want to talk, give me a call today. We intend to file the motion soon unless some kind of agreement is reached.

For what it's worth, I don't believe this particular motion would necessarily stay discovery for the City of Austin, so you—at the judge's direction—would probably still be able to go forward with that during the stay.

Thanks,

Blair J. Leake
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS,	§	
Plaintiff	§	NO. 1:20-CV-01256-RP
v.	§	
THE CITY OF AUSTIN and CHRISTOPHER TAYLOR,	§	
Defendants.	§	

PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiff Brenda Ramos, on behalf of herself and the Estate of Mike Ramos, pursuant to Federal Rule of Civil Procedure 15(a), files this Motion for Leave to File a Second Amended Complaint (a copy of which is attached to this Motion as Exhibit A).

I. Introduction

This case stems from Defendant Christopher Taylor's use of objectively unreasonable, excessive deadly force on Mike Ramos, an unarmed and nonthreatening individual. Despite the fact that much of Taylor's encounter with Ramos was captured by body and/or dash cam video, as well as cell phone video, despite the fact that the video affirmatively demonstrates that Taylor's use of deadly force under the circumstances presented was not objectively reasonable, and despite the fact that Taylor has been indicted for murder based on his execution of Ramos, Taylor and the City maintain that Plaintiff has failed to state valid claims upon which relief can be granted. Taylor's Motion to Dismiss

alleges that Taylor is entitled to qualified immunity and that the Plaintiff's allegations did not otherwise meet the *Hathaway* test, which balances time and proximity to determine if an officer's use of deadly force is justified. [Doc. 9]. The City's Motion to Dismiss alleges that Plaintiff failed to plead sufficient facts to establish *Monell* constitutional liability against the City. [Doc. 10]. And, while those motions are pending, Taylor seeks to stay any and all discovery. [Doc. 32].

In order to avoid the delays that accompany Defendants' motions, eliminate any basis—however specious—for Defendants' motions, and remove any justification for a discovery stay, Plaintiff seeks leave to amend the Complaint to include allegations of additional facts showing violations of clearly established law and to clarify the City's official policies and customs that were the moving force behind Plaintiff's claims. This request is being made within the deadline prescribed in the Scheduling Order. [Doc. 22].

II. Argument & Authorities

Federal Rule of Civil Procedure 15(a)(2) provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave." Leave to amend should be "freely give[n] … when justice so requires." In fact, the Rule is said to "evince[] a bias in favor of granting leave to amend." *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004).

A district court must therefore possess a "substantial reason" to deny a request for leave to amend. *Id.* Leave should be given unless some combination of the following factors weighs heavily against amendment: (1) undue delay; (2) bad faith or dilatory motive; (3) repeated failures to cure deficiencies by prior amendment; (4) undue prejudice

to the opposing party; and (5) the futility of the amendment. *See id*. Absent any of these factors, leave should be freely given. *Id.*

None of the factors weigh against granting leave in this case. Defendants will not be prejudiced by this amended pleadings. Discovery, for all practical purposes, has not begun. Taylor, in fact, has asked this Court to stay all discovery pending the resolution of his qualified immunity defense. In short, very little has happened in this case since the Defendants' Rule 12(b) motions were filed. Moreover, the Motion is being filed within the deadline prescribed by the Scheduling Order. [Doc. 22].

There is no bad faith or dilatory motive behind this amendment, nor have there been repeated failures to cure by prior amendments. Plaintiff believes that her prior complaints are sufficient to survive the Defendants' Rule 12(b) challenges. By amending, Plaintiff simply seeks to remove any arguable basis for those motions so that this case can move beyond the pleading stage. For example, Plaintiff's amended pleading provides significantly more detail regarding the clearly established law prong of Taylor's qualified immunity defense, including addressing the recent *Irwin v. Santiago,* No. 21-10020, 2021 WL 4932988 (5th Cir. Oct. 21, 2021), which Taylor relies upon heavily to claim that his conduct was somehow appropriate.[1] Plaintiff also seeks to address the City's complaints by

[1] As Plaintiff point out in her proposed amended complaint, *Irwin v. Santiago*, does not alter the fact that the law is clearly established that shooting and killing an unarmed man driving slowly away from officers is unconstitutional. First, the facts of *Irwin* are vastly different from these facts. Significant to the Court's decision in *Irwin* was the fact that "the projected path of Irwin's vehicle was in the officer's direction, at least generally, whereas in *Lytle* and *Flores* the vehicle was moving away from the officer." *Id.,* 2021 WL 4932988 at *3. At the same time, *Irwin* acknowledges that *Lytle* does constitute clearly established law in circumstances like these, where the officer is "positioned *behind* a vehicle that was *moving away from him* as he fired." *Id.* Finally, *Irwin* is unpublished and therefore "is not precedent" in this case. *Id.* at n. *.

including additional facts regarding the City's policies, customs, and procedures that were the moving force behind the killing of Mike Ramos. In short, all factors weigh in favor of granting leave to amend. Defendants cannot show a substantial reason to rule otherwise.

III. Prayer

For these reasons, Plaintiff Brenda Ramos, on behalf of herself and the Estate of Mike Ramos, respectfully requests that this Court grant her leave to file her Second Amended Complaint and such other relief to which they may show themselves to be justly and equitably entitled.

Respectfully submitted,

By: _____

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(512) 669-9506 – Office
Counsel for Plaintiff

CERTIFICATE OF CONFERENCE

On February 17, 2022, Plaintiff's counsel conferred with counsel for Defendants, who indicated that Defendants were opposed to this motion for leave and Plaintiff's Second Amended Complaint.

/s/ Scott M. Hendler (by permission)
Scott M. Hendler

CERTIFICATE OF SERVICE

I hereby certify that on **February 18, 2022**, a true and correct copy of this *Plaintiffs' Motion for Leave to file Second Amended Complaint* has been forwarded to the following via the Federal Rules of Civil Procedure.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS, Plaintiff v. THE CITY OF AUSTIN and CHRISTOPHER TAYLOR, Defendants.	§ § § § § § § § § § § §	NO. 1:20-CV-01256-RP

PLAINTIFF'S SECOND AMENDED COMPLAINT

Plaintiff Brenda Ramos, on behalf of Herself and the Estate of Mike Ramos, file this lawsuit against the City of Austin (City) and Christopher Taylor (Taylor), Defendants, and show the Court and the Jury the following:

I. PARTIES

1. Plaintiff Brenda Ramos is a citizen of Texas and resides in Travis County, Texas. Her son Mike Ramos was also born and raised in Austin, Texas and she is his biological mother and, therefore, an heir of the deceased, Mike Ramos. Subject to the pending administration of the Estate of Mike Ramos, Plaintiff Brenda Ramos is the representative of his Estate and therefore has capacity to bring this survival action on behalf of the Estate of Mike Ramos, pursuant to Texas Civil Practice and Remedies Code section 71.021(a), as applied under 42 U.S.C. § 1983. As Charles Ramos's biological mother, Plaintiff Brenda Ramos is a wrongful death beneficiary and, as such, brings this wrongful death action in her individual capacity pursuant to Texas Civil Practice and Remedies Code section 71.004(b) as applied under 42 U.S.C. § 1983.

2. Defendant City of Austin is a Texas municipal corporation in the Western District of Texas which funds and operates the Austin Police Department ("APD"). Former Chief of Police, Brian Manley was, at the time of the events that gave rise to this lawsuit, the City's policymaker when it comes to the implementation of the APD's budget, policies, procedures, practices, and customs, as well as the acts and omissions, challenged by this suit.

3. Defendant Christopher Taylor is an officer with the Austin Police Department. He is sued in his individual capacity and was acting under color of law at all relevant times.

II. JURISDICTION AND VENUE

4. This Court has federal question subject matter jurisdiction over this 42 U.S.C. § 1983 lawsuit under 28 U.S.C. §§ 1331 and 1343.

5. This Court has general personal jurisdiction over Taylor because he works and lives in Texas. Defendant The City is subject to general personal jurisdiction because it is a Texas municipality.

6. This Court has specific personal jurisdiction over Defendants Taylor and the City because this case is about their conduct that occurred in Austin.

7. Under 28 U.S.C. § 1391(b), the Western District of Texas is the correct venue for this lawsuit because the events occurred in Austin, Texas, which is within the Western District of Texas and the Defendants reside in the Western District of Texas.

III. FACTUAL ALLEGATIONS

A. Taylor shoots and kills an unarmed and compliant Mike Ramos.

8. On April 24, 2020, Austin Police Department (APD) received a muffled, partially unintelligible 911 call reporting two Hispanics in a car at the Rosemont Apartments at 2601 South Pleasant Valley.

9. At several points in the call, the operator could not make out the caller's words. At times, the operator could not understand what the caller said at all, indicating: "I can't understand anything you're saying. You're pulling the phone away or something."[1]

10. The call came in about 6:31 p.m. The call to the police was a swat, where someone intentionally makes a false report to the police of an emergency so that law enforcement will bring outsized powers to bear on an individual to frighten and cause problems for that person.[2]

11. The APD and Taylor should have recognized by the context and garbled nature of the call that it was potentially false and misleading and treated it with suspicion.

12. Before the officers arrived at the scene, the Operator confirmed with the caller that the Hispanic male was not pointing a gun but, if anything, merely holding a gun:

> Operator: *Okay. But I need to know the difference. Is he pointing it at her or just holding it up?*
> Caller: *He's holding it. He's holding it.*

13. The Operator made clear with the caller the individual in the car was not pointing a gun. It is legal for citizens in Texas to carry guns. Even assuming this Hispanic citizen had a gun (which he did not), holding a gun does not make him armed and dangerous.

14. Despite the suspect nature of the call, APD mobilized seven officers (Christopher Taylor, Darrell Cantu-Harkless, Benjamin Hart, James P. Morgan, Karl Krycia, Valarie Tavarez,

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[1] http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020 (last visited Feb. 17, 2022). A full transcript is attached as Exhibit A for the convenience of the court; however, the recorded call uses a digital voiceover. The actual recording is needed to fully evaluate the credibility of the caller.

[2] The caller made several misrepresentations. Mike Ramos was not wearing a white shirt, his shirt was red. He was not in possession of a gun. The caller deliberately swatted Mike. "Swatting" is defined in the Cambridge Dictionary as: "the action of making a false report of a serious emergency so that a SWAT team (a group of officers trained to deal with dangerous situations) will go to a person's home, by someone who wants to frighten, upset, or cause problems for that person." *available at* https://dictionary.cambridge.org/dictionary/english/swatting (last visited Feb. 17, 2022).

Katrina Ratcliff, and a trainee, Mitchell Pieper) in seven police cruisers to investigate two people sitting in a car.

15. Taylor voluntarily joined the aggressive APD operation. Taylor admits he "assigned himself" to the call and joined in calls for "extensive resources and backup," which included a police dog and a helicopter. (Doc. 8, ¶3).

16. Krycia joined Taylor and he also volunteered for the assignment. He is the officer who requested the police helicopter. (Doc. 8, ¶3)

17. The APD put in motion a squad of officers, soon backed up by helicopter and canine, based on an unintelligible and suspect caller, with a changing story, who admitted that no one was being threatened.

18. The police operation headed to the Rosemont Apartments. Before entering the apartment complex, the police stopped on the roadway to develop a plan. This planning stage included a written diagram. Their plan included keeping a distance between their vehicles and the subjects' vehicle. Officer Hart, who appeared to take command of the operation, said: "*We'll keep a good distance from them. Don't try and pen them in*."

19. Hart also said he had would have his assault rifle out and so should "*anyone else who had rifles*."

20. At 6:40 p.m., in an overt act of militaristic aggression, the APD drove their police vehicles into Rosemont Apartments and blocked the entrance and exit to the apartments with police vehicles.

21. Earlier that day, Mike had backed the Prius into a parking spot directly in front of the apartments, in plain sight in broad daylight. Mike parked the vehicle close to the entrance and others could easily see him, including people living in the apartments. He was not trying to hide.

22. Upon arriving at the scene, officers confirmed that Mike did not have a weapon in his hand or on his person.

23. Mike had a nonviolent criminal record, mostly involving petty theft. His most recent charge was for credit card abuse.

24. The APD police officers, including Taylor, knew him by name, knew he had a nonviolent criminal record, and knew he had previously been accused of pilfering, not violence.[3]

25. Forty-two-year-old Mike Ramos, who had struggled with drug addiction during his adult life, sat in a car with a friend. It was about dinner time and the sun was still hot and the day bright.[4] Temperatures had reached 98 degrees and Mike and his companion were facing west.

26. As the sun cast shadows against the apartment building behind them, Mike and his companion suddenly faced a fleet of police vehicles coming toward them. The officers parked to the left of the Prius, completely blocking the only exit. They formed a front row of three vehicles, with additional vehicles behind them. Taylor's vehicle parked behind these three vehicles. As they had planned, the police strategically parked their cars a good distance from the Prius. The distance between the Prius and any officer was multiple car lengths. As the officers had planned, they positioned themselves away from any direct danger or the direct path of the Prius.

27. The officers got out of their vehicles, secure in their position, their numbers, behind their three-ton SUVs with bull bars, and their ballistic vests, and *en masse* aimed high-powered rifles and semi-automatic weapons directly at Mike and his companion as they sat in the Prius, a small compact hybrid hatchback.

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[3] Taylor alleges he believed Mike was a "known violent offender." (Doc. 8 ¶ 2) Much like the swat 911 call, he and the APD were misinformed. There is no evidence to support this claim. To the extent Taylor believed someone had pursued a similar vehicle the day before, he has no evidence it was Mike and, in any event, standing alone this would not turn Mike into a violent offender.

[4] https://www.accuweather.com/en/us/austin/78701/april-weather/351193?year=2020 (last visited Feb. 17, 2022).

28. Taylor posted up in the center, standing shoulder to shoulder with Hart, backed by Tavarez. To his left, Cantu-Harkless stood on the driver side of the Cantu-Harkless vehicle, backed by Ratliff. Krycia stood to Hart's right, on the other side of the Hart vehicle. All the police aimed their weapons, including high-powered rifles, at the occupants of the Prius.

29. The police officers immediately commanded Mike to step out of his car by name.

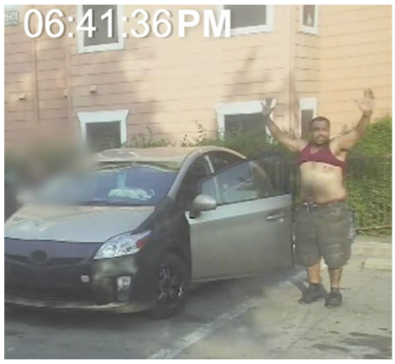
30. Mike did not attempt to flee or drive away. Mike immediately complied and got out of his car with his hands up. He was wearing shorts and a red sleeveless t-shirt, not a white t-shirt as the 911 caller had represented.

31. Mike surrendered. He raised his hands and kept them raised over his head.

32. Mike was noticeably dazed and confused. He never displayed threatening behavior. His only expression was one of confusion, dismay, and fear at the excessive display of force brought to bear against him by the APD.

33. Complying with Cantu-Harkless's direction, Mike obediently walked toward the line of officers as they aimed their guns at him. The officer ordered him to stop. Mike stopped.

34. Cantu-Harkless ordered Mike to raise his shirt and turn around. Mike raised up his shirt and turned around. At this point, officers confirmed Mike was unarmed, his bare torso in full view. He held his hands high over his hands. He fully surrendered himself to the police.



35. After Mike surrendered, however, Cantu-Harkless and the other APD officers failed to follow through. APD officers did not take Mike into custody. They did not advise Mike of his crime or move to place him under arrest or read him his rights. Had the officers done so, they would have ended what should have been a routine arrest.

36. All of the officers continued to aim high-powered assault rifles and semi-automatic handguns at Mike, even though Mike was compliant, noticeably impaired and confused by the situation. The officers had brought excessive force to bear and were so amped they failed to recognize that their suspect had surrendered.

37. Instead, the officers seized Mike by penning him in, pointing multiple high-powered weapons at him, and then left him in limbo.

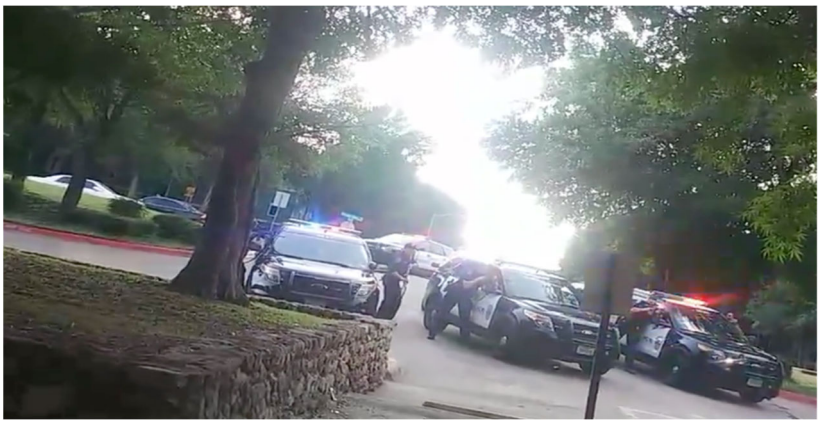
38. The APD officers, including Taylor, failed to tell Mike why he had been stopped and seized.

39. The officers, including Taylor, escalated the situation by shouting multiple, conflicting commands at Mike.[5]

40. The officers, including Taylor, quickly became aware there was no danger to the woman and that Mike did not have a gun. Based on this information, they should have immediately readjusted their response. Had they been concerned for the safety of his companion they would have asked her to leave the car when Mike was outside the car with his hands up. They would have tried to escort her away from the car. The companion simply remained in the car. Taylor and the officers should have recognized this information, registered that she did not perceive Mike as a threat, and deescalated their show of force.

[5] See Exhibit "B" transcribing just a portion of the chaotic, conflicting shouts by the officers and Mike's incredulity as to the police threatening to shoot him.

41. Instead, after Mike had surrendered, Taylor and the others kept their guns trained on Mike, including military-style assault weapons, continuing to scream conflicting commands and further escalating and confusing the situation.



42. Taylor and other officers yelled random, conflicting orders at Mike from all directions. In response, Mike told Taylor and the officers he was frightened and did not understand what they were doing or what was happening to him. "*What's going on? What's going on*?" he pleaded for answers.

43. Mike never exhibited aggressive behavior toward Taylor or any of the other officers. The entire time, Mike remained compliant and visibly frightened and confused. "*Put the guns down, dawg. What the fuck is going on? Why? What the fuck? You're scaring the fuck out of me?"*

44. And with his hands up, his bare belly still visible, Mike began to breath in and out heavily, a sign of panic and high anxiety. He rested his head on the car window. He pleaded "*Don't shoot, dawg*." And he clutched his head in his hands. "*Don't shoot*!"

45. Mike pleaded with Taylor and the officers to help him understand what was happening and not to shoot him. He continued to implore them to explain what was happened and

why: "*What's going on? What's going on? What the fuck do I fucking do, man*?" Mike, disoriented and scared, pleaded for help: "*What do I do?"* The police ignored him.

46. Mike pleaded for an explanation as to what was happening, but no officer explained the situation. To the contrary, Cantu-Harkless told him: "*I can't explain right now Mike*."

47. Then, Cantu-Harkless (the closest officer to him and the one Mike had surrendered to and looked to for help) stopped communicating with Mike Ramos.

48. Chaos ensued. All the officers started yelling at Mike and he had no one listening to him. He heard only an increasing number of random, escalating shouts and bellows from the various officers. One officer told Mike to keep his hands up. One told him to walk forward. Another told him to turn around in a circle. Another told him to get on his knees.

49. Taylor and the other officers assumed a warrior mentality and lost control of the situation. Rather than deescalate the situation, they did the opposite. Taylor contributed to the chaos by adding his own mixed messaging of orders and threats.

50. Mike remained in a state of intense confusion, while making futile attempts to comply with the impossible. The guns remained pointed at him. The yells became more strident. Alarmed and fearing for his life, he saw that no matter what he did, the officers would not tell him why he had been seized and would not lower their rifles, even when he stood before them, hands up and chest bare, pleading for help. Instead, the officers' threats escalated, and their directions conflicted. Mike slowly drew back, fearing for his life, and cowering behind the car door, which he communicated in words and body language. He was not showing aggression or trying to run, he was a man grasping for something to hold on to as the world seemed to be collapsing around him and his anxiety increased. All the while, he kept his hands in the air and tried to talk with the officers. He held the top of his head, in shock and fear. He put his head down on the window in

dismay. This was a man signaling to the officers he had no idea what he was supposed to do or what he was doing wrong.

51. Mike did not take furtive steps; he did not make any secretive or provocative movements. Implicit bias, cognitive dissonance, and APD training that emphasized viewing people of color as an imminent threat to police led Taylor and the other APD officers present to inaccurately evaluate the scene and fail to recognize the clear signs that Mike was exhibiting: fear, anxiety, and most importantly, surrender. This was a man in distress who was trying his best to respond but not able to understand what was expected of him. Quite simply, Mike was in fear for his life.

52. Morgan and his trainee Pieper originally were intended to remain in their vehicles to block the apartment entrance. Pieper asked Morgan: "*So we're blocking cars*?" Morgan replied: "*Let's see what happens*." Pieper had been with the APD for just three months, and he was in field training.[6]

53. Morgan instructed Pieper on the smallest details, including telling him he could take his mask off in the vehicle as they proceeded to the apartments: "*You can take your mask off in the car, don't want you stumbling on your words*."

54. Instead of staying back at the entrance to the apartments, Morgan and Pieper ran and joined the line of officers. Pieper stacked behind Morgan. Morgan said: "*I want you to stay with me*." Behind Morgan, Pieper did not have a view of the Prius or Mike. Pieper could not see

[6] APD policy or practice allowed Pieper to be in field training, even though he had only completed minimal training. According to the APD website, the Training Academy is 32 weeks long (8 months) or 16 weeks (4 months) for those with prior active law enforcement experience. After graduation, officers enter a 3–4-month Field Training Program with a Field Training Officer.
https://www.apdrecruiting.org/faq (last visited Feb. 17, 2022); https://www.apdrecruiting.org/academy (last visited Feb. 17, 2022).

Mike's attempts to surrender and his compliance, and did not witness his cries for help, and his visible fear and despair.

55. Standing outside of the Prius, Mike was right to be afraid. No one was listening to his words, his cries for help, or reading his body language and the clear signs of confusion, anxiety, and fear.

56. As the officers escalated the situation, Morgan joined in the fray. Although Morgan had told Pieper he wanted Pieper to stay with him, he then told Pieper to go to the vehicle and grab the projectile rifle. During this time, Pieper could not see Mike at all.

57. After grabbing the projectile rifle, Pieper did not return to Morgan, his Field Training Officer. Instead, he grabbed the rifle and proceeded to run from one police vehicle to another, rifle in hand, acting erratically without direction. He did not pay attention to Mike or his words or actions. His APD training led him to view Mike as a threat because he was a man of color, even though none of Mike actions presented an objectively reasonable threat

58. And then, Taylor began ordering the trainee Pieper to "*move up*" and then to "*impact up, impact up*."[7]

59. Pieper shouted: "*I don't have an angle*." But then immediately asked: "*Hit him?*" At this time, Mike continued to have his hands in the air, but Pieper ignored Mike's body language, dead set on shooting someone.

60. Mike at all times attempted to follow ever-changing commands from multiple officers. Indeed, Mike did his best to deescalate the situation himself. He pleaded with the officers,

[7] The less lethal shot should never have been called for or used in this situation. It was misused based on the events and facts. Telling Pieper to take a "deep breath" was not de-escalation. Taylor had already repeatedly commanded Pieper to "Impact Him!" even though Mike had his hands up in surrender and was asking for help and trying to comply. Taylor also knew Pieper could not have witnessed all the events, did not have a view, did not have angle, and was a green recruit with only a few months of training under his belt and still in field training. Indeed, telling Pieper to take a deep breath and move to the next car to the right escalated the situation.

telling Taylor and the officers he did not have a gun and pleading with them to help him understand: "*I ain't got no fucking gun, dog! What the fuck?!*"

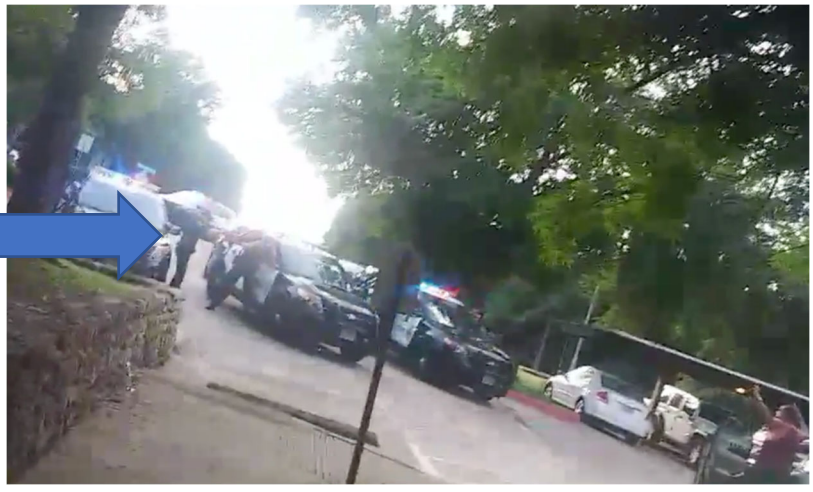
61. This entire time, Mike continued to keep his hands visible and raised in the air in surrender.

62. Then, Pieper positioned himself at the next car over, beside Krycia and joined the fray by shouting more commands at Mike: "*Walk toward us…comply with us*!" Mike, of course, had already walked toward the officers with hands raised, chest bared. The guns had remained pointed.

63. A bystander yelled: "*Why all the guns pointed at him. What the fuck?"* Another said: "*That don't make sense."*

64. Mike's last words to Taylor and the APD officers were: "*Impact me for what? Put the gun down dawg. Man, what the fuck dawg?*"

65. This photo below is the bystanders' view from her cell phone camera. Mike has his hands in the air, but the officers continue to have their rifles pointed at him.

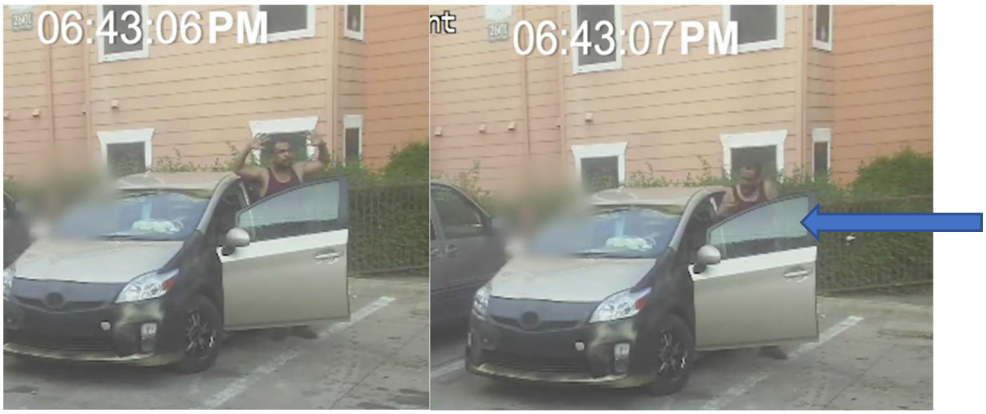


The arrow to the left is the trainee Pieper. Beside him is Krycia.

Mike with hands in the air.

66. In a split second—before Mike could react or respond—Taylor, Krycia and the other officers ordered Pieper to shoot Mike. Pieper fired, hitting Mike with a less lethal projectile from the service rifle.

67. Despite the fact that Mike was unarmed and begging for help, had complied with all of Taylor's commands, as well as the other officers, had raised his arms in surrender and lifted his shirt as he turned in circles, and had begged Taylor and the officers not to shoot him, Taylor and other officers ordered Pieper to shoot. One second later, at 6:43:07, Pieper shot Mike Ramos while his hands were still in the air, above his head. The white projectile can be seen to the right in the photo below as it ricocheted after striking Mike and frightening him to retreat into his car for protection.



68. Mike reacted in shock and disbelief.

69. The act of shooting a man who had surrendered, with his arms in the air, was so incredulous that bystanders began to scream over and over to the officers: "*Oh gosh. What'd you all shoot him? Why you shoot him? That's wrong. That's wrong. Wrong. Wrong.*"

70. Mike's companion exited on the passenger side, but the officers ignored her.

71. Frightened and believing the police were about kill him without no reason, Mike, acting in self-defense, sought the protection of his car. Mike sat in his car, injured and in a state of

shock and panic. The apartment residents continued yelling at the officers, "*Oh my gosh, why you all shoot him? Wrong…"*

72. The bystanders, who watched and listened as the entire incident unfolded, witnessed the APD officers acting outside of the law. They were equally powerless, and expressed fear for their own lives, as they witnessed another person of color's life in imminent, irrational danger from an armed police force.

73. Mike had every reason to believe that if he stayed where he was, his life was in danger.

74. Mike never once threatened the officers or anyone else present during the incident. He was simply terrified and in a state of panic and anxiety, in fear for his life.

75. From the time the officers arrived, Mike complied with their commands but no matter what he did, they continued to escalate the confrontation through a show of excessive force and use of weapons, shooting him with a so-called "less lethal" round, driving him to retreat back into his vehicle.

76. To Mike's left was a line of impenetrable police vehicles, three of which faced him outfitted with steel bull bars designed to not just look militaristic and intimidating, but to have the capacity to push other vehicles off the road. Far back and to the side each of these vehicles were multiple armed police officers aiming high-powered automatic and semi-automatic weapons at him, at locations two or even three officers deep. Police vehicles blocked the only exit.

77. Taylor and the officers were in no immediate or imminent danger, nor did they have reason to believe anyone else was in danger. The police outnumbered Mike, eight-to-one. The police stood well behind the front of their vehicles. They wore ballistic vests, and they were locked and loaded. The police had backup. No police officer was caught alone, unarmed, or

unaware. Mike posed no threat. It was not nighttime or dark. They were not in unfamiliar territory. They had drawn a map and entered cautiously, keeping a "good distance" back. They stood behind their large police vehicles for protection, a safe distance away from the path Mike's vehicle took as it slowly inched out of the parking spot to his right, away from officers.

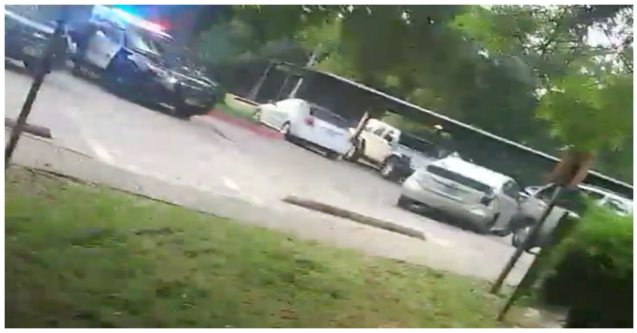
78. Mike never made any move to suggest he was reaching for a weapon. There was no gun. Mike's only thought was fear and an impending sense of doom as the officers continued shouting and targeting him with their assault rifles.

79. To Mike's right was a dead end. Taylor admits he knew and saw that "Ramos had no avenue to escape in his car to his right, because a parking lot full of cars blocked access to the street and because the parking lot reached a dead end at a large municipal dumpster." (Doc. 8, ¶6)

80. Fatalistically, the electric Prius rolled slowly and quietly away from Taylor and the other APD officers and their guns.

81. The bystander's camera shook at the moment that Taylor, on the passenger side of the first police vehicle, fired his assault rifle at Mike as his car slowly moved away from him. The bystanders can be heard yelling: "*Oh my God, why you all shooting him."*

82. The Prius turned away from Taylor and all officers and headed slowly in the opposite direction. As the Prius inched away toward the dead end blocked by dumpsters, Taylor opened fire, shooting three rounds from his assault rifle into the side window of the Prius and striking Mike in the back of the head. Neither Taylor nor any other officer was in front of the Prius or to its side when Taylor fired his fatal shots.



83. Taylor fired from the far side of the police cruiser, behind a three-ton vehicle with a grill outfitted with bull bars, standing at the passenger door of the police cruiser.

84. Taylor fired not just once, but three times. He fired three shots at Mike's head and the Prius rolled to a stop. Taylor had fatally shot Mike Ramos.

85. The bystanders yelled: "*Why you shootin him?"*

86. And then: *"Why they murdering this man?*"

87. Below is a still image taken from Taylor's body camera at the moment he fired his rifle three times: 6:43:27. Taylor was the closest of any officer and he was a substantial distance from the car. The Prius is driving away from the officers:

88. A bystander's cell phone video[8] and Austin police dashcam and body-worn camera videos[9] show Mike outnumbered, confused and fearful, trying to negotiate with the police for his life in broad daylight, then being shot while his hands are in the air in surrender, and finally desperately trying to save himself from being killed before Taylor shot him in the back of the head, killing him, as he drove into a dead end.

89. As Mike sat in his car, Taylor admits he "did not see a gun." He says he shot his rifle three times at the Prius, making the incredulous claim that he thought Mike would "drive through – and over – him or his fellow APD officers." (Doc. 8 at ¶15) Taylor's statement defies reason. The videos confirm that Taylor and the other officers were armed, a substantial distance away from the Prius, nowhere near the line of travel of the vehicle, and enjoyed extensive protection and cover. No objectively reasonable basis existed to believe the vehicle could harm anyone. Of the eight officers present with weapons drawn Taylor was the lone shooter. Any reasonable officer observing the scene unfold knew Mike was driving away from the officers, not toward them, and was not a threat to drive through or into a line of heavily armed police in heavily defended police vehicles. Mike did not move toward the officers; he turned away, headed in the direction where Taylor admits "Ramos had no avenue to escape in his car to the right." (Doc. 8 at ¶6).

90. Under these circumstances, there was no objectively reasonable basis for Taylor to be afraid for himself (or others).

[8] *Mother of man killed by Austin police officer asks for answers*, Austin American-Statesman (May 31, 2020), available at https://www.youtube.com/watch?v=7dQMDiUpLHU&feature=youtu.be (last visited Feb. 17, 2022).
[9] http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020 (last visited Feb. 17, 2022). The videos that are currently available publicly appear to have been edited by APD. And, only some of the videos from certain officers are available. Footage is unavailable at all for officers Krycia, Morgan or Ratcliff. No bodycam has been made available from officers Krycia, Morgan, Tavarez or Ratcliff. Also, the timestamps are inconsistent, some by more than 3 seconds and one by more than 5 minutes.

91. Taylor is the only officer who fired a lethal weapon, and no reasonable police officer would have used deadly force against Mike Ramos in these circumstances.

92. The companion in the vehicle was not arrested or charged with a crime.

93. It took the APD officers all of seven minutes to end the life of Mike Ramos. In that time, eight officers, including one trainee, brought about the death of an unarmed, confused, and frightened Afro-Hispanic man in broad daylight to death—a citizen who had no idea why he was being seized, who made no threats or signs of aggression, and who had no avenue to escape.

94. The Special Investigations Unit of the APD performed the criminal investigation into the conduct of Taylor and the officers present, and despite overwhelming evidence, refused to swear out a warrant for Taylor's arrest. Yet based on the facts developed in the investigation, a Travis County Grand Jury indicted Taylor for first degree murder.

95. The APD placed Taylor and Pieper on administrative duty but, upon information and belief, did not terminate Taylor nor subject him to discipline.

96. Ms. Brenda Ramos, Mike's mother, brings this lawsuit to vindicate her son's civil rights, hold the Austin Police Department and Taylor accountable for her son's senseless killing, and recover for her own harm and damages from losing her only child to excessive, unjustified police violence.

97. Taylor and the other APD officers used excessive force in violation of Mike's Fourth Amendment rights. Taylor and the other APD officers were on notice that their actions were objectively unreasonable in light of clearly established law at the time of this incident.

B. This was not Taylor's first killing.

98. On the afternoon of July 31, 2019, APD officers responded to a check welfare call at a high-rise condominium in downtown Austin. Dr. Mauris DeSilva, a neuroscientist who had a

history of mental health disease, was having a mental health episode. Taylor and Krycia were two of the four APD officers who responded to the call. Rather than helping Dr. DeSilva, Taylor and Krycia pulled their duty pistols and shot and killed Dr. DeSilva.[10]

99. After the shooting, APD allowed Taylor and Krycia to return to duty.

100. The civil complaint filed in the *DeSilva* case states that "despite having knowledge of Dr. DeSilva's prior mental health contacts and his ongoing mental health crisis, officers responded as if this were the scene of a violent crime."

101. In the interim, internal audits of the APD have found that officers receive training that encourages a paramilitary approach to policing, acting not as guardians of the community at large, but as warriors engaged in battle.

102. On or about August 27, 2021, the Grand Jury indicted Christopher Taylor and Karl Krycia for first-degree murder and third-degree felony deadly conduct for the shooting death of Dr. Mauris DeSilva. This was Taylor's second indictment for first degree murder. The first was returned four months prior, on March 10, 2021, for the shooting death of Mike Ramos on April 24, 2020, which is the subject of this lawsuit.[11]

C. APD shuts down its training academy following Taylor's killing of Mike Ramos.

103. After Mike Ramos was killed, the City shut down the APD Training Academy. It was reopened as a "reorganized and reimagined" police academy a year later, putting focus on de-escalation and community engagement and addressing systemic inequalities and racism in policing. Austin Police Chief Joseph Chacon announced; "We are really transitioning from this

[10] Discovery in the civil case is subject to a protective order so it is unavailable to Plaintiff.

[11] Due to pending criminal investigations, prosecutorial privileges, and discovery limitations, material evidence remains unavailable to Plaintiff which could inform her allegations. The police released select videos, but not all. The original, unedited videos have not been made available. The autopsy has not been released. The officers' and witness statements have not been released. The Defendant has not served his initial disclosures.

kind of military-styled Academy into one that's employing adult learning concepts and active learning." The courses in the academy now focus on "diversity, equity and inclusion, as well as a strong emphasis on de-escalation and communication skills."[12]

D. The City and APD have a long history of using excessive force against minority citizens.

104. In 2016, the Center for Policing Equity found that Austin police officers used more violence in the neighborhoods where Black and Hispanic Austinites live than in predominantly white neighborhoods. The study adjusted for crime and poverty variables and found that Austin police officers' use of force in those communities was disproportionate and unjustified. Austin police were more likely to use severe force against Black people and other people of color. Austin police were disproportionately more likely to shoot rather than use their hand-to-hand training or deploy pepper spray when the person subjected to force was Black. Mike Ramos was biracial – Black and Hispanic.

105. The Austin City Council criticized the Austin Police Department's patterns of racist behavior and outcomes in December 2019, *less than five months before Taylor, a white officer, murdered Mike Ramos, a mixed race Black and Hispanic Austinite*:

> APD's state-mandated racial profiling reports consistently show that Black and Latino drivers are more than twice as likely to be searched as their white counterparts during traffic stops despite similar "hit rates," including in 2018 where 6% of traffic stops of white drivers resulted in a police search compared to 14% for Latino drivers and 17% for Black drivers.
>
> APD data provided per Council Resolution No. 20180614-073 (one of the Freedom City Resolutions) showed that in 2017 APO [sic] police officers made discretionary arrests of African Americans at more than twice the rate of either White or Latino residents.

[12] https://www.kxan.com/news/local/austin/austin-police-training-academy-resumes-next-week-will-serve-as-pilot-for-future-cadet-classes/ (last visited Feb. 17, 2022).

> That same 2017 data also showed Black and Latino residents accounted for nearly 75% of those discretionary arrests for driving with an invalid license, although the two groups combine to make up less than 45% of Austin's population.
>
> That same 2017 data also showed that one out of every three discretionary arrests for misdemeanor marijuana possession involved a Black resident even though less than one in ten Austinites is Black, while usage rates of marijuana are similar across racial groups.
>
> Per the quarterly report for Council Resolution No. 20180614-073, issued by APD on May 3, 2019, African Americans comprised 32% of persons arrested by APD for offenses eligible for citation, which, proportionally, amounts to more than three times Austin's Black population.
>
> An anonymous whistle-blower recently accused an Assistant Chief of the Austin Police Department of using racist epithets and derogatory terms, including "nigger," to refer to specific Black elected officials and sworn officers of the Austin Police Department.
>
> Patterns and specific incidents of discrimination and bigotry in the Austin Police Department erode the public trust, which is necessary to effectively enforce the law, solve crimes, and maintain public safety, and so the Council finds it imperative to understand the full extent of bigotry and systemic racism and discrimination within APD, and consider reforms to APD's policies, protocols, and training curriculum.

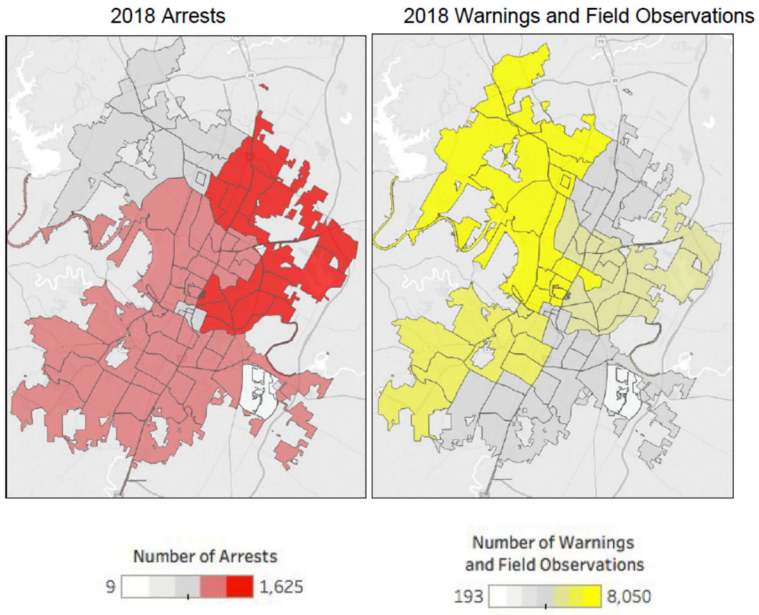
106. The Austin Office of Police Oversight, Office of Innovation, and Equity Office published a joint report in January 2020 (*less than four months before Taylor murdered Mike Ramos*) critical of the Austin Police Department's policing practices based on race during motor vehicle stops:

> Data reveals racial disparities in motor vehicle stops in 2018, with Black/African Americans as the most overrepresented of all racial/ethnic groups in Austin.
>
> In 2018, Black/African Americans made up 8% of the Austin population, 15% of the motor vehicle stops, and 25% of the arrests.
>
> Black/African Americans and Hispanic/Latinos are increasingly overrepresented in motor vehicle stops from 2015-2018. White/Caucasians are increasingly underrepresented during the same time period.
>
> Data from 2018 shows that Black/African Americans are disproportionately overrepresented in cases when their race is known by officers before the stop compared to cases when their race is not known before the stop.

> APD classifies motor vehicle stops based on whether the race of the person stopped was known to the officer prior to the stop. In 2018, Black/African Americans are overrepresented in both Race Not Known and Race Known categories. In the Race Not Known category, Black/African Americans make up 14% of stops (this is a 6% overrepresentation compared to their share of the Austin population). Black/African Americans are further overrepresented when their race is known before the stop, making up 17% of stops in the Race Known category and indicating a 9% overrepresentation when compared to their share of the population.

107. That same 2020 report included two maps of Austin that snapshot the Austin Police Department's approach. The map with red coloring shows the location of vehicle stops that resulted in arrests. The map with yellow coloring shows the location of vehicle stops that resulted in warnings. Austin's East Side, where this shooting death occurred, has higher concentrations of people of color and the police made more arrests, while Austin's West Side is disproportionally white, and the police gave more warnings:

Map 2 and 3: 2018 Motor Vehicle Stops Resulting in Arrests and Warnings and Field Observations



108. On April 16, 2020, *one week before Taylor killed Mike Ramos*, the City released a third-party investigative report regarding persistent racist behavior that permeated the Austin

Police Department and the almost certain retaliation that employees who dared to speak out must be prepared to endure:

> By several accounts, [Assistant Chief] Newsom's use of racist language was well known throughout the Department as was the use of such language by other officers who were known to be close friends with AC Newsom and used such language openly and often.
>
> Reports came to us, from different ranks, races, and genders, advising of the fact that the racist and sexist name-calling and use of derogatory terms associated with race and sex persists. Anecdotal history indicated that even members of the executive staff over the years had been known to use racist and sexist language, particularly when around the lower ranks or other subordinates.
>
> We listened to many anecdotes illustrating inappropriate comments over the years through which APD personnel expressed concern about racist behavior, but also sexist behavior, and dissimilar treatment in the handling of officer discipline and those who may be served by APD chaplain services with the denial of marital services to same sex couples. There are some real cultural issues that are in need of attention.
>
> Tatum Law was able to establish that [Austin Police] Chief Manley had reason to inquire as to [Assistant Chief] Newsom's conduct . . . The October 7, 2019, email received by Chief Manley alleging similar facts to those later alleged in the October 30, 2019, complaint about AC Newsom's use of the derogatory term "nigger" in text messages to refer to African Americans provided sufficient information . . . Chief Manley did not send these allegations for review or investigation.
>
> Whether it is about a grievance or misconduct there is an overwhelming sentiment among officers, at or previously involved with the Austin Police Department, and regardless of rank, that an officer, or even civilian staff member, who wishes to right a wrong, complain about improper conduct, or participate in an investigation such as this one, must be prepared in the present climate and culture to face almost certain retaliation, and not necessarily from Chief Manley, directly or solely.

109. The Austin City Council made additional, equally critical findings on June 11, 2020 (*less than a month after Taylor killed Mike Ramos*) regarding the City's anemic and unsuccessful efforts to fix its racist and violent policing culture:

> **The elected members of City Council have no confidence that current Austin Police Department leadership intends to implement the policy and culture changes required to end the disproportionate impact of police violence on Black Americans, Latinx Americans, other nonwhite ethnic communities.**

> The measures that current Austin Police Department leadership have been willing to implement are inadequate and resemble the same flawed police training and command expectations that have existed in the past. [emphasis added].

110. These recent findings by Austin's City Council, Office of Police Oversight, Office of Innovation, and Equity Office are binding evidentiary admissions by the City that its policing policies have led to disproportionate and unconstitutional police violence against members of the Black and Hispanic communities in Austin. Mike Ramos—a mixed race Black and Hispanic, native Austinite—bridged these two communities and his tragic death is a direct result of the racism that has permeated the policies of the Austin Police Department and culture of policing in Austin. It is that much more heartbreaking that he was killed in the same year that City leaders began to face – and grapple with – these ingrained problems. Mike's unjustified killing by Taylor emphasizes the urgency of the problem Austin faces and the importance of holding Defendants Taylor and the City accountable.

IV. Claims

A. Cause of Action against Taylor under 42 U.S.C. §1983 for Violation of Mike Ramos's Fourth Amendment right to be free from excessive force.

111. Ms. Ramos incorporates sections I through III above into her excessive force claim brought under 42 U.S.C. § 1983.

112. Taylor violated Mike Ramos's Fourth Amendment rights when he shot and killed Mike Ramos without justification.

113. Taylor was acting under color of law and violated Mike Ramos' constitutional rights when he and other APD officers ordered trainee Pieper to shoot Mike when Mike never showed any malicious or dangerous behavior, had his hands in the air in surrender and was compliant while pleading for help. By ordering Officer Pieper to impact Mike, Taylor escalated

the situation, causing Mike to further fear for his life, provoking him to seek safety by getting in the car.

114. Taylor was further acting under color of law when he fatally shot Mike, who he knew was unarmed and already injured from the less-lethal impact round, as Mike attempted to ineffectually move away in self-defense. Taylor knew Mike had "no avenue to escape" and posed no imminent threat of serious injury or death to anyone that justified lethal force. Taylor's use of force and use of lethal force under these circumstances and in light of clearly established law was excessive and objectively unreasonable.

115. Taylor's unlawful and unconstitutional use of deadly force violated Mike's civil rights, is the direct cause of his death, and caused Ms. Ramos's harm and damages.

116. Taylor is not entitled to qualified immunity under clearly established law. The following, while not exhaustive, illustrates the precedent:

117. **This case presents an obvious case with a particularly egregious set of facts.** Since 1985, the law only permits the use of deadly force to protect the life of the shooting officer or others: "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Tennessee v. Garner,* 471 U.S. 1, 11 (1985). The rule from *Garner* can be sufficient in obvious cases, without dependence on the fact patterns of other cases. *Cole v. Carson*, 935 F.3d 444, 453 (5th Cir. 2019). In 2020, the Supreme Court reaffirmed this basic principle that in cases with "particularly egregious facts," it is unnecessary for plaintiffs to identify a prior case involving the same factual scenario. *Taylor v. Riojas*, 141 S.Ct. 52, 54 (2020); *see also McCoy v. Alamu*, 141 S.Ct. 1364 (2021). This case represents particularly egregious facts and behavior by Taylor that is "antithetical to human dignity." *Hope v. Pelzer*, 536 U.S. 730, 745 (2002).

118. **It is clearly established law that force must be reduced, not increased, once a suspect is subdued.** The moment an officer retains the freedom of a person to walk away, he has seized the person. *Garner*, 417 U.S. at 7. APD retained Mike's freedom for several minutes as he stood with his hands raised in surrender. It does not matter that the first shot came from an impact gun. "Lawfulness of force, however, does not depend on the precise instrument used to apply it. Qualified immunity will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel." *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012). Newman, a Black man, was a passenger in a vehicle during a traffic stop. *Id.* at 759. Officers told Newman to stay in car, but he got out. *Id.* He raised his arms and officers said he they thought he might have a gun in his waistband. *Id.* at 762. Four officers hit Newman with a baton and a taser. *Id.* at 760. The Court held: "It is beyond dispute that Newman's right to be free from excessive force during an investigatory stop or arrest was clearly established in August 2007." *Id.*at 763 (citing *Deville v. Marcantel*, 567 F.3d 156, 169 (5th Cir. 2009) and *Tarver v. City of Edna*, 410 F.3d 745, 753 (5th Cir. 2005)); *see also Joseph v. Bartlett*, 981 F.3d 319 (5th Cir. 2020); *Darden v. City of Fort Worth*, 866 F.3d 698, 706 (5th Cir. 2017) (It is objectively unreasonable to tase a suspect once he is "no longer resisting arrest."). Mike Ramos was a dumbfounded, frightened man who never showed threatened the officers. He surrendered and pleaded for his life, his hands in the air, when Taylor ordered Pieper to shoot Mike with an impact rifle. Mike, in fear for his life, then tried to save himself from further injury when he was shot dead from behind by Taylor.

119. **It is clearly established law that an officer cannot seize an unarmed, nondangerous suspect by shooting him dead**. The Fifth Circuit has stressed: "It should go without saying that it is unreasonable for an officer to 'seize an unarmed, nondangerous suspect by shooting him dead.'" *Poole v. Shreveport*, 13 F.4th 420, 425 (5th Cir. 2021). Poole led six

police cars on a low-speed pursuit, disobeying traffic signals and driving on the wrong side of the road to avoid police spike strips. *Id.* at 422. When Poole finally stopped, "he hastily exited his vehicle and reached into the bed of his truck" and paused for a second with his right hand on the pickup while his left hand opened the door of the truck. *Id.* As he lowered himself in the driver's seat, the officer fired six shots at him. *Id.* Relying on the dashcam, the court determined that Poole's hands were visible and empty, and he was moving away from the officer with his back turned when he was shot. *Id.* at 424. The court further emphasized: "[A]n officer violates clearly established law if he shoots a visibly unarmed suspect who is moving away from everyone present at the scene." *Id*. at 425. As in *Poole*, at the time Defendant shot Mike dead, he knew he was unarmed and had no avenue of escape.

120. **It is clearly established law that a suspect is not a threat that warrants deadly force when turning or moving away from officers.** The Fifth Circuit recognizes that "[c]ommon sense, and the law, tells us that a suspect is less of a threat when he is turning or moving away from the officer. *Roque v. Harvel*, 993 F.3d 325, 339 (5th Cir. 2021); *Hanks v. Rogers*, 853 F.3d 738, 746 (5th Cir. 2017); *Poole*, 13 F.4th at 425. As a matter of law, Mike was not a threat as he was moving away. Indeed, he was ***less so*** as it was visible to APD Officers that he had no firearm or other weapon in his hand, had been shot without reason, and turned away from the line of heavily armed police officers aiming weapons at him behind a vehicular barricade seeking to avoid being shot again.

121. **It is clearly established law that deadly force cannot be used to against a nonthreatening suspect, fleeing in a motor vehicle.**

> We need not dwell on this issue. It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others. *See Kirby*, 530 F.3d at 483–84. This holds as both a

> general matter, see *Garner*, 471 U.S. at 11–12, 105 S.Ct. 1694, and in the more specific context of shooting a suspect fleeing in a motor vehicle, see, e.g., *Kirby*, 530 F.3d at 484; *Vaughan*, 343 F.3d at 1332–33. The right in question was therefore clearly established on February 28, 2006, and this is sufficient to affirmatively answer the qualified immunity question of our inquiry.

Lytle v. Bexar Cnty., Tex., 560 F.3d 404, 417–18 (5th Cir. 2009); *see also Newman v. Guedry*, 703 F.3d 757, 763 (5th Cir. 2012) ("It is beyond dispute that Newman's right to be free from excessive force during an investigatory stop or arrest was clearly established in August 2007."); *Reyes v. Bridgwater*, 362 Fed. App'x 403, 409 (5th Cir. 2010) ("The cases on deadly force are clear: an officer cannot use deadly force without an immediate serious threat to himself or others."); *Flores v. City of Palacios*, 381 F.3d 391, 395 (5th Cir. 2004).[13] In the instant case, Mike was an unarmed, wounded man, who posed no threat to anyone, driving slowly away from officers toward a dead end.

B. Cause of Action against the City under 42 U.S.C. § 1983 for violation of Mike Ramos's Fourth Amendment rights based on express or implied policies that promote the violation of the civil rights of Black and Hispanic people and were the moving force behind the killing of Mike Ramos.

122. Ms. Ramos incorporates sections I through IV.A above into her *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978), claim brought under 42 U.S.C. § 1983.

123. The City is liable for all damages suffered by the Plaintiffs pursuant to *Monell* and 42 U.S.C § 1983, based on official policies or customs of the APD of which the City Council, the

[13] Taylor's recent reliance on *Irwin v. Santiago,* No. 21-10020, 2021 WL 4932988 (5th Cir. Oct. 21, 2021), does not alter the fact that the law is clearly established that shooting and killing an unarmed man driving slowly away from officers is unconstitutional. First, the facts of *Irwin* are vastly different from these facts. Significant to the Court's decision in *Irwin* was the fact that "the projected path of Irwin's vehicle was in the officer's direction, at least generally, whereas in *Lytle* and *Flores* the vehicle was moving away from the officer." *Id.* at *3. At the same time, *Irwin* acknowledges that *Lytle* does constitute clearly established law in circumstances like these, where the officer is "positioned *behind* a vehicle that was *moving away from him* as he fired." *Id.* Finally, *Irwin* is unpublished and therefore "is not precedent" in this case. *Id.* at n. *.

City Manager, the Mayor, and the Chief of Police all had actual or constructive knowledge, and which were the moving forces behind the constitutional violations at issue here.

124. The City had these policies, practices, and customs on April 24, 2020:

a. Disproportionate use of excessive force against people of color,

b. Condoning such disproportionate use of excessive force against people of color

c. Choosing not to adequately train officers regarding civil rights protected by the United States Constitution,

d. Choosing not to adequately supervise officers regarding the use of force against people of color,

e. Choosing not to intervene to stop excessive force and civil rights violations by its officers,

f. Choosing not to investigate excessive violence and civil rights violations by its officers, and

g. Making the deliberate choice not to discipline officers for—and deter officers from—using excessive force and violating civil rights.

125. The City and Brian Manley knew about these policies and required Austin police to comply with them.

126. The City and Brian Manley developed and issued these policing policies with deliberate indifference to Mike Ramos and other Black and Hispanic Austinites' civil rights.

127. The City and Brian Manley were aware of the obvious consequences of these policies. Implementation of these policies made it predictable that Mike's civil rights would be violated in the manner they were, and the City and Brian Manley knew that was likely to occur.

128. These policies were the moving force behind Taylor's violation of Mike's civil rights and thus, proximately caused Mike's death and Ms. Ramos's damages.

129. Ultimately, when the City failed and refused to discipline Taylor for his clearly established constitutional violations, it approved of and ratified his conduct which itself establishes

a custom of the APD. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 755 (5th Cir. 2009). When a municipality approves a subordinate's conduct and the basis for it, liability for that conduct is chargeable against the municipality because it has "retained the authority to measure the official's conduct for conformance with their policies." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion); *Groden v. City of Dallas*, 826 F.3d 280, 284 (5th Cir. 2016); *see also Balle v. Nueces Cnty., Tex.*, 690 Fed. App'x 847, 852 (5th Cir. 2017). Under *Praprotnik*, "post hoc ratification by a final policymaker is sufficient to subject a city to liability because decisions by final policymakers are policy." *Hobart v. City of Stanford*, 916 F. Supp. 2d 783, 793 (S.D. Tex. 2013) (citing *Praprotnik*, 485 U.S. at 127); *see also Rivera v. City of San Antonio,* No. SA-06-CA-235-XR, 2006 WL 3340908, at *13 (W.D. Tex. Nov. 15, 2006) (disagreeing with the City that post hoc approval of prior conduct cannot be the moving force behind a constitutional violation.); *Santibanes v. City of Tomball, Tex.*, 654 F. Supp. 2d 593, 613 (S.D. Tex. 2009) (where chief of police approved of the officer's use of force, even though the officer's conduct violated the police department's use of force policy, "it is reasonable to infer that Sergeant Williams used deadly force with the knowledge that the City would exact no consequence for his actions."); *Rivera v. City of San Antonio* No. SA-06-CA-235-XR, 2006 WL 3340908, at *13 (W.D. Tex. 2006) (citing *Grandstaff v. City of Borger*, 767 F.2d 161, 170 (5th Cir. 1985) ("Where police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force requirement is satisfied.").

V. Damages

130. **Actual damages.** Brenda Ramos incorporates sections I through IV above into this section on damages. Defendants' acts and/or omissions were the cause of Mike Ramos's death and the following damages to Plaintiffs:

a. Estate of Mike Ramos (Survival Claim; Tex. Civ. Prac. & Rem. Code § 71.021).

1. Conscious pain and mental anguish suffered by Mike Ramos prior to his death; and

2. Funeral and burial expenses.

b. Brenda Ramos (as wrongful death beneficiary of Mike Ramos; Tex. Civ. Prac. & Rem. Code § 71.004).

1. Mental anguish—the emotional pain, torment, and suffering experienced by Brenda Ramos because of the death of her son, Mike—that Brenda Ramos sustained in the past and that she will, in reasonable probability, sustain in the future;

2. Loss of companionship and society—the loss of the positive benefits flowing from the love, comfort, companionship, and society that Brenda Ramos would have received from Mike Ramos had he lived—that Brenda Ramos sustained in the past and that she will, in reasonable probability, sustain in the future;

3. Pecuniary loss—loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that Brenda Ramos would have received from Mike Ramos had he lived—that Brenda Ramos sustained in the past and that she will, in reasonable probability will sustain in the future.

140. **Punitive/Exemplary Damages** against Taylor. Punitive/exemplary damages are recoverable under Section 1983 when the conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. Here, the conduct of Taylor was done with evil motive or intent, or at the very least, Taylor was reckless or callously indifferent to the federally protected rights of the Plaintiff and Mike Ramos. As such, Plaintiff requests punitive and exemplary damages to deter this type of conduct in the future.

141. **Prejudgment and post-judgment interest.**

142. **Costs of court.**

143. **Reasonable and necessary attorney's fees** incurred by Plaintiff through trial, and reasonable and necessary attorney's fees that may be incurred by Plaintiff for any post-trial proceedings, or appeal, interlocutory or otherwise, pursuant to 42 U.S.C. § 1988.

VI. Request for jury trial

144. Ms. Ramos requests a jury trial.

VII. Prayer

131. For all these reasons, Plaintiff Brenda Ramos requests that the City of Austin and Christopher Taylor be summoned to appear and answer her allegations. After a jury trial regarding her claims, Ms. Ramos seeks to recover the damages listed above in an amount to be determined by the jury and any other relief to which she shows herself justly entitled, including her attorney's fees and expenses under 42 U.S.C. §1988(b), court costs, and pre- and post-judgment interest.

Respectfully submitted,

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on **February 18, 2022**, a true and correct copy of this *Plaintiffs' Second Amended Complaint* has been forwarded to the following via the Federal Rules of Civil Procedure.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS, Plaintiff v. THE CITY OF AUSTIN and CHRISTOPHER TAYLOR, Defendants.	§ § § § § § § § § § §	NO. 1:20-CV-01256-RP

ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

Came to be heard on this day Plaintiff Brenda Ramos, on behalf of herself and the Estate of Mike Ramos's Motion for Leave to Amend Complaint. The Court, having considered the Motion, is of the opinion that the Motion should be GRANTED.

It is, therefore, ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Leave to Amend Complaint is GRANTED.

SIGNED on this _____ day of _____, 2022.

_____
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS, Plaintiff v. THE CITY OF AUSTIN and CHRISTOPHER TAYLOR, Defendants.	§ § § § § § § § § § § §	NO. 1:20-CV-01256-RP

PLAINTIFF'S SECOND AMENDED COMPLAINT

Plaintiff Brenda Ramos, on behalf of Herself and the Estate of Mike Ramos, file this lawsuit against the City of Austin (City) and Christopher Taylor (Taylor), Defendants, and show the Court and the Jury the following:

I. PARTIES

1. Plaintiff Brenda Ramos is a citizen of Texas and resides in Travis County, Texas. Her son Mike Ramos was also born and raised in Austin, Texas and she is his biological mother and, therefore, an heir of the deceased, Mike Ramos. Subject to the pending administration of the Estate of Mike Ramos, Plaintiff Brenda Ramos is the representative of his Estate and therefore has capacity to bring this survival action on behalf of the Estate of Mike Ramos, pursuant to Texas Civil Practice and Remedies Code section 71.021(a), as applied under 42 U.S.C. § 1983. As Charles Ramos's biological mother, Plaintiff Brenda Ramos is a wrongful death beneficiary and, as such, brings this wrongful death action in her individual capacity pursuant to Texas Civil Practice and Remedies Code section 71.004(b) as applied under 42 U.S.C. § 1983.

2. Defendant City of Austin is a Texas municipal corporation in the Western District of Texas which funds and operates the Austin Police Department ("APD"). Former Chief of Police, Brian Manley was, at the time of the events that gave rise to this lawsuit, the City's policymaker when it comes to the implementation of the APD's budget, policies, procedures, practices, and customs, as well as the acts and omissions, challenged by this suit.

3. Defendant Christopher Taylor is an officer with the Austin Police Department. He is sued in his individual capacity and was acting under color of law at all relevant times.

II. JURISDICTION AND VENUE

4. This Court has federal question subject matter jurisdiction over this 42 U.S.C. § 1983 lawsuit under 28 U.S.C. §§ 1331 and 1343.

5. This Court has general personal jurisdiction over Taylor because he works and lives in Texas. Defendant The City is subject to general personal jurisdiction because it is a Texas municipality.

6. This Court has specific personal jurisdiction over Defendants Taylor and the City because this case is about their conduct that occurred in Austin.

7. Under 28 U.S.C. § 1391(b), the Western District of Texas is the correct venue for this lawsuit because the events occurred in Austin, Texas, which is within the Western District of Texas and the Defendants reside in the Western District of Texas.

III. FACTUAL ALLEGATIONS

A. Taylor shoots and kills an unarmed and compliant Mike Ramos.

8. On April 24, 2020, Austin Police Department (APD) received a muffled, partially unintelligible 911 call reporting two Hispanics in a car at the Rosemont Apartments at 2601 South Pleasant Valley.

9. At several points in the call, the operator could not make out the caller's words. At times, the operator could not understand what the caller said at all, indicating: "I can't understand anything you're saying. You're pulling the phone away or something."[1]

10. The call came in about 6:31 p.m. The call to the police was a swat, where someone intentionally makes a false report to the police of an emergency so that law enforcement will bring outsized powers to bear on an individual to frighten and cause problems for that person.[2]

11. The APD and Taylor should have recognized by the context and garbled nature of the call that it was potentially false and misleading and treated it with suspicion.

12. Before the officers arrived at the scene, the Operator confirmed with the caller that the Hispanic male was not pointing a gun but, if anything, merely holding a gun:

> Operator: *Okay. But I need to know the difference. Is he pointing it at her or just holding it up?*
> Caller: *He's holding it. He's holding it.*

13. The Operator made clear with the caller the individual in the car was not pointing a gun. It is legal for citizens in Texas to carry guns. Even assuming this Hispanic citizen had a gun (which he did not), holding a gun does not make him armed and dangerous.

14. Despite the suspect nature of the call, APD mobilized seven officers (Christopher Taylor, Darrell Cantu-Harkless, Benjamin Hart, James P. Morgan, Karl Krycia, Valarie Tavarez,

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[1] http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020 (last visited Feb. 17, 2022). A full transcript is attached as Exhibit A for the convenience of the court; however, the recorded call uses a digital voiceover. The actual recording is needed to fully evaluate the credibility of the caller.

[2] The caller made several misrepresentations. Mike Ramos was not wearing a white shirt, his shirt was red. He was not in possession of a gun. The caller deliberately swatted Mike. "Swatting" is defined in the Cambridge Dictionary as: "the action of making a false report of a serious emergency so that a SWAT team (a group of officers trained to deal with dangerous situations) will go to a person's home, by someone who wants to frighten, upset, or cause problems for that person." *available at* https://dictionary.cambridge.org/dictionary/english/swatting (last visited Feb. 17, 2022).

Katrina Ratcliff, and a trainee, Mitchell Pieper) in seven police cruisers to investigate two people sitting in a car.

15. Taylor voluntarily joined the aggressive APD operation. Taylor admits he "assigned himself" to the call and joined in calls for "extensive resources and backup," which included a police dog and a helicopter. (Doc. 8, ¶3).

16. Krycia joined Taylor and he also volunteered for the assignment. He is the officer who requested the police helicopter. (Doc. 8, ¶3)

17. The APD put in motion a squad of officers, soon backed up by helicopter and canine, based on an unintelligible and suspect caller, with a changing story, who admitted that no one was being threatened.

18. The police operation headed to the Rosemont Apartments. Before entering the apartment complex, the police stopped on the roadway to develop a plan. This planning stage included a written diagram. Their plan included keeping a distance between their vehicles and the subjects' vehicle. Officer Hart, who appeared to take command of the operation, said: "*We'll keep a good distance from them. Don't try and pen them in*."

19. Hart also said he had would have his assault rifle out and so should "*anyone else who had rifles*."

20. At 6:40 p.m., in an overt act of militaristic aggression, the APD drove their police vehicles into Rosemont Apartments and blocked the entrance and exit to the apartments with police vehicles.

21. Earlier that day, Mike had backed the Prius into a parking spot directly in front of the apartments, in plain sight in broad daylight. Mike parked the vehicle close to the entrance and others could easily see him, including people living in the apartments. He was not trying to hide.

22. Upon arriving at the scene, officers confirmed that Mike did not have a weapon in his hand or on his person.

23. Mike had a nonviolent criminal record, mostly involving petty theft. His most recent charge was for credit card abuse.

24. The APD police officers, including Taylor, knew him by name, knew he had a nonviolent criminal record, and knew he had previously been accused of pilfering, not violence.[3]

25. Forty-two-year-old Mike Ramos, who had struggled with drug addiction during his adult life, sat in a car with a friend. It was about dinner time and the sun was still hot and the day bright.[4] Temperatures had reached 98 degrees and Mike and his companion were facing west.

26. As the sun cast shadows against the apartment building behind them, Mike and his companion suddenly faced a fleet of police vehicles coming toward them. The officers parked to the left of the Prius, completely blocking the only exit. They formed a front row of three vehicles, with additional vehicles behind them. Taylor's vehicle parked behind these three vehicles. As they had planned, the police strategically parked their cars a good distance from the Prius. The distance between the Prius and any officer was multiple car lengths. As the officers had planned, they positioned themselves away from any direct danger or the direct path of the Prius.

27. The officers got out of their vehicles, secure in their position, their numbers, behind their three-ton SUVs with bull bars, and their ballistic vests, and *en masse* aimed high-powered rifles and semi-automatic weapons directly at Mike and his companion as they sat in the Prius, a small compact hybrid hatchback.

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[3] Taylor alleges he believed Mike was a "known violent offender." (Doc. 8 ¶ 2) Much like the swat 911 call, he and the APD were misinformed. There is no evidence to support this claim. To the extent Taylor believed someone had pursued a similar vehicle the day before, he has no evidence it was Mike and, in any event, standing alone this would not turn Mike into a violent offender.

[4] https://www.accuweather.com/en/us/austin/78701/april-weather/351193?year=2020 (last visited Feb. 17, 2022).

28. Taylor posted up in the center, standing shoulder to shoulder with Hart, backed by Tavarez. To his left, Cantu-Harkless stood on the driver side of the Cantu-Harkless vehicle, backed by Ratliff. Krycia stood to Hart's right, on the other side of the Hart vehicle. All the police aimed their weapons, including high-powered rifles, at the occupants of the Prius.

29. The police officers immediately commanded Mike to step out of his car by name.

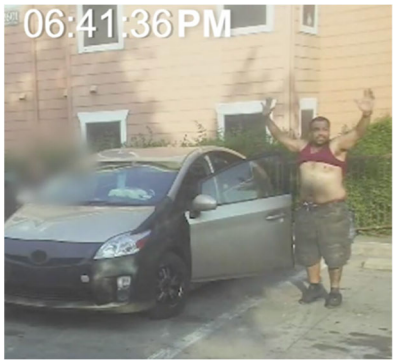
30. Mike did not attempt to flee or drive away. Mike immediately complied and got out of his car with his hands up. He was wearing shorts and a red sleeveless t-shirt, not a white t-shirt as the 911 caller had represented.

31. Mike surrendered. He raised his hands and kept them raised over his head.

32. Mike was noticeably dazed and confused. He never displayed threatening behavior. His only expression was one of confusion, dismay, and fear at the excessive display of force brought to bear against him by the APD.

33. Complying with Cantu-Harkless's direction, Mike obediently walked toward the line of officers as they aimed their guns at him. The officer ordered him to stop. Mike stopped.

34. Cantu-Harkless ordered Mike to raise his shirt and turn around. Mike raised up his shirt and turned around. At this point, officers confirmed Mike was unarmed, his bare torso in full view. He held his hands high over his hands. He fully surrendered himself to the police.



35. After Mike surrendered, however, Cantu-Harkless and the other APD officers failed to follow through. APD officers did not take Mike into custody. They did not advise Mike of his crime or move to place him under arrest or read him his rights. Had the officers done so, they would have ended what should have been a routine arrest.

36. All of the officers continued to aim high-powered assault rifles and semi-automatic handguns at Mike, even though Mike was compliant, noticeably impaired and confused by the situation. The officers had brought excessive force to bear and were so amped they failed to recognize that their suspect had surrendered.

37. Instead, the officers seized Mike by penning him in, pointing multiple high-powered weapons at him, and then left him in limbo.

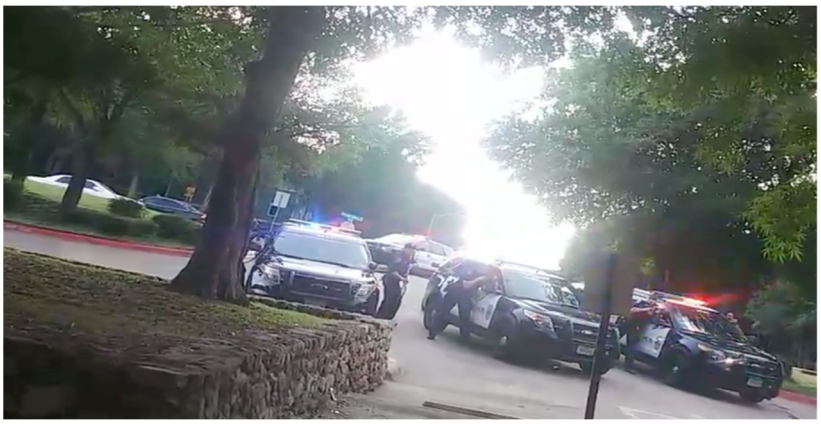
38. The APD officers, including Taylor, failed to tell Mike why he had been stopped and seized.

39. The officers, including Taylor, escalated the situation by shouting multiple, conflicting commands at Mike.[5]

40. The officers, including Taylor, quickly became aware there was no danger to the woman and that Mike did not have a gun. Based on this information, they should have immediately readjusted their response. Had they been concerned for the safety of his companion they would have asked her to leave the car when Mike was outside the car with his hands up. They would have tried to escort her away from the car. The companion simply remained in the car. Taylor and the officers should have recognized this information, registered that she did not perceive Mike as a threat, and deescalated their show of force.

[5] See Exhibit "B" transcribing just a portion of the chaotic, conflicting shouts by the officers and Mike's incredulity as to the police threatening to shoot him.

41. Instead, after Mike had surrendered, Taylor and the others kept their guns trained on Mike, including military-style assault weapons, continuing to scream conflicting commands and further escalating and confusing the situation.



42. Taylor and other officers yelled random, conflicting orders at Mike from all directions. In response, Mike told Taylor and the officers he was frightened and did not understand what they were doing or what was happening to him. "*What's going on? What's going on*?" he pleaded for answers.

43. Mike never exhibited aggressive behavior toward Taylor or any of the other officers. The entire time, Mike remained compliant and visibly frightened and confused. "*Put the guns down, dawg. What the fuck is going on? Why? What the fuck? You're scaring the fuck out of me?"*

44. And with his hands up, his bare belly still visible, Mike began to breath in and out heavily, a sign of panic and high anxiety. He rested his head on the car window. He pleaded "*Don't shoot, dawg*." And he clutched his head in his hands. "*Don't shoot*!"

45. Mike pleaded with Taylor and the officers to help him understand what was happening and not to shoot him. He continued to implore them to explain what was happened and

why: "*What's going on? What's going on? What the fuck do I fucking do, man*?" Mike, disoriented and scared, pleaded for help: "*What do I do?"* The police ignored him.

46. Mike pleaded for an explanation as to what was happening, but no officer explained the situation. To the contrary, Cantu-Harkless told him: "*I can't explain right now Mike*."

47. Then, Cantu-Harkless (the closest officer to him and the one Mike had surrendered to and looked to for help) stopped communicating with Mike Ramos.

48. Chaos ensued. All the officers started yelling at Mike and he had no one listening to him. He heard only an increasing number of random, escalating shouts and bellows from the various officers. One officer told Mike to keep his hands up. One told him to walk forward. Another told him to turn around in a circle. Another told him to get on his knees.

49. Taylor and the other officers assumed a warrior mentality and lost control of the situation. Rather than deescalate the situation, they did the opposite. Taylor contributed to the chaos by adding his own mixed messaging of orders and threats.

50. Mike remained in a state of intense confusion, while making futile attempts to comply with the impossible. The guns remained pointed at him. The yells became more strident. Alarmed and fearing for his life, he saw that no matter what he did, the officers would not tell him why he had been seized and would not lower their rifles, even when he stood before them, hands up and chest bare, pleading for help. Instead, the officers' threats escalated, and their directions conflicted. Mike slowly drew back, fearing for his life, and cowering behind the car door, which he communicated in words and body language. He was not showing aggression or trying to run, he was a man grasping for something to hold on to as the world seemed to be collapsing around him and his anxiety increased. All the while, he kept his hands in the air and tried to talk with the officers. He held the top of his head, in shock and fear. He put his head down on the window in

dismay. This was a man signaling to the officers he had no idea what he was supposed to do or what he was doing wrong.

51. Mike did not take furtive steps; he did not make any secretive or provocative movements. Implicit bias, cognitive dissonance, and APD training that emphasized viewing people of color as an imminent threat to police led Taylor and the other APD officers present to inaccurately evaluate the scene and fail to recognize the clear signs that Mike was exhibiting: fear, anxiety, and most importantly, surrender. This was a man in distress who was trying his best to respond but not able to understand what was expected of him. Quite simply, Mike was in fear for his life.

52. Morgan and his trainee Pieper originally were intended to remain in their vehicles to block the apartment entrance. Pieper asked Morgan: "*So we're blocking cars*?" Morgan replied: "*Let's see what happens*." Pieper had been with the APD for just three months, and he was in field training.[6]

53. Morgan instructed Pieper on the smallest details, including telling him he could take his mask off in the vehicle as they proceeded to the apartments: "*You can take your mask off in the car, don't want you stumbling on your words*."

54. Instead of staying back at the entrance to the apartments, Morgan and Pieper ran and joined the line of officers. Pieper stacked behind Morgan. Morgan said: "*I want you to stay with me*." Behind Morgan, Pieper did not have a view of the Prius or Mike. Pieper could not see

[6] APD policy or practice allowed Pieper to be in field training, even though he had only completed minimal training. According to the APD website, the Training Academy is 32 weeks long (8 months) or 16 weeks (4 months) for those with prior active law enforcement experience. After graduation, officers enter a 3–4-month Field Training Program with a Field Training Officer.
https://www.apdrecruiting.org/faq (last visited Feb. 17, 2022); https://www.apdrecruiting.org/academy (last visited Feb. 17, 2022).

Mike's attempts to surrender and his compliance, and did not witness his cries for help, and his visible fear and despair.

55. Standing outside of the Prius, Mike was right to be afraid. No one was listening to his words, his cries for help, or reading his body language and the clear signs of confusion, anxiety, and fear.

56. As the officers escalated the situation, Morgan joined in the fray. Although Morgan had told Pieper he wanted Pieper to stay with him, he then told Pieper to go to the vehicle and grab the projectile rifle. During this time, Pieper could not see Mike at all.

57. After grabbing the projectile rifle, Pieper did not return to Morgan, his Field Training Officer. Instead, he grabbed the rifle and proceeded to run from one police vehicle to another, rifle in hand, acting erratically without direction. He did not pay attention to Mike or his words or actions. His APD training led him to view Mike as a threat because he was a man of color, even though none of Mike actions presented an objectively reasonable threat

58. And then, Taylor began ordering the trainee Pieper to "*move up*" and then to "*impact up, impact up*."[7]

59. Pieper shouted: "*I don't have an angle*." But then immediately asked: "*Hit him?*" At this time, Mike continued to have his hands in the air, but Pieper ignored Mike's body language, dead set on shooting someone.

60. Mike at all times attempted to follow ever-changing commands from multiple officers. Indeed, Mike did his best to deescalate the situation himself. He pleaded with the officers,

[7] The less lethal shot should never have been called for or used in this situation. It was misused based on the events and facts. Telling Pieper to take a "deep breath" was not de-escalation. Taylor had already repeatedly commanded Pieper to "Impact Him!" even though Mike had his hands up in surrender and was asking for help and trying to comply. Taylor also knew Pieper could not have witnessed all the events, did not have a view, did not have angle, and was a green recruit with only a few months of training under his belt and still in field training. Indeed, telling Pieper to take a deep breath and move to the next car to the right escalated the situation.

telling Taylor and the officers he did not have a gun and pleading with them to help him understand: "*I ain't got no fucking gun, dog! What the fuck?!*"

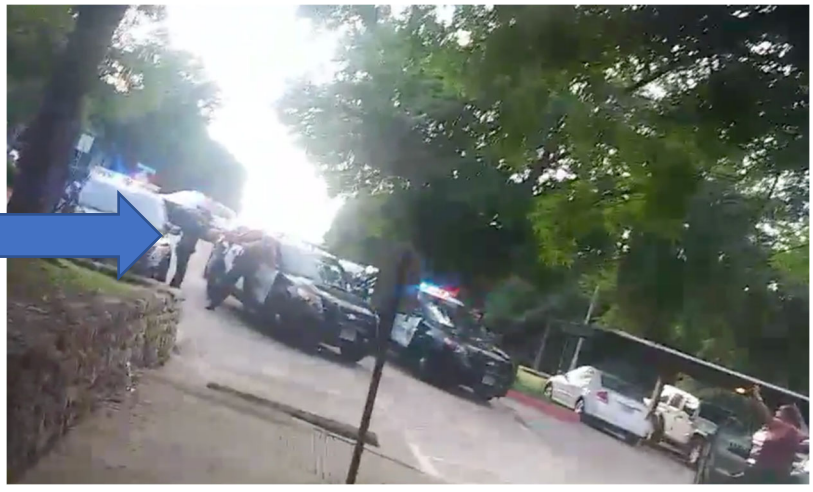
61. This entire time, Mike continued to keep his hands visible and raised in the air in surrender.

62. Then, Pieper positioned himself at the next car over, beside Krycia and joined the fray by shouting more commands at Mike: "*Walk toward us…comply with us*!" Mike, of course, had already walked toward the officers with hands raised, chest bared. The guns had remained pointed.

63. A bystander yelled: "*Why all the guns pointed at him. What the fuck?"* Another said: "*That don't make sense."*

64. Mike's last words to Taylor and the APD officers were: "*Impact me for what? Put the gun down dawg. Man, what the fuck dawg?*"

65. This photo below is the bystanders' view from her cell phone camera. Mike has his hands in the air, but the officers continue to have their rifles pointed at him.

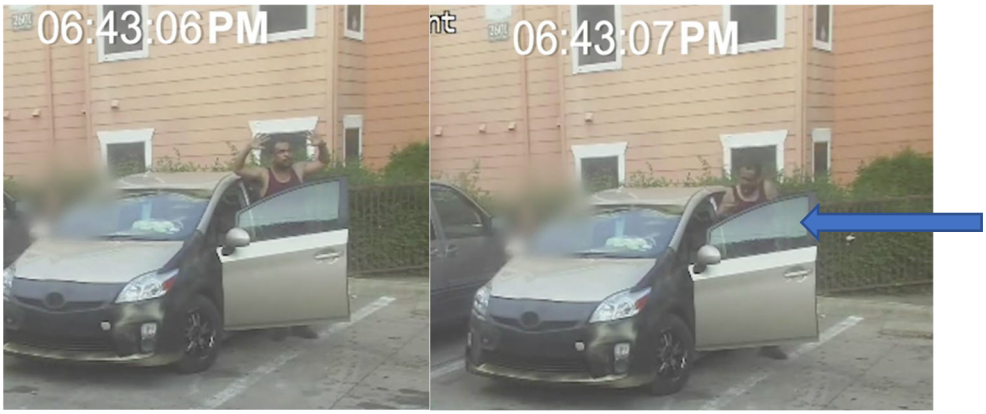


The arrow to the left is the trainee Pieper. Beside him is Krycia.

Mike with hands in the air.

66. In a split second—before Mike could react or respond—Taylor, Krycia and the other officers ordered Pieper to shoot Mike. Pieper fired, hitting Mike with a less lethal projectile from the service rifle.

67. Despite the fact that Mike was unarmed and begging for help, had complied with all of Taylor's commands, as well as the other officers, had raised his arms in surrender and lifted his shirt as he turned in circles, and had begged Taylor and the officers not to shoot him, Taylor and other officers ordered Pieper to shoot. One second later, at 6:43:07, Pieper shot Mike Ramos while his hands were still in the air, above his head. The white projectile can be seen to the right in the photo below as it ricocheted after striking Mike and frightening him to retreat into his car for protection.



68. Mike reacted in shock and disbelief.

69. The act of shooting a man who had surrendered, with his arms in the air, was so incredulous that bystanders began to scream over and over to the officers: "*Oh gosh. What'd you all shoot him? Why you shoot him? That's wrong. That's wrong. Wrong. Wrong.*"

70. Mike's companion exited on the passenger side, but the officers ignored her.

71. Frightened and believing the police were about kill him without no reason, Mike, acting in self-defense, sought the protection of his car. Mike sat in his car, injured and in a state of

shock and panic. The apartment residents continued yelling at the officers, "*Oh my gosh, why you all shoot him? Wrong…"*

72. The bystanders, who watched and listened as the entire incident unfolded, witnessed the APD officers acting outside of the law. They were equally powerless, and expressed fear for their own lives, as they witnessed another person of color's life in imminent, irrational danger from an armed police force.

73. Mike had every reason to believe that if he stayed where he was, his life was in danger.

74. Mike never once threatened the officers or anyone else present during the incident. He was simply terrified and in a state of panic and anxiety, in fear for his life.

75. From the time the officers arrived, Mike complied with their commands but no matter what he did, they continued to escalate the confrontation through a show of excessive force and use of weapons, shooting him with a so-called "less lethal" round, driving him to retreat back into his vehicle.

76. To Mike's left was a line of impenetrable police vehicles, three of which faced him outfitted with steel bull bars designed to not just look militaristic and intimidating, but to have the capacity to push other vehicles off the road. Far back and to the side each of these vehicles were multiple armed police officers aiming high-powered automatic and semi-automatic weapons at him, at locations two or even three officers deep. Police vehicles blocked the only exit.

77. Taylor and the officers were in no immediate or imminent danger, nor did they have reason to believe anyone else was in danger. The police outnumbered Mike, eight-to-one. The police stood well behind the front of their vehicles. They wore ballistic vests, and they were locked and loaded. The police had backup. No police officer was caught alone, unarmed, or

unaware. Mike posed no threat. It was not nighttime or dark. They were not in unfamiliar territory. They had drawn a map and entered cautiously, keeping a "good distance" back. They stood behind their large police vehicles for protection, a safe distance away from the path Mike's vehicle took as it slowly inched out of the parking spot to his right, away from officers.

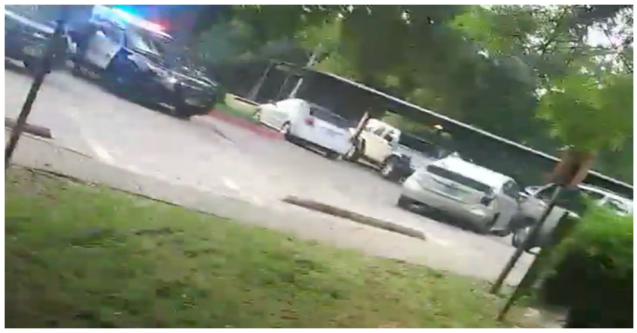
78. Mike never made any move to suggest he was reaching for a weapon. There was no gun. Mike's only thought was fear and an impending sense of doom as the officers continued shouting and targeting him with their assault rifles.

79. To Mike's right was a dead end. Taylor admits he knew and saw that "Ramos had no avenue to escape in his car to his right, because a parking lot full of cars blocked access to the street and because the parking lot reached a dead end at a large municipal dumpster." (Doc. 8, ¶6)

80. Fatalistically, the electric Prius rolled slowly and quietly away from Taylor and the other APD officers and their guns.

81. The bystander's camera shook at the moment that Taylor, on the passenger side of the first police vehicle, fired his assault rifle at Mike as his car slowly moved away from him. The bystanders can be heard yelling: "*Oh my God, why you all shooting him."*

82. The Prius turned away from Taylor and all officers and headed slowly in the opposite direction. As the Prius inched away toward the dead end blocked by dumpsters, Taylor opened fire, shooting three rounds from his assault rifle into the side window of the Prius and striking Mike in the back of the head. Neither Taylor nor any other officer was in front of the Prius or to its side when Taylor fired his fatal shots.



83. Taylor fired from the far side of the police cruiser, behind a three-ton vehicle with a grill outfitted with bull bars, standing at the passenger door of the police cruiser.

84. Taylor fired not just once, but three times. He fired three shots at Mike's head and the Prius rolled to a stop. Taylor had fatally shot Mike Ramos.

85. The bystanders yelled: "*Why you shootin him?"*

86. And then: *"Why they murdering this man?*"

87. Below is a still image taken from Taylor's body camera at the moment he fired his rifle three times: 6:43:27. Taylor was the closest of any officer and he was a substantial distance from the car. The Prius is driving away from the officers:

88. A bystander's cell phone video[8] and Austin police dashcam and body-worn camera videos[9] show Mike outnumbered, confused and fearful, trying to negotiate with the police for his life in broad daylight, then being shot while his hands are in the air in surrender, and finally desperately trying to save himself from being killed before Taylor shot him in the back of the head, killing him, as he drove into a dead end.

89. As Mike sat in his car, Taylor admits he "did not see a gun." He says he shot his rifle three times at the Prius, making the incredulous claim that he thought Mike would "drive through – and over – him or his fellow APD officers." (Doc. 8 at ¶15) Taylor's statement defies reason. The videos confirm that Taylor and the other officers were armed, a substantial distance away from the Prius, nowhere near the line of travel of the vehicle, and enjoyed extensive protection and cover. No objectively reasonable basis existed to believe the vehicle could harm anyone. Of the eight officers present with weapons drawn Taylor was the lone shooter. Any reasonable officer observing the scene unfold knew Mike was driving away from the officers, not toward them, and was not a threat to drive through or into a line of heavily armed police in heavily defended police vehicles. Mike did not move toward the officers; he turned away, headed in the direction where Taylor admits "Ramos had no avenue to escape in his car to the right." (Doc. 8 at ¶6).

90. Under these circumstances, there was no objectively reasonable basis for Taylor to be afraid for himself (or others).

[8] *Mother of man killed by Austin police officer asks for answers*, Austin American-Statesman (May 31, 2020), available at https://www.youtube.com/watch?v=7dQMDiUpLHU&feature=youtu.be (last visited Feb. 17, 2022).
[9] http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020 (last visited Feb. 17, 2022). The videos that are currently available publicly appear to have been edited by APD. And, only some of the videos from certain officers are available. Footage is unavailable at all for officers Krycia, Morgan or Ratcliff. No bodycam has been made available from officers Krycia, Morgan, Tavarez or Ratcliff. Also, the timestamps are inconsistent, some by more than 3 seconds and one by more than 5 minutes.

91. Taylor is the only officer who fired a lethal weapon, and no reasonable police officer would have used deadly force against Mike Ramos in these circumstances.

92. The companion in the vehicle was not arrested or charged with a crime.

93. It took the APD officers all of seven minutes to end the life of Mike Ramos. In that time, eight officers, including one trainee, brought about the death of an unarmed, confused, and frightened Afro-Hispanic man in broad daylight to death—a citizen who had no idea why he was being seized, who made no threats or signs of aggression, and who had no avenue to escape.

94. The Special Investigations Unit of the APD performed the criminal investigation into the conduct of Taylor and the officers present, and despite overwhelming evidence, refused to swear out a warrant for Taylor's arrest. Yet based on the facts developed in the investigation, a Travis County Grand Jury indicted Taylor for first degree murder.

95. The APD placed Taylor and Pieper on administrative duty but, upon information and belief, did not terminate Taylor nor subject him to discipline.

96. Ms. Brenda Ramos, Mike's mother, brings this lawsuit to vindicate her son's civil rights, hold the Austin Police Department and Taylor accountable for her son's senseless killing, and recover for her own harm and damages from losing her only child to excessive, unjustified police violence.

97. Taylor and the other APD officers used excessive force in violation of Mike's Fourth Amendment rights. Taylor and the other APD officers were on notice that their actions were objectively unreasonable in light of clearly established law at the time of this incident.

B. This was not Taylor's first killing.

98. On the afternoon of July 31, 2019, APD officers responded to a check welfare call at a high-rise condominium in downtown Austin. Dr. Mauris DeSilva, a neuroscientist who had a

history of mental health disease, was having a mental health episode. Taylor and Krycia were two of the four APD officers who responded to the call. Rather than helping Dr. DeSilva, Taylor and Krycia pulled their duty pistols and shot and killed Dr. DeSilva.[10]

99. After the shooting, APD allowed Taylor and Krycia to return to duty.

100. The civil complaint filed in the *DeSilva* case states that "despite having knowledge of Dr. DeSilva's prior mental health contacts and his ongoing mental health crisis, officers responded as if this were the scene of a violent crime."

101. In the interim, internal audits of the APD have found that officers receive training that encourages a paramilitary approach to policing, acting not as guardians of the community at large, but as warriors engaged in battle.

102. On or about August 27, 2021, the Grand Jury indicted Christopher Taylor and Karl Krycia for first-degree murder and third-degree felony deadly conduct for the shooting death of Dr. Mauris DeSilva. This was Taylor's second indictment for first degree murder. The first was returned four months prior, on March 10, 2021, for the shooting death of Mike Ramos on April 24, 2020, which is the subject of this lawsuit.[11]

C. APD shuts down its training academy following Taylor's killing of Mike Ramos.

103. After Mike Ramos was killed, the City shut down the APD Training Academy. It was reopened as a "reorganized and reimagined" police academy a year later, putting focus on de-escalation and community engagement and addressing systemic inequalities and racism in policing. Austin Police Chief Joseph Chacon announced; "We are really transitioning from this

[10] Discovery in the civil case is subject to a protective order so it is unavailable to Plaintiff.

[11] Due to pending criminal investigations, prosecutorial privileges, and discovery limitations, material evidence remains unavailable to Plaintiff which could inform her allegations. The police released select videos, but not all. The original, unedited videos have not been made available. The autopsy has not been released. The officers' and witness statements have not been released. The Defendant has not served his initial disclosures.

kind of military-styled Academy into one that's employing adult learning concepts and active learning." The courses in the academy now focus on "diversity, equity and inclusion, as well as a strong emphasis on de-escalation and communication skills."[12]

D. The City and APD have a long history of using excessive force against minority citizens.

104. In 2016, the Center for Policing Equity found that Austin police officers used more violence in the neighborhoods where Black and Hispanic Austinites live than in predominantly white neighborhoods. The study adjusted for crime and poverty variables and found that Austin police officers' use of force in those communities was disproportionate and unjustified. Austin police were more likely to use severe force against Black people and other people of color. Austin police were disproportionately more likely to shoot rather than use their hand-to-hand training or deploy pepper spray when the person subjected to force was Black. Mike Ramos was biracial – Black and Hispanic.

105. The Austin City Council criticized the Austin Police Department's patterns of racist behavior and outcomes in December 2019, *less than five months before Taylor, a white officer, murdered Mike Ramos, a mixed race Black and Hispanic Austinite*:

> APD's state-mandated racial profiling reports consistently show that Black and Latino drivers are more than twice as likely to be searched as their white counterparts during traffic stops despite similar "hit rates," including in 2018 where 6% of traffic stops of white drivers resulted in a police search compared to 14% for Latino drivers and 17% for Black drivers.
>
> APD data provided per Council Resolution No. 20180614-073 (one of the Freedom City Resolutions) showed that in 2017 APO [sic] police officers made discretionary arrests of African Americans at more than twice the rate of either White or Latino residents.

[12] https://www.kxan.com/news/local/austin/austin-police-training-academy-resumes-next-week-will-serve-as-pilot-for-future-cadet-classes/ (last visited Feb. 17, 2022).

> That same 2017 data also showed Black and Latino residents accounted for nearly 75% of those discretionary arrests for driving with an invalid license, although the two groups combine to make up less than 45% of Austin's population.
>
> That same 2017 data also showed that one out of every three discretionary arrests for misdemeanor marijuana possession involved a Black resident even though less than one in ten Austinites is Black, while usage rates of marijuana are similar across racial groups.
>
> Per the quarterly report for Council Resolution No. 20180614-073, issued by APD on May 3, 2019, African Americans comprised 32% of persons arrested by APD for offenses eligible for citation, which, proportionally, amounts to more than three times Austin's Black population.
>
> An anonymous whistle-blower recently accused an Assistant Chief of the Austin Police Department of using racist epithets and derogatory terms, including "nigger," to refer to specific Black elected officials and sworn officers of the Austin Police Department.
>
> Patterns and specific incidents of discrimination and bigotry in the Austin Police Department erode the public trust, which is necessary to effectively enforce the law, solve crimes, and maintain public safety, and so the Council finds it imperative to understand the full extent of bigotry and systemic racism and discrimination within APD, and consider reforms to APD's policies, protocols, and training curriculum.

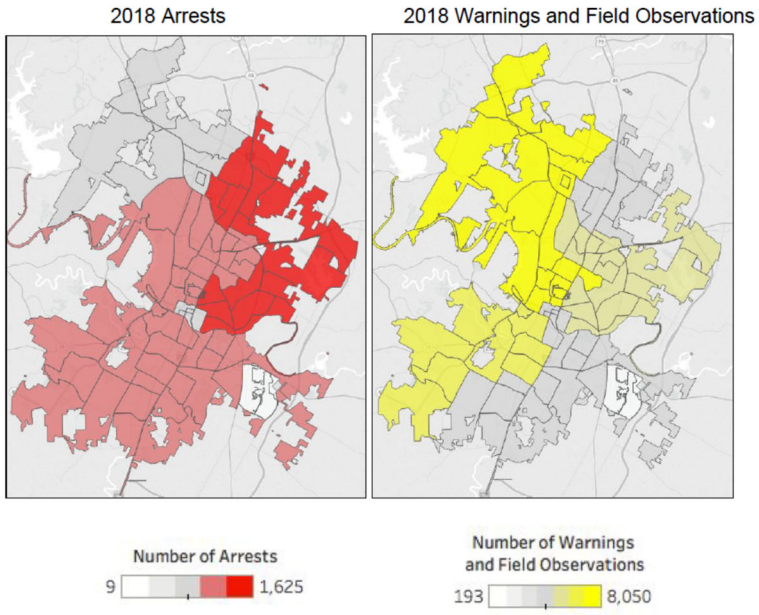
106. The Austin Office of Police Oversight, Office of Innovation, and Equity Office published a joint report in January 2020 (*less than four months before Taylor murdered Mike Ramos*) critical of the Austin Police Department's policing practices based on race during motor vehicle stops:

> Data reveals racial disparities in motor vehicle stops in 2018, with Black/African Americans as the most overrepresented of all racial/ethnic groups in Austin.
>
> In 2018, Black/African Americans made up 8% of the Austin population, 15% of the motor vehicle stops, and 25% of the arrests.
>
> Black/African Americans and Hispanic/Latinos are increasingly overrepresented in motor vehicle stops from 2015-2018. White/Caucasians are increasingly underrepresented during the same time period.
>
> Data from 2018 shows that Black/African Americans are disproportionately overrepresented in cases when their race is known by officers before the stop compared to cases when their race is not known before the stop.

> APD classifies motor vehicle stops based on whether the race of the person stopped was known to the officer prior to the stop. In 2018, Black/African Americans are overrepresented in both Race Not Known and Race Known categories. In the Race Not Known category, Black/African Americans make up 14% of stops (this is a 6% overrepresentation compared to their share of the Austin population). Black/African Americans are further overrepresented when their race is known before the stop, making up 17% of stops in the Race Known category and indicating a 9% overrepresentation when compared to their share of the population.

107. That same 2020 report included two maps of Austin that snapshot the Austin Police Department's approach. The map with red coloring shows the location of vehicle stops that resulted in arrests. The map with yellow coloring shows the location of vehicle stops that resulted in warnings. Austin's East Side, where this shooting death occurred, has higher concentrations of people of color and the police made more arrests, while Austin's West Side is disproportionally white, and the police gave more warnings:

Map 2 and 3: 2018 Motor Vehicle Stops Resulting in Arrests and Warnings and Field Observations



108. On April 16, 2020, *one week before Taylor killed Mike Ramos*, the City released a third-party investigative report regarding persistent racist behavior that permeated the Austin

Police Department and the almost certain retaliation that employees who dared to speak out must be prepared to endure:

> By several accounts, [Assistant Chief] Newsom's use of racist language was well known throughout the Department as was the use of such language by other officers who were known to be close friends with AC Newsom and used such language openly and often.
>
> Reports came to us, from different ranks, races, and genders, advising of the fact that the racist and sexist name-calling and use of derogatory terms associated with race and sex persists. Anecdotal history indicated that even members of the executive staff over the years had been known to use racist and sexist language, particularly when around the lower ranks or other subordinates.
>
> We listened to many anecdotes illustrating inappropriate comments over the years through which APD personnel expressed concern about racist behavior, but also sexist behavior, and dissimilar treatment in the handling of officer discipline and those who may be served by APD chaplain services with the denial of marital services to same sex couples. There are some real cultural issues that are in need of attention.
>
> Tatum Law was able to establish that [Austin Police] Chief Manley had reason to inquire as to [Assistant Chief] Newsom's conduct . . . The October 7, 2019, email received by Chief Manley alleging similar facts to those later alleged in the October 30, 2019, complaint about AC Newsom's use of the derogatory term "nigger" in text messages to refer to African Americans provided sufficient information . . . Chief Manley did not send these allegations for review or investigation.
>
> Whether it is about a grievance or misconduct there is an overwhelming sentiment among officers, at or previously involved with the Austin Police Department, and regardless of rank, that an officer, or even civilian staff member, who wishes to right a wrong, complain about improper conduct, or participate in an investigation such as this one, must be prepared in the present climate and culture to face almost certain retaliation, and not necessarily from Chief Manley, directly or solely.

109. The Austin City Council made additional, equally critical findings on June 11, 2020 (*less than a month after Taylor killed Mike Ramos*) regarding the City's anemic and unsuccessful efforts to fix its racist and violent policing culture:

> **The elected members of City Council have no confidence that current Austin Police Department leadership intends to implement the policy and culture changes required to end the disproportionate impact of police violence on Black Americans, Latinx Americans, other nonwhite ethnic communities.**

> The measures that current Austin Police Department leadership have been willing to implement are inadequate and resemble the same flawed police training and command expectations that have existed in the past. [emphasis added].

110. These recent findings by Austin's City Council, Office of Police Oversight, Office of Innovation, and Equity Office are binding evidentiary admissions by the City that its policing policies have led to disproportionate and unconstitutional police violence against members of the Black and Hispanic communities in Austin. Mike Ramos—a mixed race Black and Hispanic, native Austinite—bridged these two communities and his tragic death is a direct result of the racism that has permeated the policies of the Austin Police Department and culture of policing in Austin. It is that much more heartbreaking that he was killed in the same year that City leaders began to face – and grapple with – these ingrained problems. Mike's unjustified killing by Taylor emphasizes the urgency of the problem Austin faces and the importance of holding Defendants Taylor and the City accountable.

IV. Claims

A. Cause of Action against Taylor under 42 U.S.C. §1983 for Violation of Mike Ramos's Fourth Amendment right to be free from excessive force.

111. Ms. Ramos incorporates sections I through III above into her excessive force claim brought under 42 U.S.C. § 1983.

112. Taylor violated Mike Ramos's Fourth Amendment rights when he shot and killed Mike Ramos without justification.

113. Taylor was acting under color of law and violated Mike Ramos' constitutional rights when he and other APD officers ordered trainee Pieper to shoot Mike when Mike never showed any malicious or dangerous behavior, had his hands in the air in surrender and was compliant while pleading for help. By ordering Officer Pieper to impact Mike, Taylor escalated

the situation, causing Mike to further fear for his life, provoking him to seek safety by getting in the car.

114. Taylor was further acting under color of law when he fatally shot Mike, who he knew was unarmed and already injured from the less-lethal impact round, as Mike attempted to ineffectually move away in self-defense. Taylor knew Mike had "no avenue to escape" and posed no imminent threat of serious injury or death to anyone that justified lethal force. Taylor's use of force and use of lethal force under these circumstances and in light of clearly established law was excessive and objectively unreasonable.

115. Taylor's unlawful and unconstitutional use of deadly force violated Mike's civil rights, is the direct cause of his death, and caused Ms. Ramos's harm and damages.

116. Taylor is not entitled to qualified immunity under clearly established law. The following, while not exhaustive, illustrates the precedent:

117. **This case presents an obvious case with a particularly egregious set of facts.** Since 1985, the law only permits the use of deadly force to protect the life of the shooting officer or others: "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Tennessee v. Garner,* 471 U.S. 1, 11 (1985). The rule from *Garner* can be sufficient in obvious cases, without dependence on the fact patterns of other cases. *Cole v. Carson*, 935 F.3d 444, 453 (5th Cir. 2019). In 2020, the Supreme Court reaffirmed this basic principle that in cases with "particularly egregious facts," it is unnecessary for plaintiffs to identify a prior case involving the same factual scenario. *Taylor v. Riojas*, 141 S.Ct. 52, 54 (2020); *see also McCoy v. Alamu*, 141 S.Ct. 1364 (2021). This case represents particularly egregious facts and behavior by Taylor that is "antithetical to human dignity." *Hope v. Pelzer*, 536 U.S. 730, 745 (2002).

118. **It is clearly established law that force must be reduced, not increased, once a suspect is subdued.** The moment an officer retains the freedom of a person to walk away, he has seized the person. *Garner*, 417 U.S. at 7. APD retained Mike's freedom for several minutes as he stood with his hands raised in surrender. It does not matter that the first shot came from an impact gun. "Lawfulness of force, however, does not depend on the precise instrument used to apply it. Qualified immunity will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel." *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012). Newman, a Black man, was a passenger in a vehicle during a traffic stop. *Id.* at 759. Officers told Newman to stay in car, but he got out. *Id.* He raised his arms and officers said he they thought he might have a gun in his waistband. *Id.* at 762. Four officers hit Newman with a baton and a taser. *Id.* at 760. The Court held: "It is beyond dispute that Newman's right to be free from excessive force during an investigatory stop or arrest was clearly established in August 2007." *Id.*at 763 (citing *Deville v. Marcantel*, 567 F.3d 156, 169 (5th Cir. 2009) and *Tarver v. City of Edna*, 410 F.3d 745, 753 (5th Cir. 2005)); *see also Joseph v. Bartlett*, 981 F.3d 319 (5th Cir. 2020); *Darden v. City of Fort Worth*, 866 F.3d 698, 706 (5th Cir. 2017) (It is objectively unreasonable to tase a suspect once he is "no longer resisting arrest."). Mike Ramos was a dumbfounded, frightened man who never showed threatened the officers. He surrendered and pleaded for his life, his hands in the air, when Taylor ordered Pieper to shoot Mike with an impact rifle. Mike, in fear for his life, then tried to save himself from further injury when he was shot dead from behind by Taylor.

119. **It is clearly established law that an officer cannot seize an unarmed, nondangerous suspect by shooting him dead**. The Fifth Circuit has stressed: "It should go without saying that it is unreasonable for an officer to 'seize an unarmed, nondangerous suspect by shooting him dead.'" *Poole v. Shreveport*, 13 F.4th 420, 425 (5th Cir. 2021). Poole led six

police cars on a low-speed pursuit, disobeying traffic signals and driving on the wrong side of the road to avoid police spike strips. *Id.* at 422. When Poole finally stopped, "he hastily exited his vehicle and reached into the bed of his truck" and paused for a second with his right hand on the pickup while his left hand opened the door of the truck. *Id.* As he lowered himself in the driver's seat, the officer fired six shots at him. *Id.* Relying on the dashcam, the court determined that Poole's hands were visible and empty, and he was moving away from the officer with his back turned when he was shot. *Id.* at 424. The court further emphasized: "[A]n officer violates clearly established law if he shoots a visibly unarmed suspect who is moving away from everyone present at the scene." *Id*. at 425. As in *Poole*, at the time Defendant shot Mike dead, he knew he was unarmed and had no avenue of escape.

120. **It is clearly established law that a suspect is not a threat that warrants deadly force when turning or moving away from officers.** The Fifth Circuit recognizes that "[c]ommon sense, and the law, tells us that a suspect is less of a threat when he is turning or moving away from the officer. *Roque v. Harvel*, 993 F.3d 325, 339 (5th Cir. 2021); *Hanks v. Rogers*, 853 F.3d 738, 746 (5th Cir. 2017); *Poole*, 13 F.4th at 425. As a matter of law, Mike was not a threat as he was moving away. Indeed, he was ***less so*** as it was visible to APD Officers that he had no firearm or other weapon in his hand, had been shot without reason, and turned away from the line of heavily armed police officers aiming weapons at him behind a vehicular barricade seeking to avoid being shot again.

121. **It is clearly established law that deadly force cannot be used to against a nonthreatening suspect, fleeing in a motor vehicle.**

> We need not dwell on this issue. It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others. *See Kirby*, 530 F.3d at 483–84. This holds as both a

> general matter, see *Garner*, 471 U.S. at 11–12, 105 S.Ct. 1694, and in the more specific context of shooting a suspect fleeing in a motor vehicle, see, e.g., *Kirby*, 530 F.3d at 484; *Vaughan*, 343 F.3d at 1332–33. The right in question was therefore clearly established on February 28, 2006, and this is sufficient to affirmatively answer the qualified immunity question of our inquiry.

Lytle v. Bexar Cnty., Tex., 560 F.3d 404, 417–18 (5th Cir. 2009); *see also Newman v. Guedry*, 703 F.3d 757, 763 (5th Cir. 2012) ("It is beyond dispute that Newman's right to be free from excessive force during an investigatory stop or arrest was clearly established in August 2007."); *Reyes v. Bridgwater*, 362 Fed. App'x 403, 409 (5th Cir. 2010) ("The cases on deadly force are clear: an officer cannot use deadly force without an immediate serious threat to himself or others."); *Flores v. City of Palacios*, 381 F.3d 391, 395 (5th Cir. 2004).[13] In the instant case, Mike was an unarmed, wounded man, who posed no threat to anyone, driving slowly away from officers toward a dead end.

B. Cause of Action against the City under 42 U.S.C. § 1983 for violation of Mike Ramos's Fourth Amendment rights based on express or implied policies that promote the violation of the civil rights of Black and Hispanic people and were the moving force behind the killing of Mike Ramos.

122. Ms. Ramos incorporates sections I through IV.A above into her *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978), claim brought under 42 U.S.C. § 1983.

123. The City is liable for all damages suffered by the Plaintiffs pursuant to *Monell* and 42 U.S.C § 1983, based on official policies or customs of the APD of which the City Council, the

[13] Taylor's recent reliance on *Irwin v. Santiago,* No. 21-10020, 2021 WL 4932988 (5th Cir. Oct. 21, 2021), does not alter the fact that the law is clearly established that shooting and killing an unarmed man driving slowly away from officers is unconstitutional. First, the facts of *Irwin* are vastly different from these facts. Significant to the Court's decision in *Irwin* was the fact that "the projected path of Irwin's vehicle was in the officer's direction, at least generally, whereas in *Lytle* and *Flores* the vehicle was moving away from the officer." *Id.* at *3. At the same time, *Irwin* acknowledges that *Lytle* does constitute clearly established law in circumstances like these, where the officer is "positioned *behind* a vehicle that was *moving away from him* as he fired." *Id.* Finally, *Irwin* is unpublished and therefore "is not precedent" in this case. *Id.* at n. *.

City Manager, the Mayor, and the Chief of Police all had actual or constructive knowledge, and which were the moving forces behind the constitutional violations at issue here.

124. The City had these policies, practices, and customs on April 24, 2020:

a. Disproportionate use of excessive force against people of color,

b. Condoning such disproportionate use of excessive force against people of color

c. Choosing not to adequately train officers regarding civil rights protected by the United States Constitution,

d. Choosing not to adequately supervise officers regarding the use of force against people of color,

e. Choosing not to intervene to stop excessive force and civil rights violations by its officers,

f. Choosing not to investigate excessive violence and civil rights violations by its officers, and

g. Making the deliberate choice not to discipline officers for—and deter officers from—using excessive force and violating civil rights.

125. The City and Brian Manley knew about these policies and required Austin police to comply with them.

126. The City and Brian Manley developed and issued these policing policies with deliberate indifference to Mike Ramos and other Black and Hispanic Austinites' civil rights.

127. The City and Brian Manley were aware of the obvious consequences of these policies. Implementation of these policies made it predictable that Mike's civil rights would be violated in the manner they were, and the City and Brian Manley knew that was likely to occur.

128. These policies were the moving force behind Taylor's violation of Mike's civil rights and thus, proximately caused Mike's death and Ms. Ramos's damages.

129. Ultimately, when the City failed and refused to discipline Taylor for his clearly established constitutional violations, it approved of and ratified his conduct which itself establishes

a custom of the APD. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 755 (5th Cir. 2009). When a municipality approves a subordinate's conduct and the basis for it, liability for that conduct is chargeable against the municipality because it has "retained the authority to measure the official's conduct for conformance with their policies." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion); *Groden v. City of Dallas*, 826 F.3d 280, 284 (5th Cir. 2016); *see also Balle v. Nueces Cnty., Tex.*, 690 Fed. App'x 847, 852 (5th Cir. 2017). Under *Praprotnik*, "post hoc ratification by a final policymaker is sufficient to subject a city to liability because decisions by final policymakers are policy." *Hobart v. City of Stanford*, 916 F. Supp. 2d 783, 793 (S.D. Tex. 2013) (citing *Praprotnik*, 485 U.S. at 127); *see also Rivera v. City of San Antonio,* No. SA-06-CA-235-XR, 2006 WL 3340908, at *13 (W.D. Tex. Nov. 15, 2006) (disagreeing with the City that post hoc approval of prior conduct cannot be the moving force behind a constitutional violation.); *Santibanes v. City of Tomball, Tex.*, 654 F. Supp. 2d 593, 613 (S.D. Tex. 2009) (where chief of police approved of the officer's use of force, even though the officer's conduct violated the police department's use of force policy, "it is reasonable to infer that Sergeant Williams used deadly force with the knowledge that the City would exact no consequence for his actions."); *Rivera v. City of San Antonio* No. SA-06-CA-235-XR, 2006 WL 3340908, at *13 (W.D. Tex. 2006) (citing *Grandstaff v. City of Borger*, 767 F.2d 161, 170 (5th Cir. 1985) ("Where police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force requirement is satisfied.").

V. Damages

130. **Actual damages.** Brenda Ramos incorporates sections I through IV above into this section on damages. Defendants' acts and/or omissions were the cause of Mike Ramos's death and the following damages to Plaintiffs:

a. Estate of Mike Ramos (Survival Claim; Tex. Civ. Prac. & Rem. Code § 71.021).

1. Conscious pain and mental anguish suffered by Mike Ramos prior to his death; and

2. Funeral and burial expenses.

b. Brenda Ramos (as wrongful death beneficiary of Mike Ramos; Tex. Civ. Prac. & Rem. Code § 71.004).

1. Mental anguish—the emotional pain, torment, and suffering experienced by Brenda Ramos because of the death of her son, Mike—that Brenda Ramos sustained in the past and that she will, in reasonable probability, sustain in the future;

2. Loss of companionship and society—the loss of the positive benefits flowing from the love, comfort, companionship, and society that Brenda Ramos would have received from Mike Ramos had he lived—that Brenda Ramos sustained in the past and that she will, in reasonable probability, sustain in the future;

3. Pecuniary loss—loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that Brenda Ramos would have received from Mike Ramos had he lived—that Brenda Ramos sustained in the past and that she will, in reasonable probability will sustain in the future.

140. **Punitive/Exemplary Damages** against Taylor. Punitive/exemplary damages are recoverable under Section 1983 when the conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. Here, the conduct of Taylor was done with evil motive or intent, or at the very least, Taylor was reckless or callously indifferent to the federally protected rights of the Plaintiff and Mike Ramos. As such, Plaintiff requests punitive and exemplary damages to deter this type of conduct in the future.

141. **Prejudgment and post-judgment interest.**

142. **Costs of court.**

143. **Reasonable and necessary attorney's fees** incurred by Plaintiff through trial, and reasonable and necessary attorney's fees that may be incurred by Plaintiff for any post-trial proceedings, or appeal, interlocutory or otherwise, pursuant to 42 U.S.C. § 1988.

VI. Request for jury trial

144. Ms. Ramos requests a jury trial.

VII. Prayer

131. For all these reasons, Plaintiff Brenda Ramos requests that the City of Austin and Christopher Taylor be summoned to appear and answer her allegations. After a jury trial regarding her claims, Ms. Ramos seeks to recover the damages listed above in an amount to be determined by the jury and any other relief to which she shows herself justly entitled, including her attorney's fees and expenses under 42 U.S.C. §1988(b), court costs, and pre- and post-judgment interest.

Respectfully submitted,

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on **February 18, 2022**, a true and correct copy of this *Plaintiffs' Second Amended Complaint* has been forwarded to the following via the Federal Rules of Civil Procedure.

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/s/ Scott M. Hendler
Scott M. Hendler

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS, Plaintiff v. THE CITY OF AUSTIN and CHRISTOPHER TAYLOR, Defendants.	§ § § § § § § § § § §	NO. 1:20-CV-01256-RP

ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

Came to be heard on this day Plaintiff Brenda Ramos, on behalf of herself and the Estate of Mike Ramos's Motion for Leave to Amend Complaint. The Court, having considered the Motion, is of the opinion that the Motion should be GRANTED.

It is, therefore, ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Leave to Amend Complaint is GRANTED.

SIGNED on this _____ day of _____, 2022.

_____
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS *Plaintiff,*	§	
v.	§	CIVIL ACTION NO. 1:20-cv-01256-RP
THE CITY OF AUSTIN AND CHRISTOPHER TAYLOR, *Defendants.*	§	

DEFENDANTS' JOINT RESPONSE TO PLAINTIFF'S OPPOSED MOTION FOR LEAVE TO AMEND COMPLAINT

TO THE HONORABLE JUDGE OF THIS COURT:

NOW COME Defendants Christopher Taylor ("Officer Taylor") and the City of Austin ("the City"), Defendants in the above-entitled and numbered cause, and submits this their Joint Response to Plaintiff's Motion for Leave to file her Second Amended Complaint[1], and in support thereof would respectfully show this Court as follows:

[1] Pl.'s Mot. for Leave to Amend Compl., Dkt. # 39.

I. Summary of the Argument

1. Pursuant to the factors set forth in *Foman v. Davis* and its Fifth Circuit and District Court progeny, Officer Christopher Taylor and the City of Austin oppose Plaintiff's request for leave to file a third version of her Complaint because the proposed amendments would (1) be futile, (2) cause undue delay, and (3) would unduly prejudice Defendants by way of rendering moot motions that include two separate pending motions to dismiss. Plaintiff's proposed amendment is futile because the outcome of the two pending dispositive motions will be unaffected by the proposed amendment. Plaintiff already expended her sole legal opportunity to amend her Complaint. Allowing Plaintiff to file a third version of her Complaint will consequently create the need for Officer Taylor and the City to expend additional unnecessary legal fees for additional motion practice—extending beyond just the drafting and filing of a new iteration of their respective currently pending 12(b)(6) motions to dismiss.

II. Arguments and Authorities

2. A party may amend a Complaint *once* as a matter of law during a prescribed time period that has long since passed in the instant suit.[2] "Thereafter, pleadings may be amended 'only with the opposing party's written consent or the court's leave.'"[3] It is a "fundamental rule in [the Fifth Circuit's] jurisdiction" that this Court "possesses broad discretion in…its decision whether to permit amended Complaints."[4] The seminal Supreme Court case on the issue, *Foman v. Davis*,

[2] FED. R. CIV. P. 15(a)(1).
[3] *McDade v. Wells Fargo Bank, N.A.*, 2011 WL 4860023, at *4 (citing FED. R. CIV. P. 15(a)(2)).
[4] *McLean v. Int'l Harvester Co.*, 817 F.2d 1214, 1224 (5th Cir. 1987) (citing *Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1163 (5th Cir. 1982)).

sets forth five potential grounds for denying leave to amend a Complaint, and Defendants invoke three of those grounds herein: (1) futility, (2) undue delay, and (3) undue prejudice.[5]

A. The Court should deny Plaintiff's motion for leave because filing a third version of her Complaint would be futile based on the required analysis of her proposed pleading in the context of the defense of Qualified Immunity.

3. Granting Plaintiff leave to file a third iteration of her Complaint would be futile, because—just as in her previous two Complaints—nothing therein factually states a claim for which relief can be granted against Officer Taylor when the required "detailed analysis" is performed in the context of his defense of Qualified Immunity. "[L]eave to amend need not be granted when it would be futile to do so."[6] "Clearly, if a Complaint as amended is subject to dismissal, leave to amend need not be given."[7] "The trial court acts within its discretion in denying leave to amend where the proposed amendment would be futile because it could not survive a motion to dismiss."[8] Whenever a nonmovant challenges a motion for leave on futility grounds, this Court recently reaffirmed that it is consequently tasked with performing "'a ***detailed analysis*** of the proposed pleading in the context of the claims ***or defenses asserted***."[9] Here, this Court is tasked with

[5] *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003).

[6] *F.D.I.C. v. Conner*, 20 F.3d 1376, 1385 (5th Cir. 1994) (citing *See Pan–Islamic Trade Corp. v. Exxon Corp.,* 632 F.2d 539 (5th Cir. 1980), *cert. denied, Needham v. White Laboratories, Inc.,* 454 U.S. 927 (1981).

[7] *Pan-Islamic Trade Corp. v. Exxon Corp*., 632 F.2d at 546, abrogated on other grounds by *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

[8] *Rio Grande Royalty Co. v. Energy Transfer Partners, L.P.*, 620 F.3d 465, 468 (5th Cir. 2010) (citing *Briggs v. Mississippi*, 331 F.3d 499, 508 (5th Cir. 2003) (holding that "[t]he district court did not abuse its discretion because, for the reasons above stated, **the proposed amended complaint could not survive a Fed. R. Civ. P. 12(b)(6) motion and allowing Briggs to amend the Complaint would be futile**.").

[9] *Eng. v. Texas Farm Bureau Cas. Ins. Co.*, No. 6:17-CV-00323-ADA-JCM, 2020 WL 10316672, at *4 (W.D. Tex. Dec. 9, 2020) (emphasis added) (citing *Moore v. Dallas Indep. Sch. Dist*., 557 F. Supp. 2d 755, 759 (N.D. Tex. 2008), aff'd, 370 Fed. Appx. 455 (5th Cir. 2010)).

analyzing Plaintiff Ramos's "proposed pleading in the context of" Officer Taylor's ***asserted defense*** of Qualified Immunity, as well as in the context of the *Monell* claim legal precedents applicable to the claims against the City of Austin.[10]

4. Plaintiff's fundamental inability to overcome the second prong of Officer Taylor's Qualified Immunity defense has already been laid out in detail in his Motion to Dismiss, the Reply in support of the same, and the Reply in Support of his Motion to Stay Discovery—the latter of which analyzes the brand-new 2021 *Irwin* Fifth Circuit decision that serves as the strongest affirmation yet of the legal futility of Plaintiff's claims.[11] Rather than parrot at length the legal standards, arguments, and evidence in those pleadings, Officer Taylor instead defers to such pleadings and incorporates them by reference herein for the purposes of opposing Plaintiff's motion for leave. Officer Taylor provides the following ultra-abbreviated summary of the overall argument for this Court's quick reference: The defense of Qualified Immunity's "clearly established law" prong requires the prior existence of a controlling Circuit Court decision that declared factually similar conduct to be unconstitutional—with extremely limited exceptions. Plaintiff's newly proposed Second Amended Complaint still incorporates by reference (including by providing a hyperlink to view) the incident videos that were also part of Plaintiff's current First Amended Complaint.[12] Such videos show that nearby pedestrian police officers were undeniably standing either to the front or to the side of the direct path of Ramos's fleeing vehicle. The

[10] *See* Def. Taylor's Mot. to Dismiss Pl.'s First Am. Compl., Dkt. # 9; *see also* Def. Taylor's Reply in Support of Mot. to Dismiss, Dkt. # 19; *see also* Def. Taylor's Reply in Support of Mot. to Stay Disc., Dkt. # 38; *see also* Def. City of Austin's Mot. to Dismiss Pl.'s First Am. Compl., Dkt. # 10; *see also* Def. City of Austin's Reply in Support of Mot. to Dismiss, Dkt. # 17.
[11] *See* Def. Taylor's Mot. to Dismiss Pl.'s First Am. Compl., Dkt. # 9; *see also* Def. Taylor's Reply in Support of Mot. to Dismiss, Dkt. # 19; *see also* Def. Taylor's Reply in Support of Mot. to Stay Disc., Dkt. # 38.
[12] Pl.'s First Am. Compl. at fn 1, pg. 1, Dkt. # 5.

pedestrian officers can be seen scrambling backwards away from the fleeing vehicle as soon as it starts moving forward in their general direction. The Northern District of Texas in *Irwin* examined an almost identical situation, assumed as true that the officers were at least standing to the *side* of the fleeing vehicle, and concluded that no prior Fifth Circuit precedent (or other qualifying precedent) existed beforehand that could serve to defeat the officers' defense of Qualified Immunity. In 2021, the Fifth Circuit affirmed the *Irwin* decision after conducting its own legal research and likewise determining that no clearly established law existed at the time of the incident. Because the subject incident that forms the basis of the instant lawsuit happened before the *Irwin* decision, the Fifth Circuit has already *de facto* confirmed that no clearly established law existed that could defeat Officer Taylor's defense of Qualified Immunity in this almost identical factual scenario and lawsuit.

5. Just as in the Fifth Circuit's 2019 *per curiam* decision in *Gressett*, Plaintiff Ramos's "proposed amended pleading [] does not cure the deficiencies in [her] claims," and thus leave to amend in the instant suit should likewise be denied on grounds of futility.[13] Plaintiff has not—and cannot—point to a *single* Fifth Circuit precedent that would constitute "clearly established law" because *no such precedent exists*—as painstakingly established by the Fifth Circuit's legal research documented in its 2021 *Irwin* decision.[14] Plaintiff's factual allegations and incorporated videos in her proposed Second Amended Complaint thus fail to overcome the second prong of the

[13] *See Gressett v. New Orleans,* 779 Fed.Appx. 260, 261 (5th Cir. Oct. 7, 2019) (**affirming District Court's denial of motion for leave to amend where the proposed amended Complaint still failed to state a claim for which relief could be granted**).

[14] *Irwin v. Santiago*, No. 21-10020, 2021 WL 4932988, at *2 (5th Cir. Oct. 21, 2021) (holding that **no clearly established law existed as of the date of the incident that would put the officer defendants on notice that shooting a fleeing suspect with officers standing to the side of the car would be a constitutional violation**, and consequently affirming dismissal of Plaintiff's suit under the second prong of Qualified Immunity—clearly established law).

Qualified Immunity analysis. Consequently, granting her leave to file a third version of her Complaint would be futile and should not be allowed.

B. Significant precedent exists for the denial of leave to amend a Complaint based on futility.

6. The Fifth Circuit has in its precedential history a bevy of cases where a denial of leave to amend was affirmed, including cases in addition to those cited *supra.*[15] Such cases include civil rights cases.[16] This Court has done the same. In *Watson*, this Court analyzed its earlier decision to deny leave to amend a Complaint, and determined that such denial was proper.[17] The *Watson* case included § 1983 civil rights claims based on alleged illegal search and seizure of the plaintiff's residence. Citing multiple Fifth Circuit precedents, this Court noted that:

> When a court rules on a motion for leave to file an amended Complaint, a key factor in that analysis is the futility of the amendment.[18] An amendment is futile if it could not survive a motion to dismiss.[19]

This Court went on to analyze the new facts added to the proposed amended Complaint to "determine whether they could carry Plaintiff's constitutional causes of action beyond the motion to dismiss stage," and ultimately concluded "they could not."[20] As spelled out in this Court's original *Watson* decision denying leave to amend, this Court determined that "***allowing Plaintiff***

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[15] *See also U.S. ex rel. Willard v. Humana Health Plan of Texas Inc*., 336 F.3d 375, 387 (5th Cir. 2003) (denying leave to amend and determining "it appears that a third chance to amend would prove to be futile.").
[16] *See e.g. Gressett v. New Orleans,* 779 Fed.Appx. at 261 (**denying leave to amend as being futile in § 1983 civil rights case** against an unidentified police officer and the City of New Orleans).
[17] *Watson v. Flores*, No. 5:13-CV-265-DAE, 2015 WL 1509512, at *1 (W.D. Tex. Apr. 1, 2015).
[18] *Id.* at *5 (citing *Rosenzweig,* 332 F.3d at 864).
[19] *Id.* at *5 (citing *Rio Grande Royalty Co., Inc. v. Energy Transfer Partners, L.P.*, 620 F.3d 465, 468 (5th Cir. 2010)).
[20] *Id.* at *5.

leave to amend his Complaint to include this claim would be futile," and denied the leave to amend accordingly.[21]

7. Other District Courts within the Fifth Circuit have likewise denied motions for leave to amend Complaints where the proposed amendment failed to state a claim for which relief could be granted—including in civil rights cases.[22] In the 2020 *McDade* decision, the District Court analyzed the contents of the plaintiff's proposed amended Complaint, and determined that "granting plaintiff leave to amend would be futile" against both the defendant police officers and the City of New Orleans.[23] The Court specifically noted that the plaintiff's claims "failed to meet his burden to overcome the defense of Qualified Immunity asserted by [the individual officers]."[24]

8. Plaintiff's newly proposed Second Amended Complaint fails to state facts that overcome Officer Taylor's defense of Qualified Immunity. It also fails to state facts that can support a *Monell* claim against the City, because it fails to identify a City policy or custom that was the moving force behind the alleged violation of decedent's constitutional rights. Because the proposed Second Amended Complaint would not stand up to one or both pending motions to dismiss, filing it would be futile and leave to do so should be denied.

B. Filing a third Complaint would cause both undue delay and undue prejudice to the Defendants, frustrate judicial economy, and hinder the disposition of the § 1983 and *Monell* claims currently being challenged.

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[21] *Watson v. Flores*, No. SA:13-CV-265-DAE, 2014 WL 6964902 at *5 (W.D. Tex. Dec. 8, 2014) (emphasis added).
[22] *See e.g. McDade v. Wells Fargo Bank, N.A.*, 2011 WL 4860023 at *7 ("Plaintiff's Motion and Memorandum in Support for Leave to File Amended Second Petition and Jury Demand is DENIED"); *see also e.g. Garcia v. Swift Beef Co.*, No. 2:20-CV-263-Z, 2021 WL 2826791 at *7 (N.D. Tex. July 7, 2021) ("Even if Plaintiffs amended their Complaint a second time, corporate employees, individually, still would not have a duty to provide a safe working environment. **Thus, any amendment to the Complaint would be futile.**"); *see also Herbert v. New Orleans City,* No. CV 20-952, 2020 WL 4584192, at *11, fn 54 (E.D. La. Aug. 10, 2020).
[23] *Herbert,* 2020 WL 4584192 at *11, fn 54.
[24] *Id.* at *7.

9. Plaintiff's request for leave to file a third version of her Complaint would cause both undue delay and undue prejudice to Defendants. The Fifth Circuit has continually held that, "[w]hen ruling on a motion for leave to amend, the court should 'consider judicial economy and whether the amendments would lead to expeditious disposition of the merits of the litigation.'"[25] Here, in contrast, the timing and circumstances of Plaintiff's pleadings serve only to frustrate judicial economy and hinder this Court's ability to expeditiously answer the question of whether clearly established law existed, and whether the City of Austin's conduct amounted to *the actual moving force that caused Plaintiff's injuries*. The answer to both questions is "no," and Plaintiff's motion for leave to amend would only function to expensively delay that answer from being rendered.

10. The Fifth Circuit has upheld a District Court's denial of a motion for leave to amend an excessive force complaint, noting that allowing the proffered amendment would, "***unnecessarily delay resolution of this action,' burdening both the nonmoving party and the court***," and the same is true here.[26] Allowing amendment will force Defendants to spend considerable time and attorney fees to file duplicative pleadings, including new answers, new motions to dismiss, and new motions to stay discovery based on such pleadings. It will also cause the Court to necessarily abandon its ongoing work in analyzing and rendering a decision on both pending motions to dismiss and the motion to stay discovery, only to have to begin anew analyzing and rendering a decision on the inevitable subsequent iterations of them—not to mention the corresponding Response briefs, Reply briefs, and any added or altered arguments in every such pleading.

[25] *See Waddleton v. Rodriguez*, 750 Fed. Appx. 248, 253–55, 2018 WL 4292175 at *4 (5th Cir. Sept. 7, 2018) (emphasis added) (citing *Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1163 (5th Cir. 1982)).
[26] *See Waddleton*, 2018 WL 4292175 at *4.

Allowing amendment will thus in the aggregate create hours and hours of additional work for the parties' respective counsel as well as for this Court.

11. "Courts have found undue prejudice where the opposing party is forced to file a duplicative dispositive motion."[27] In *Springboards to Education*, the District Court denied a motion to amend a Complaint, finding undue prejudice would exist if the court granted leave to amend a second time because doing so would render moot the defendant's pending motion to dismiss and consequently cause the defendant "to have to file a ***third*** motion to dismiss."[28] In *Nowell*, the court likewise struck the plaintiff's attempt to file a third version of her complaint, because otherwise "the Court would then be required to deny Defendant's [second iteration of its motion for summary judgment] as moot, thus forcing Defendant to move for summary judgment a ***third*** time."[29]

12. The same prejudice and undue delay exist here. The City of Austin has already researched and drafted two 12(b)(6) motions to dismiss in this case.[30] Officer Taylor has likewise already researched and drafted two 12(b)(6) motions in this case, and the grounds for his pending motion to stay discovery revolve around the most recent of the two motions.[31] Just as in *Springboards to Education* and as in *Nowell*, allowing Plaintiff's futile amendment will cause both defendants to incur the cost and time to research and draft a ***third*** version of their respective motions to dismiss, as well as every other future pleading related to—or based upon—those respective motions. The

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[27] *See Springboards to Education, Inc. v. Houston Independent School District*, 2017 WL 7201927, at *2 (S.D. Tex. Jul. 27, 2017) (citing *Nowell v. Coastal Bend Surgery Ctr.*, No. C-10-205, 2011 WL 338821, at *8 (S.D. Tex. Feb. 2, 2011).

[28] *Springboards to Education, Inc.,* 2017 WL 7201927 at *2 (emphasis added).

[29] See *Nowell v. Coastal Bend Surgery Ctr*., No. C-10-205, 2011 WL 338821 at *8 (S.D. Tex. Feb. 2, 2011) (emphasis added).

[30] *See* Def. City of Austin's Mot. to Dismiss, Dkt. # 4; *see also* Def. City of Austin's Mot. to Dismiss Pl.'s First Am. Compl., Dkt. # 10;

[31] *See* Def. Taylor's Mot. to Dismiss Pl.'s Compl., Dkt. # 7; *see also* Def. Taylor's Mot. to Dismiss Pl.'s First Am. Compl., Dkt. # 9; *see also* Def Taylor's Mot. to Stay Disc. Based on the Pending Qualified Immunity Threshold Determination, Dkt. # 32.

only pragmatic way to avoid the unnecessary motion practice and the unduly prejudicial defense costs discussed herein is to deny Plaintiff's request for leave to file a third version of her Complaint, force her to stand on her First Amended Complaint, and consequently allow this Court the opportunity to rule on the currently pending dispositive motions.

III. PRAYER FOR RELIEF

13. WHEREFORE, PREMISES CONSIDERED, Defendants Christopher Taylor and the City of Austin respectfully request that this Court deny Plaintiff's Motion for Leave to Amend Complaint, and for all other relief to which they may be entitled in law or in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of March, 2022, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail and/or Regular U.S. Mail, in accordance with the Texas Rules of Civil Procedure, as follows:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS *on behalf of herself and the Estate of Mike Ramos*, Plaintiff, v. CHRISTOPHER TAYLOR and THE CITY OF AUSTIN, Defendants.	§ § § § § § § § § §	1:20-CV-1256-RP

ORDER

Before the Court is Plaintiff Brenda Ramos's ("Ramos") Motion for Leave to File her Second Amended Complaint, (Dkt. 39), and Defendants Christopher Taylor ("Taylor") and the City of Austin's (collectively, "Defendants") Joint Response, (Dkt. 43).

The Federal Rules of Civil Procedure permit a party to amend its pleading "once as a matter of course," but afterwards "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(1)–(2). "The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(2). Rule 15(a) "requires the trial court to grant leave to amend freely, and the language of this rule evinces a bias in favor of granting leave to amend." *Lyn–Lea Travel Corp. v. Am. Airlines*, 283 F.3d 282, 286 (5th Cir. 2002) (citation and internal quotation omitted). "[A]bsent a 'substantial reason' such as undue delay, bad faith, dilatory motive, repeated failures to cure deficiencies, or undue prejudice to the opposing party, 'the discretion of the district court is not broad enough to permit denial.'" *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420, 425 (5th Cir. 2004) (quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981)).

Ramos seeks to file a second amended complaint to avoid delays arising from Defendants' Motions to Dismiss, (Dkts. 9, 10), and Taylor's Motion to Stay Discovery, (Dkt. 32). (Mot. Amend,

Dkt. 39, at 2). She seeks to supplement her Amended Complaint, (Dkt. 5), with "allegations of additional facts showing violations of clearly established law and to clarify the City's official policies and customs that were the moving force behind Plaintiff's claims." (Mot. Amend, Dkt. 39, at 2). Defendants oppose Plaintiff's motion, claiming that amendment will be futile and cause both delay and prejudice to them. (Resp., Dkt. 43, at 2).

The Court finds no substantial reason to deny leave, and that it is in the interest of justice to allow Ramos to file her second amended complaint. The Court agrees that the additional facts will assist in promptly resolving Defendants' motions, in the event they are renewed. The Court also notes that this request is made before the Scheduling Order deadline, (*see* Scheduling Order, Dkt. 22), and that "[d]iscovery, for all practical purposes, has not begun." (Mot. Amend, Dkt. 39, at 3). Given these findings, and Rule 15's "bias in favor of granting leave to amend," the Court will grant Ramos's motion. *See Lyn–Lea Travel Corp.*, 283 F.3d at 286; *Mayeaux*, 376 F.3d at 425.

Accordingly, the Court **ORDERS** that Ramos's Motion for Leave to File a Second Amended Complaint, (Dkt. 39), is **GRANTED**.

IT IS FURTHER ORDERED that the Clerk of Court shall file Ramos's Second Amended Complaint. (Dkt 39-1).

IT IS FINALLY ORDERED that Defendants' Motions to Dismiss, (Dkts. 4, 7, 9, 10); Defendant Taylor's Motion to Stay Discovery, (Dkt. 32); and the parties' Agreed Motion to Amend Scheduling Order, (Dkt. 34), are **MOOT.**

SIGNED on March 15, 2022.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS, Plaintiff v. THE CITY OF AUSTIN and CHRISTOPHER TAYLOR, Defendants.	§ § § § § § § § § § § §	NO. 1:20-CV-01256-RP

PLAINTIFF'S SECOND AMENDED COMPLAINT

Plaintiff Brenda Ramos, on behalf of Herself and the Estate of Mike Ramos, file this lawsuit against the City of Austin (City) and Christopher Taylor (Taylor), Defendants, and show the Court and the Jury the following:

I. PARTIES

1. Plaintiff Brenda Ramos is a citizen of Texas and resides in Travis County, Texas. Her son Mike Ramos was also born and raised in Austin, Texas and she is his biological mother and, therefore, an heir of the deceased, Mike Ramos. Subject to the pending administration of the Estate of Mike Ramos, Plaintiff Brenda Ramos is the representative of his Estate and therefore has capacity to bring this survival action on behalf of the Estate of Mike Ramos, pursuant to Texas Civil Practice and Remedies Code section 71.021(a), as applied under 42 U.S.C. § 1983. As Charles Ramos's biological mother, Plaintiff Brenda Ramos is a wrongful death beneficiary and, as such, brings this wrongful death action in her individual capacity pursuant to Texas Civil Practice and Remedies Code section 71.004(b) as applied under 42 U.S.C. § 1983.

2. Defendant City of Austin is a Texas municipal corporation in the Western District of Texas which funds and operates the Austin Police Department ("APD"). Former Chief of Police, Brian Manley was, at the time of the events that gave rise to this lawsuit, the City's policymaker when it comes to the implementation of the APD's budget, policies, procedures, practices, and customs, as well as the acts and omissions, challenged by this suit.

3. Defendant Christopher Taylor is an officer with the Austin Police Department. He is sued in his individual capacity and was acting under color of law at all relevant times.

II. JURISDICTION AND VENUE

4. This Court has federal question subject matter jurisdiction over this 42 U.S.C. § 1983 lawsuit under 28 U.S.C. §§ 1331 and 1343.

5. This Court has general personal jurisdiction over Taylor because he works and lives in Texas. Defendant The City is subject to general personal jurisdiction because it is a Texas municipality.

6. This Court has specific personal jurisdiction over Defendants Taylor and the City because this case is about their conduct that occurred in Austin.

7. Under 28 U.S.C. § 1391(b), the Western District of Texas is the correct venue for this lawsuit because the events occurred in Austin, Texas, which is within the Western District of Texas and the Defendants reside in the Western District of Texas.

III. FACTUAL ALLEGATIONS

A. Taylor shoots and kills an unarmed and compliant Mike Ramos.

8. On April 24, 2020, Austin Police Department (APD) received a muffled, partially unintelligible 911 call reporting two Hispanics in a car at the Rosemont Apartments at 2601 South Pleasant Valley.

9. At several points in the call, the operator could not make out the caller's words. At times, the operator could not understand what the caller said at all, indicating: "I can't understand anything you're saying. You're pulling the phone away or something."[1]

10. The call came in about 6:31 p.m. The call to the police was a swat, where someone intentionally makes a false report to the police of an emergency so that law enforcement will bring outsized powers to bear on an individual to frighten and cause problems for that person.[2]

11. The APD and Taylor should have recognized by the context and garbled nature of the call that it was potentially false and misleading and treated it with suspicion.

12. Before the officers arrived at the scene, the Operator confirmed with the caller that the Hispanic male was not pointing a gun but, if anything, merely holding a gun:

> Operator: *Okay. But I need to know the difference. Is he pointing it at her or just holding it up?*
> Caller: *He's holding it. He's holding it.*

13. The Operator made clear with the caller the individual in the car was not pointing a gun. It is legal for citizens in Texas to carry guns. Even assuming this Hispanic citizen had a gun (which he did not), holding a gun does not make him armed and dangerous.

14. Despite the suspect nature of the call, APD mobilized seven officers (Christopher Taylor, Darrell Cantu-Harkless, Benjamin Hart, James P. Morgan, Karl Krycia, Valarie Tavarez,

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[1] http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020 (last visited Feb. 17, 2022). A full transcript is attached as Exhibit A for the convenience of the court; however, the recorded call uses a digital voiceover. The actual recording is needed to fully evaluate the credibility of the caller.

[2] The caller made several misrepresentations. Mike Ramos was not wearing a white shirt, his shirt was red. He was not in possession of a gun. The caller deliberately swatted Mike. "Swatting" is defined in the Cambridge Dictionary as: "the action of making a false report of a serious emergency so that a SWAT team (a group of officers trained to deal with dangerous situations) will go to a person's home, by someone who wants to frighten, upset, or cause problems for that person." *available at* https://dictionary.cambridge.org/dictionary/english/swatting (last visited Feb. 17, 2022).

Katrina Ratcliff, and a trainee, Mitchell Pieper) in seven police cruisers to investigate two people sitting in a car.

15. Taylor voluntarily joined the aggressive APD operation. Taylor admits he "assigned himself" to the call and joined in calls for "extensive resources and backup," which included a police dog and a helicopter. (Doc. 8, ¶3).

16. Krycia joined Taylor and he also volunteered for the assignment. He is the officer who requested the police helicopter. (Doc. 8, ¶3)

17. The APD put in motion a squad of officers, soon backed up by helicopter and canine, based on an unintelligible and suspect caller, with a changing story, who admitted that no one was being threatened.

18. The police operation headed to the Rosemont Apartments. Before entering the apartment complex, the police stopped on the roadway to develop a plan. This planning stage included a written diagram. Their plan included keeping a distance between their vehicles and the subjects' vehicle. Officer Hart, who appeared to take command of the operation, said: "*We'll keep a good distance from them. Don't try and pen them in*."

19. Hart also said he had would have his assault rifle out and so should "*anyone else who had rifles*."

20. At 6:40 p.m., in an overt act of militaristic aggression, the APD drove their police vehicles into Rosemont Apartments and blocked the entrance and exit to the apartments with police vehicles.

21. Earlier that day, Mike had backed the Prius into a parking spot directly in front of the apartments, in plain sight in broad daylight. Mike parked the vehicle close to the entrance and others could easily see him, including people living in the apartments. He was not trying to hide.

22. Upon arriving at the scene, officers confirmed that Mike did not have a weapon in his hand or on his person.

23. Mike had a nonviolent criminal record, mostly involving petty theft. His most recent charge was for credit card abuse.

24. The APD police officers, including Taylor, knew him by name, knew he had a nonviolent criminal record, and knew he had previously been accused of pilfering, not violence.[3]

25. Forty-two-year-old Mike Ramos, who had struggled with drug addiction during his adult life, sat in a car with a friend. It was about dinner time and the sun was still hot and the day bright.[4] Temperatures had reached 98 degrees and Mike and his companion were facing west.

26. As the sun cast shadows against the apartment building behind them, Mike and his companion suddenly faced a fleet of police vehicles coming toward them. The officers parked to the left of the Prius, completely blocking the only exit. They formed a front row of three vehicles, with additional vehicles behind them. Taylor's vehicle parked behind these three vehicles. As they had planned, the police strategically parked their cars a good distance from the Prius. The distance between the Prius and any officer was multiple car lengths. As the officers had planned, they positioned themselves away from any direct danger or the direct path of the Prius.

27. The officers got out of their vehicles, secure in their position, their numbers, behind their three-ton SUVs with bull bars, and their ballistic vests, and *en masse* aimed high-powered rifles and semi-automatic weapons directly at Mike and his companion as they sat in the Prius, a small compact hybrid hatchback.

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[3] Taylor alleges he believed Mike was a "known violent offender." (Doc. 8 ¶ 2) Much like the swat 911 call, he and the APD were misinformed. There is no evidence to support this claim. To the extent Taylor believed someone had pursued a similar vehicle the day before, he has no evidence it was Mike and, in any event, standing alone this would not turn Mike into a violent offender.

[4] https://www.accuweather.com/en/us/austin/78701/april-weather/351193?year=2020 (last visited Feb. 17, 2022).

28. Taylor posted up in the center, standing shoulder to shoulder with Hart, backed by Tavarez. To his left, Cantu-Harkless stood on the driver side of the Cantu-Harkless vehicle, backed by Ratliff. Krycia stood to Hart's right, on the other side of the Hart vehicle. All the police aimed their weapons, including high-powered rifles, at the occupants of the Prius.

29. The police officers immediately commanded Mike to step out of his car by name.

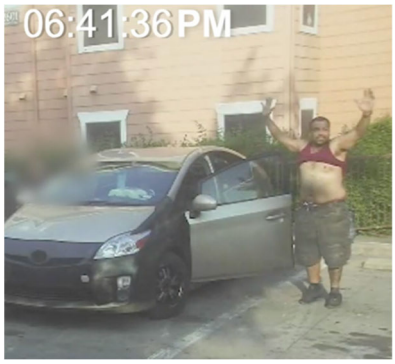
30. Mike did not attempt to flee or drive away. Mike immediately complied and got out of his car with his hands up. He was wearing shorts and a red sleeveless t-shirt, not a white t-shirt as the 911 caller had represented.

31. Mike surrendered. He raised his hands and kept them raised over his head.

32. Mike was noticeably dazed and confused. He never displayed threatening behavior. His only expression was one of confusion, dismay, and fear at the excessive display of force brought to bear against him by the APD.

33. Complying with Cantu-Harkless's direction, Mike obediently walked toward the line of officers as they aimed their guns at him. The officer ordered him to stop. Mike stopped.

34. Cantu-Harkless ordered Mike to raise his shirt and turn around. Mike raised up his shirt and turned around. At this point, officers confirmed Mike was unarmed, his bare torso in full view. He held his hands high over his hands. He fully surrendered himself to the police.



35. After Mike surrendered, however, Cantu-Harkless and the other APD officers failed to follow through. APD officers did not take Mike into custody. They did not advise Mike of his crime or move to place him under arrest or read him his rights. Had the officers done so, they would have ended what should have been a routine arrest.

36. All of the officers continued to aim high-powered assault rifles and semi-automatic handguns at Mike, even though Mike was compliant, noticeably impaired and confused by the situation. The officers had brought excessive force to bear and were so amped they failed to recognize that their suspect had surrendered.

37. Instead, the officers seized Mike by penning him in, pointing multiple high-powered weapons at him, and then left him in limbo.

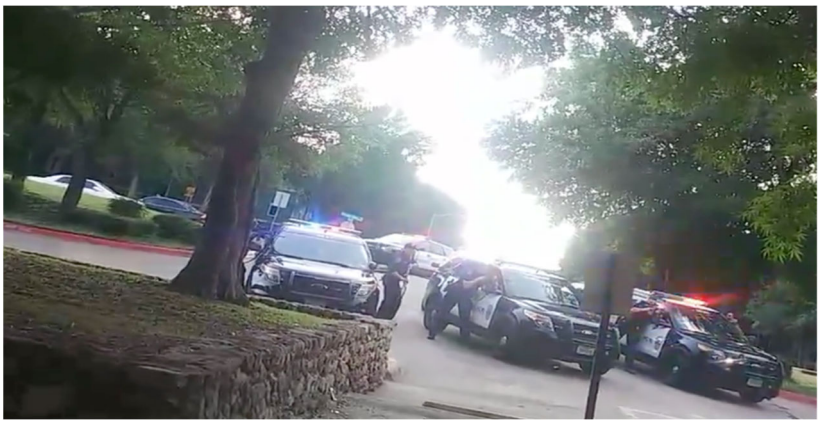
38. The APD officers, including Taylor, failed to tell Mike why he had been stopped and seized.

39. The officers, including Taylor, escalated the situation by shouting multiple, conflicting commands at Mike.[5]

40. The officers, including Taylor, quickly became aware there was no danger to the woman and that Mike did not have a gun. Based on this information, they should have immediately readjusted their response. Had they been concerned for the safety of his companion they would have asked her to leave the car when Mike was outside the car with his hands up. They would have tried to escort her away from the car. The companion simply remained in the car. Taylor and the officers should have recognized this information, registered that she did not perceive Mike as a threat, and deescalated their show of force.

[5] See Exhibit "B" transcribing just a portion of the chaotic, conflicting shouts by the officers and Mike's incredulity as to the police threatening to shoot him.

41. Instead, after Mike had surrendered, Taylor and the others kept their guns trained on Mike, including military-style assault weapons, continuing to scream conflicting commands and further escalating and confusing the situation.



42. Taylor and other officers yelled random, conflicting orders at Mike from all directions. In response, Mike told Taylor and the officers he was frightened and did not understand what they were doing or what was happening to him. "*What's going on? What's going on*?" he pleaded for answers.

43. Mike never exhibited aggressive behavior toward Taylor or any of the other officers. The entire time, Mike remained compliant and visibly frightened and confused. "*Put the guns down, dawg. What the fuck is going on? Why? What the fuck? You're scaring the fuck out of me?"*

44. And with his hands up, his bare belly still visible, Mike began to breath in and out heavily, a sign of panic and high anxiety. He rested his head on the car window. He pleaded "*Don't shoot, dawg*." And he clutched his head in his hands. "*Don't shoot*!"

45. Mike pleaded with Taylor and the officers to help him understand what was happening and not to shoot him. He continued to implore them to explain what was happened and

why: "*What's going on? What's going on? What the fuck do I fucking do, man*?" Mike, disoriented and scared, pleaded for help: "*What do I do?"* The police ignored him.

46. Mike pleaded for an explanation as to what was happening, but no officer explained the situation. To the contrary, Cantu-Harkless told him: "*I can't explain right now Mike*."

47. Then, Cantu-Harkless (the closest officer to him and the one Mike had surrendered to and looked to for help) stopped communicating with Mike Ramos.

48. Chaos ensued. All the officers started yelling at Mike and he had no one listening to him. He heard only an increasing number of random, escalating shouts and bellows from the various officers. One officer told Mike to keep his hands up. One told him to walk forward. Another told him to turn around in a circle. Another told him to get on his knees.

49. Taylor and the other officers assumed a warrior mentality and lost control of the situation. Rather than deescalate the situation, they did the opposite. Taylor contributed to the chaos by adding his own mixed messaging of orders and threats.

50. Mike remained in a state of intense confusion, while making futile attempts to comply with the impossible. The guns remained pointed at him. The yells became more strident. Alarmed and fearing for his life, he saw that no matter what he did, the officers would not tell him why he had been seized and would not lower their rifles, even when he stood before them, hands up and chest bare, pleading for help. Instead, the officers' threats escalated, and their directions conflicted. Mike slowly drew back, fearing for his life, and cowering behind the car door, which he communicated in words and body language. He was not showing aggression or trying to run, he was a man grasping for something to hold on to as the world seemed to be collapsing around him and his anxiety increased. All the while, he kept his hands in the air and tried to talk with the officers. He held the top of his head, in shock and fear. He put his head down on the window in

dismay. This was a man signaling to the officers he had no idea what he was supposed to do or what he was doing wrong.

51. Mike did not take furtive steps; he did not make any secretive or provocative movements. Implicit bias, cognitive dissonance, and APD training that emphasized viewing people of color as an imminent threat to police led Taylor and the other APD officers present to inaccurately evaluate the scene and fail to recognize the clear signs that Mike was exhibiting: fear, anxiety, and most importantly, surrender. This was a man in distress who was trying his best to respond but not able to understand what was expected of him. Quite simply, Mike was in fear for his life.

52. Morgan and his trainee Pieper originally were intended to remain in their vehicles to block the apartment entrance. Pieper asked Morgan: "*So we're blocking cars*?" Morgan replied: "*Let's see what happens*." Pieper had been with the APD for just three months, and he was in field training.[6]

53. Morgan instructed Pieper on the smallest details, including telling him he could take his mask off in the vehicle as they proceeded to the apartments: "*You can take your mask off in the car, don't want you stumbling on your words*."

54. Instead of staying back at the entrance to the apartments, Morgan and Pieper ran and joined the line of officers. Pieper stacked behind Morgan. Morgan said: "*I want you to stay with me*." Behind Morgan, Pieper did not have a view of the Prius or Mike. Pieper could not see

[6] APD policy or practice allowed Pieper to be in field training, even though he had only completed minimal training. According to the APD website, the Training Academy is 32 weeks long (8 months) or 16 weeks (4 months) for those with prior active law enforcement experience. After graduation, officers enter a 3–4-month Field Training Program with a Field Training Officer.
https://www.apdrecruiting.org/faq (last visited Feb. 17, 2022); https://www.apdrecruiting.org/academy (last visited Feb. 17, 2022).

Mike's attempts to surrender and his compliance, and did not witness his cries for help, and his visible fear and despair.

55. Standing outside of the Prius, Mike was right to be afraid. No one was listening to his words, his cries for help, or reading his body language and the clear signs of confusion, anxiety, and fear.

56. As the officers escalated the situation, Morgan joined in the fray. Although Morgan had told Pieper he wanted Pieper to stay with him, he then told Pieper to go to the vehicle and grab the projectile rifle. During this time, Pieper could not see Mike at all.

57. After grabbing the projectile rifle, Pieper did not return to Morgan, his Field Training Officer. Instead, he grabbed the rifle and proceeded to run from one police vehicle to another, rifle in hand, acting erratically without direction. He did not pay attention to Mike or his words or actions. His APD training led him to view Mike as a threat because he was a man of color, even though none of Mike actions presented an objectively reasonable threat

58. And then, Taylor began ordering the trainee Pieper to "*move up*" and then to "*impact up, impact up*."[7]

59. Pieper shouted: "*I don't have an angle*." But then immediately asked: "*Hit him?*" At this time, Mike continued to have his hands in the air, but Pieper ignored Mike's body language, dead set on shooting someone.

60. Mike at all times attempted to follow ever-changing commands from multiple officers. Indeed, Mike did his best to deescalate the situation himself. He pleaded with the officers,

[7] The less lethal shot should never have been called for or used in this situation. It was misused based on the events and facts. Telling Pieper to take a "deep breath" was not de-escalation. Taylor had already repeatedly commanded Pieper to "Impact Him!" even though Mike had his hands up in surrender and was asking for help and trying to comply. Taylor also knew Pieper could not have witnessed all the events, did not have a view, did not have angle, and was a green recruit with only a few months of training under his belt and still in field training. Indeed, telling Pieper to take a deep breath and move to the next car to the right escalated the situation.

telling Taylor and the officers he did not have a gun and pleading with them to help him understand: "*I ain't got no fucking gun, dog! What the fuck?!*"

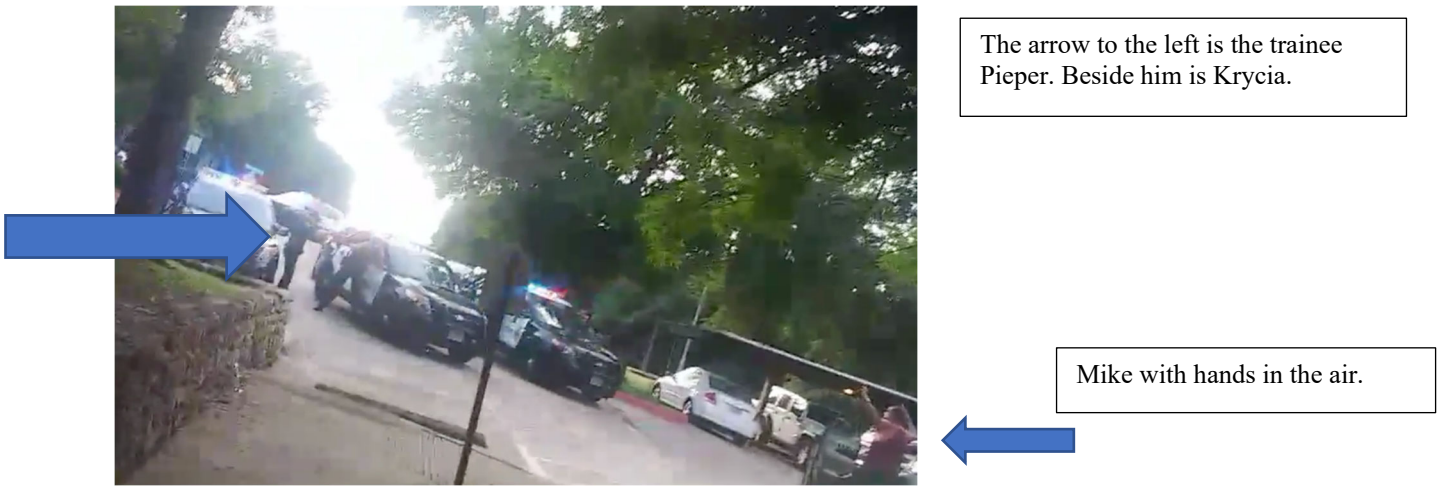
61. This entire time, Mike continued to keep his hands visible and raised in the air in surrender.

62. Then, Pieper positioned himself at the next car over, beside Krycia and joined the fray by shouting more commands at Mike: "*Walk toward us…comply with us*!" Mike, of course, had already walked toward the officers with hands raised, chest bared. The guns had remained pointed.

63. A bystander yelled: "*Why all the guns pointed at him. What the fuck?"* Another said: "*That don't make sense."*

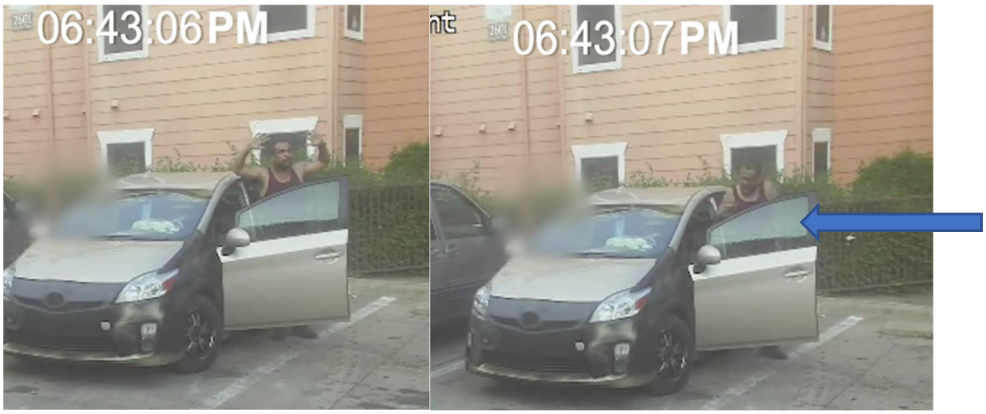
64. Mike's last words to Taylor and the APD officers were: "*Impact me for what? Put the gun down dawg. Man, what the fuck dawg?*"

65. This photo below is the bystanders' view from her cell phone camera. Mike has his hands in the air, but the officers continue to have their rifles pointed at him.



66. In a split second—before Mike could react or respond—Taylor, Krycia and the other officers ordered Pieper to shoot Mike. Pieper fired, hitting Mike with a less lethal projectile from the service rifle.

67. Despite the fact that Mike was unarmed and begging for help, had complied with all of Taylor's commands, as well as the other officers, had raised his arms in surrender and lifted his shirt as he turned in circles, and had begged Taylor and the officers not to shoot him, Taylor and other officers ordered Pieper to shoot. One second later, at 6:43:07, Pieper shot Mike Ramos while his hands were still in the air, above his head. The white projectile can be seen to the right in the photo below as it ricocheted after striking Mike and frightening him to retreat into his car for protection.



68. Mike reacted in shock and disbelief.

69. The act of shooting a man who had surrendered, with his arms in the air, was so incredulous that bystanders began to scream over and over to the officers: "*Oh gosh. What'd you all shoot him? Why you shoot him? That's wrong. That's wrong. Wrong. Wrong.*"

70. Mike's companion exited on the passenger side, but the officers ignored her.

71. Frightened and believing the police were about kill him without no reason, Mike, acting in self-defense, sought the protection of his car. Mike sat in his car, injured and in a state of

shock and panic. The apartment residents continued yelling at the officers, "*Oh my gosh, why you all shoot him? Wrong…"*

72. The bystanders, who watched and listened as the entire incident unfolded, witnessed the APD officers acting outside of the law. They were equally powerless, and expressed fear for their own lives, as they witnessed another person of color's life in imminent, irrational danger from an armed police force.

73. Mike had every reason to believe that if he stayed where he was, his life was in danger.

74. Mike never once threatened the officers or anyone else present during the incident. He was simply terrified and in a state of panic and anxiety, in fear for his life.

75. From the time the officers arrived, Mike complied with their commands but no matter what he did, they continued to escalate the confrontation through a show of excessive force and use of weapons, shooting him with a so-called "less lethal" round, driving him to retreat back into his vehicle.

76. To Mike's left was a line of impenetrable police vehicles, three of which faced him outfitted with steel bull bars designed to not just look militaristic and intimidating, but to have the capacity to push other vehicles off the road. Far back and to the side each of these vehicles were multiple armed police officers aiming high-powered automatic and semi-automatic weapons at him, at locations two or even three officers deep. Police vehicles blocked the only exit.

77. Taylor and the officers were in no immediate or imminent danger, nor did they have reason to believe anyone else was in danger. The police outnumbered Mike, eight-to-one. The police stood well behind the front of their vehicles. They wore ballistic vests, and they were locked and loaded. The police had backup. No police officer was caught alone, unarmed, or

unaware. Mike posed no threat. It was not nighttime or dark. They were not in unfamiliar territory. They had drawn a map and entered cautiously, keeping a "good distance" back. They stood behind their large police vehicles for protection, a safe distance away from the path Mike's vehicle took as it slowly inched out of the parking spot to his right, away from officers.

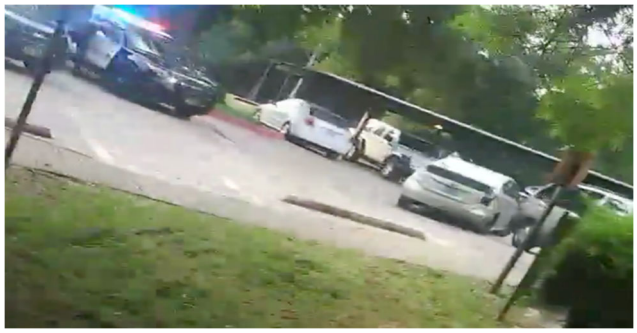
78. Mike never made any move to suggest he was reaching for a weapon. There was no gun. Mike's only thought was fear and an impending sense of doom as the officers continued shouting and targeting him with their assault rifles.

79. To Mike's right was a dead end. Taylor admits he knew and saw that "Ramos had no avenue to escape in his car to his right, because a parking lot full of cars blocked access to the street and because the parking lot reached a dead end at a large municipal dumpster." (Doc. 8, ¶6)

80. Fatalistically, the electric Prius rolled slowly and quietly away from Taylor and the other APD officers and their guns.

81. The bystander's camera shook at the moment that Taylor, on the passenger side of the first police vehicle, fired his assault rifle at Mike as his car slowly moved away from him. The bystanders can be heard yelling: "*Oh my God, why you all shooting him."*

82. The Prius turned away from Taylor and all officers and headed slowly in the opposite direction. As the Prius inched away toward the dead end blocked by dumpsters, Taylor opened fire, shooting three rounds from his assault rifle into the side window of the Prius and striking Mike in the back of the head. Neither Taylor nor any other officer was in front of the Prius or to its side when Taylor fired his fatal shots.



83. Taylor fired from the far side of the police cruiser, behind a three-ton vehicle with a grill outfitted with bull bars, standing at the passenger door of the police cruiser.

84. Taylor fired not just once, but three times. He fired three shots at Mike's head and the Prius rolled to a stop. Taylor had fatally shot Mike Ramos.

85. The bystanders yelled: "*Why you shootin him?"*

86. And then: *"Why they murdering this man?*"

87. Below is a still image taken from Taylor's body camera at the moment he fired his rifle three times: 6:43:27. Taylor was the closest of any officer and he was a substantial distance from the car. The Prius is driving away from the officers:

88. A bystander's cell phone video[8] and Austin police dashcam and body-worn camera videos[9] show Mike outnumbered, confused and fearful, trying to negotiate with the police for his life in broad daylight, then being shot while his hands are in the air in surrender, and finally desperately trying to save himself from being killed before Taylor shot him in the back of the head, killing him, as he drove into a dead end.

89. As Mike sat in his car, Taylor admits he "did not see a gun." He says he shot his rifle three times at the Prius, making the incredulous claim that he thought Mike would "drive through – and over – him or his fellow APD officers." (Doc. 8 at ¶15) Taylor's statement defies reason. The videos confirm that Taylor and the other officers were armed, a substantial distance away from the Prius, nowhere near the line of travel of the vehicle, and enjoyed extensive protection and cover. No objectively reasonable basis existed to believe the vehicle could harm anyone. Of the eight officers present with weapons drawn Taylor was the lone shooter. Any reasonable officer observing the scene unfold knew Mike was driving away from the officers, not toward them, and was not a threat to drive through or into a line of heavily armed police in heavily defended police vehicles. Mike did not move toward the officers; he turned away, headed in the direction where Taylor admits "Ramos had no avenue to escape in his car to the right." (Doc. 8 at ¶6).

90. Under these circumstances, there was no objectively reasonable basis for Taylor to be afraid for himself (or others).

[8] *Mother of man killed by Austin police officer asks for answers*, Austin American-Statesman (May 31, 2020), available at https://www.youtube.com/watch?v=7dQMDiUpLHU&feature=youtu.be (last visited Feb. 17, 2022).
[9] http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020 (last visited Feb. 17, 2022). The videos that are currently available publicly appear to have been edited by APD. And, only some of the videos from certain officers are available. Footage is unavailable at all for officers Krycia, Morgan or Ratcliff. No bodycam has been made available from officers Krycia, Morgan, Tavarez or Ratcliff. Also, the timestamps are inconsistent, some by more than 3 seconds and one by more than 5 minutes.

91. Taylor is the only officer who fired a lethal weapon, and no reasonable police officer would have used deadly force against Mike Ramos in these circumstances.

92. The companion in the vehicle was not arrested or charged with a crime.

93. It took the APD officers all of seven minutes to end the life of Mike Ramos. In that time, eight officers, including one trainee, brought about the death of an unarmed, confused, and frightened Afro-Hispanic man in broad daylight to death—a citizen who had no idea why he was being seized, who made no threats or signs of aggression, and who had no avenue to escape.

94. The Special Investigations Unit of the APD performed the criminal investigation into the conduct of Taylor and the officers present, and despite overwhelming evidence, refused to swear out a warrant for Taylor's arrest. Yet based on the facts developed in the investigation, a Travis County Grand Jury indicted Taylor for first degree murder.

95. The APD placed Taylor and Pieper on administrative duty but, upon information and belief, did not terminate Taylor nor subject him to discipline.

96. Ms. Brenda Ramos, Mike's mother, brings this lawsuit to vindicate her son's civil rights, hold the Austin Police Department and Taylor accountable for her son's senseless killing, and recover for her own harm and damages from losing her only child to excessive, unjustified police violence.

97. Taylor and the other APD officers used excessive force in violation of Mike's Fourth Amendment rights. Taylor and the other APD officers were on notice that their actions were objectively unreasonable in light of clearly established law at the time of this incident.

B. This was not Taylor's first killing.

98. On the afternoon of July 31, 2019, APD officers responded to a check welfare call at a high-rise condominium in downtown Austin. Dr. Mauris DeSilva, a neuroscientist who had a

history of mental health disease, was having a mental health episode. Taylor and Krycia were two of the four APD officers who responded to the call. Rather than helping Dr. DeSilva, Taylor and Krycia pulled their duty pistols and shot and killed Dr. DeSilva.[10]

99. After the shooting, APD allowed Taylor and Krycia to return to duty.

100. The civil complaint filed in the *DeSilva* case states that "despite having knowledge of Dr. DeSilva's prior mental health contacts and his ongoing mental health crisis, officers responded as if this were the scene of a violent crime."

101. In the interim, internal audits of the APD have found that officers receive training that encourages a paramilitary approach to policing, acting not as guardians of the community at large, but as warriors engaged in battle.

102. On or about August 27, 2021, the Grand Jury indicted Christopher Taylor and Karl Krycia for first-degree murder and third-degree felony deadly conduct for the shooting death of Dr. Mauris DeSilva. This was Taylor's second indictment for first degree murder. The first was returned four months prior, on March 10, 2021, for the shooting death of Mike Ramos on April 24, 2020, which is the subject of this lawsuit.[11]

C. APD shuts down its training academy following Taylor's killing of Mike Ramos.

103. After Mike Ramos was killed, the City shut down the APD Training Academy. It was reopened as a "reorganized and reimagined" police academy a year later, putting focus on de-escalation and community engagement and addressing systemic inequalities and racism in policing. Austin Police Chief Joseph Chacon announced; "We are really transitioning from this

[10] Discovery in the civil case is subject to a protective order so it is unavailable to Plaintiff.

[11] Due to pending criminal investigations, prosecutorial privileges, and discovery limitations, material evidence remains unavailable to Plaintiff which could inform her allegations. The police released select videos, but not all. The original, unedited videos have not been made available. The autopsy has not been released. The officers' and witness statements have not been released. The Defendant has not served his initial disclosures.

kind of military-styled Academy into one that's employing adult learning concepts and active learning." The courses in the academy now focus on "diversity, equity and inclusion, as well as a strong emphasis on de-escalation and communication skills."[12]

D. The City and APD have a long history of using excessive force against minority citizens.

104. In 2016, the Center for Policing Equity found that Austin police officers used more violence in the neighborhoods where Black and Hispanic Austinites live than in predominantly white neighborhoods. The study adjusted for crime and poverty variables and found that Austin police officers' use of force in those communities was disproportionate and unjustified. Austin police were more likely to use severe force against Black people and other people of color. Austin police were disproportionately more likely to shoot rather than use their hand-to-hand training or deploy pepper spray when the person subjected to force was Black. Mike Ramos was biracial – Black and Hispanic.

105. The Austin City Council criticized the Austin Police Department's patterns of racist behavior and outcomes in December 2019, *less than five months before Taylor, a white officer, murdered Mike Ramos, a mixed race Black and Hispanic Austinite*:

> APD's state-mandated racial profiling reports consistently show that Black and Latino drivers are more than twice as likely to be searched as their white counterparts during traffic stops despite similar "hit rates," including in 2018 where 6% of traffic stops of white drivers resulted in a police search compared to 14% for Latino drivers and 17% for Black drivers.
>
> APD data provided per Council Resolution No. 20180614-073 (one of the Freedom City Resolutions) showed that in 2017 APO [sic] police officers made discretionary arrests of African Americans at more than twice the rate of either White or Latino residents.

[12] https://www.kxan.com/news/local/austin/austin-police-training-academy-resumes-next-week-will-serve-as-pilot-for-future-cadet-classes/ (last visited Feb. 17, 2022).

> That same 2017 data also showed Black and Latino residents accounted for nearly 75% of those discretionary arrests for driving with an invalid license, although the two groups combine to make up less than 45% of Austin's population.
>
> That same 2017 data also showed that one out of every three discretionary arrests for misdemeanor marijuana possession involved a Black resident even though less than one in ten Austinites is Black, while usage rates of marijuana are similar across racial groups.
>
> Per the quarterly report for Council Resolution No. 20180614-073, issued by APD on May 3, 2019, African Americans comprised 32% of persons arrested by APD for offenses eligible for citation, which, proportionally, amounts to more than three times Austin's Black population.
>
> An anonymous whistle-blower recently accused an Assistant Chief of the Austin Police Department of using racist epithets and derogatory terms, including "nigger," to refer to specific Black elected officials and sworn officers of the Austin Police Department.
>
> Patterns and specific incidents of discrimination and bigotry in the Austin Police Department erode the public trust, which is necessary to effectively enforce the law, solve crimes, and maintain public safety, and so the Council finds it imperative to understand the full extent of bigotry and systemic racism and discrimination within APD, and consider reforms to APD's policies, protocols, and training curriculum.

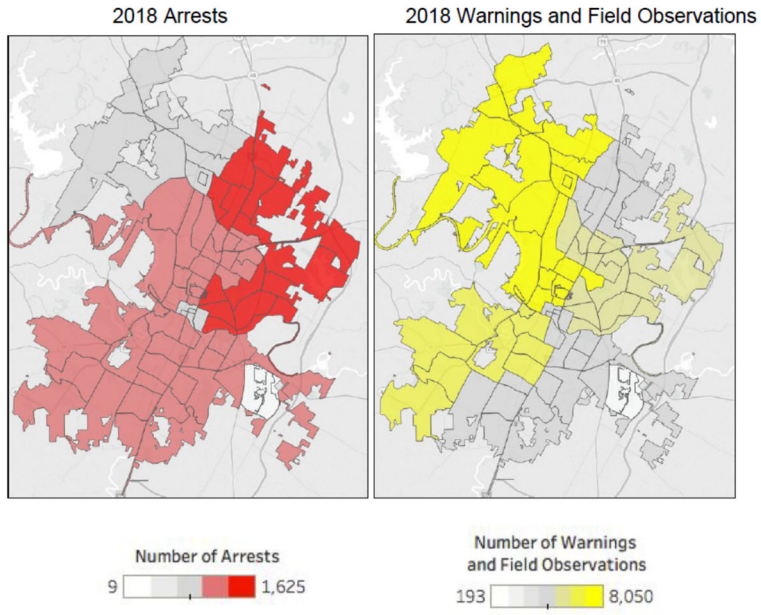
106. The Austin Office of Police Oversight, Office of Innovation, and Equity Office published a joint report in January 2020 (*less than four months before Taylor murdered Mike Ramos*) critical of the Austin Police Department's policing practices based on race during motor vehicle stops:

> Data reveals racial disparities in motor vehicle stops in 2018, with Black/African Americans as the most overrepresented of all racial/ethnic groups in Austin.
>
> In 2018, Black/African Americans made up 8% of the Austin population, 15% of the motor vehicle stops, and 25% of the arrests.
>
> Black/African Americans and Hispanic/Latinos are increasingly overrepresented in motor vehicle stops from 2015-2018. White/Caucasians are increasingly underrepresented during the same time period.
>
> Data from 2018 shows that Black/African Americans are disproportionately overrepresented in cases when their race is known by officers before the stop compared to cases when their race is not known before the stop.

> APD classifies motor vehicle stops based on whether the race of the person stopped was known to the officer prior to the stop. In 2018, Black/African Americans are overrepresented in both Race Not Known and Race Known categories. In the Race Not Known category, Black/African Americans make up 14% of stops (this is a 6% overrepresentation compared to their share of the Austin population). Black/African Americans are further overrepresented when their race is known before the stop, making up 17% of stops in the Race Known category and indicating a 9% overrepresentation when compared to their share of the population.

107. That same 2020 report included two maps of Austin that snapshot the Austin Police Department's approach. The map with red coloring shows the location of vehicle stops that resulted in arrests. The map with yellow coloring shows the location of vehicle stops that resulted in warnings. Austin's East Side, where this shooting death occurred, has higher concentrations of people of color and the police made more arrests, while Austin's West Side is disproportionally white, and the police gave more warnings:

Map 2 and 3: 2018 Motor Vehicle Stops Resulting in Arrests and Warnings and Field Observations



108. On April 16, 2020, *one week before Taylor killed Mike Ramos*, the City released a third-party investigative report regarding persistent racist behavior that permeated the Austin

Police Department and the almost certain retaliation that employees who dared to speak out must be prepared to endure:

> By several accounts, [Assistant Chief] Newsom's use of racist language was well known throughout the Department as was the use of such language by other officers who were known to be close friends with AC Newsom and used such language openly and often.
>
> Reports came to us, from different ranks, races, and genders, advising of the fact that the racist and sexist name-calling and use of derogatory terms associated with race and sex persists. Anecdotal history indicated that even members of the executive staff over the years had been known to use racist and sexist language, particularly when around the lower ranks or other subordinates.
>
> We listened to many anecdotes illustrating inappropriate comments over the years through which APD personnel expressed concern about racist behavior, but also sexist behavior, and dissimilar treatment in the handling of officer discipline and those who may be served by APD chaplain services with the denial of marital services to same sex couples. There are some real cultural issues that are in need of attention.
>
> Tatum Law was able to establish that [Austin Police] Chief Manley had reason to inquire as to [Assistant Chief] Newsom's conduct . . . The October 7, 2019, email received by Chief Manley alleging similar facts to those later alleged in the October 30, 2019, complaint about AC Newsom's use of the derogatory term "nigger" in text messages to refer to African Americans provided sufficient information . . . Chief Manley did not send these allegations for review or investigation.
>
> Whether it is about a grievance or misconduct there is an overwhelming sentiment among officers, at or previously involved with the Austin Police Department, and regardless of rank, that an officer, or even civilian staff member, who wishes to right a wrong, complain about improper conduct, or participate in an investigation such as this one, must be prepared in the present climate and culture to face almost certain retaliation, and not necessarily from Chief Manley, directly or solely.

109. The Austin City Council made additional, equally critical findings on June 11, 2020 (*less than a month after Taylor killed Mike Ramos*) regarding the City's anemic and unsuccessful efforts to fix its racist and violent policing culture:

> **The elected members of City Council have no confidence that current Austin Police Department leadership intends to implement the policy and culture changes required to end the disproportionate impact of police violence on Black Americans, Latinx Americans, other nonwhite ethnic communities.**

> The measures that current Austin Police Department leadership have been willing to implement are inadequate and resemble the same flawed police training and command expectations that have existed in the past. [emphasis added].

110. These recent findings by Austin's City Council, Office of Police Oversight, Office of Innovation, and Equity Office are binding evidentiary admissions by the City that its policing policies have led to disproportionate and unconstitutional police violence against members of the Black and Hispanic communities in Austin. Mike Ramos—a mixed race Black and Hispanic, native Austinite—bridged these two communities and his tragic death is a direct result of the racism that has permeated the policies of the Austin Police Department and culture of policing in Austin. It is that much more heartbreaking that he was killed in the same year that City leaders began to face – and grapple with – these ingrained problems. Mike's unjustified killing by Taylor emphasizes the urgency of the problem Austin faces and the importance of holding Defendants Taylor and the City accountable.

IV. Claims

A. Cause of Action against Taylor under 42 U.S.C. §1983 for Violation of Mike Ramos's Fourth Amendment right to be free from excessive force.

111. Ms. Ramos incorporates sections I through III above into her excessive force claim brought under 42 U.S.C. § 1983.

112. Taylor violated Mike Ramos's Fourth Amendment rights when he shot and killed Mike Ramos without justification.

113. Taylor was acting under color of law and violated Mike Ramos' constitutional rights when he and other APD officers ordered trainee Pieper to shoot Mike when Mike never showed any malicious or dangerous behavior, had his hands in the air in surrender and was compliant while pleading for help. By ordering Officer Pieper to impact Mike, Taylor escalated

the situation, causing Mike to further fear for his life, provoking him to seek safety by getting in the car.

114. Taylor was further acting under color of law when he fatally shot Mike, who he knew was unarmed and already injured from the less-lethal impact round, as Mike attempted to ineffectually move away in self-defense. Taylor knew Mike had "no avenue to escape" and posed no imminent threat of serious injury or death to anyone that justified lethal force. Taylor's use of force and use of lethal force under these circumstances and in light of clearly established law was excessive and objectively unreasonable.

115. Taylor's unlawful and unconstitutional use of deadly force violated Mike's civil rights, is the direct cause of his death, and caused Ms. Ramos's harm and damages.

116. Taylor is not entitled to qualified immunity under clearly established law. The following, while not exhaustive, illustrates the precedent:

117. **This case presents an obvious case with a particularly egregious set of facts.** Since 1985, the law only permits the use of deadly force to protect the life of the shooting officer or others: "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Tennessee v. Garner,* 471 U.S. 1, 11 (1985). The rule from *Garner* can be sufficient in obvious cases, without dependence on the fact patterns of other cases. *Cole v. Carson*, 935 F.3d 444, 453 (5th Cir. 2019). In 2020, the Supreme Court reaffirmed this basic principle that in cases with "particularly egregious facts," it is unnecessary for plaintiffs to identify a prior case involving the same factual scenario. *Taylor v. Riojas*, 141 S.Ct. 52, 54 (2020); *see also McCoy v. Alamu*, 141 S.Ct. 1364 (2021). This case represents particularly egregious facts and behavior by Taylor that is "antithetical to human dignity." *Hope v. Pelzer*, 536 U.S. 730, 745 (2002).

118. **It is clearly established law that force must be reduced, not increased, once a suspect is subdued.** The moment an officer retains the freedom of a person to walk away, he has seized the person. *Garner*, 417 U.S. at 7. APD retained Mike's freedom for several minutes as he stood with his hands raised in surrender. It does not matter that the first shot came from an impact gun. "Lawfulness of force, however, does not depend on the precise instrument used to apply it. Qualified immunity will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel." *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012). Newman, a Black man, was a passenger in a vehicle during a traffic stop. *Id.* at 759. Officers told Newman to stay in car, but he got out. *Id.* He raised his arms and officers said he they thought he might have a gun in his waistband. *Id.* at 762. Four officers hit Newman with a baton and a taser. *Id.* at 760. The Court held: "It is beyond dispute that Newman's right to be free from excessive force during an investigatory stop or arrest was clearly established in August 2007." *Id.*at 763 (citing *Deville v. Marcantel*, 567 F.3d 156, 169 (5th Cir. 2009) and *Tarver v. City of Edna*, 410 F.3d 745, 753 (5th Cir. 2005)); *see also Joseph v. Bartlett*, 981 F.3d 319 (5th Cir. 2020); *Darden v. City of Fort Worth*, 866 F.3d 698, 706 (5th Cir. 2017) (It is objectively unreasonable to tase a suspect once he is "no longer resisting arrest."). Mike Ramos was a dumbfounded, frightened man who never showed threatened the officers. He surrendered and pleaded for his life, his hands in the air, when Taylor ordered Pieper to shoot Mike with an impact rifle. Mike, in fear for his life, then tried to save himself from further injury when he was shot dead from behind by Taylor.

119. **It is clearly established law that an officer cannot seize an unarmed, nondangerous suspect by shooting him dead**. The Fifth Circuit has stressed: "It should go without saying that it is unreasonable for an officer to 'seize an unarmed, nondangerous suspect by shooting him dead.'" *Poole v. Shreveport*, 13 F.4th 420, 425 (5th Cir. 2021). Poole led six

police cars on a low-speed pursuit, disobeying traffic signals and driving on the wrong side of the road to avoid police spike strips. *Id.* at 422. When Poole finally stopped, "he hastily exited his vehicle and reached into the bed of his truck" and paused for a second with his right hand on the pickup while his left hand opened the door of the truck. *Id.* As he lowered himself in the driver's seat, the officer fired six shots at him. *Id.* Relying on the dashcam, the court determined that Poole's hands were visible and empty, and he was moving away from the officer with his back turned when he was shot. *Id.* at 424. The court further emphasized: "[A]n officer violates clearly established law if he shoots a visibly unarmed suspect who is moving away from everyone present at the scene." *Id*. at 425. As in *Poole*, at the time Defendant shot Mike dead, he knew he was unarmed and had no avenue of escape.

120. **It is clearly established law that a suspect is not a threat that warrants deadly force when turning or moving away from officers.** The Fifth Circuit recognizes that "[c]ommon sense, and the law, tells us that a suspect is less of a threat when he is turning or moving away from the officer. *Roque v. Harvel*, 993 F.3d 325, 339 (5th Cir. 2021); *Hanks v. Rogers*, 853 F.3d 738, 746 (5th Cir. 2017); *Poole*, 13 F.4th at 425. As a matter of law, Mike was not a threat as he was moving away. Indeed, he was ***less so*** as it was visible to APD Officers that he had no firearm or other weapon in his hand, had been shot without reason, and turned away from the line of heavily armed police officers aiming weapons at him behind a vehicular barricade seeking to avoid being shot again.

121. **It is clearly established law that deadly force cannot be used to against a nonthreatening suspect, fleeing in a motor vehicle.**

> We need not dwell on this issue. It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others. *See Kirby*, 530 F.3d at 483–84. This holds as both a

> general matter, see *Garner*, 471 U.S. at 11–12, 105 S.Ct. 1694, and in the more specific context of shooting a suspect fleeing in a motor vehicle, see, e.g., *Kirby*, 530 F.3d at 484; *Vaughan*, 343 F.3d at 1332–33. The right in question was therefore clearly established on February 28, 2006, and this is sufficient to affirmatively answer the qualified immunity question of our inquiry.

Lytle v. Bexar Cnty., Tex., 560 F.3d 404, 417–18 (5th Cir. 2009); *see also Newman v. Guedry*, 703 F.3d 757, 763 (5th Cir. 2012) ("It is beyond dispute that Newman's right to be free from excessive force during an investigatory stop or arrest was clearly established in August 2007."); *Reyes v. Bridgwater*, 362 Fed. App'x 403, 409 (5th Cir. 2010) ("The cases on deadly force are clear: an officer cannot use deadly force without an immediate serious threat to himself or others."); *Flores v. City of Palacios*, 381 F.3d 391, 395 (5th Cir. 2004).[13] In the instant case, Mike was an unarmed, wounded man, who posed no threat to anyone, driving slowly away from officers toward a dead end.

B. Cause of Action against the City under 42 U.S.C. § 1983 for violation of Mike Ramos's Fourth Amendment rights based on express or implied policies that promote the violation of the civil rights of Black and Hispanic people and were the moving force behind the killing of Mike Ramos.

122. Ms. Ramos incorporates sections I through IV.A above into her *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978), claim brought under 42 U.S.C. § 1983.

123. The City is liable for all damages suffered by the Plaintiffs pursuant to *Monell* and 42 U.S.C § 1983, based on official policies or customs of the APD of which the City Council, the

[13] Taylor's recent reliance on *Irwin v. Santiago,* No. 21-10020, 2021 WL 4932988 (5th Cir. Oct. 21, 2021), does not alter the fact that the law is clearly established that shooting and killing an unarmed man driving slowly away from officers is unconstitutional. First, the facts of *Irwin* are vastly different from these facts. Significant to the Court's decision in *Irwin* was the fact that "the projected path of Irwin's vehicle was in the officer's direction, at least generally, whereas in *Lytle* and *Flores* the vehicle was moving away from the officer." *Id.* at *3. At the same time, *Irwin* acknowledges that *Lytle* does constitute clearly established law in circumstances like these, where the officer is "positioned *behind* a vehicle that was *moving away from him* as he fired." *Id.* Finally, *Irwin* is unpublished and therefore "is not precedent" in this case. *Id.* at n. *.

City Manager, the Mayor, and the Chief of Police all had actual or constructive knowledge, and which were the moving forces behind the constitutional violations at issue here.

124. The City had these policies, practices, and customs on April 24, 2020:

a. Disproportionate use of excessive force against people of color,

b. Condoning such disproportionate use of excessive force against people of color

c. Choosing not to adequately train officers regarding civil rights protected by the United States Constitution,

d. Choosing not to adequately supervise officers regarding the use of force against people of color,

e. Choosing not to intervene to stop excessive force and civil rights violations by its officers,

f. Choosing not to investigate excessive violence and civil rights violations by its officers, and

g. Making the deliberate choice not to discipline officers for—and deter officers from—using excessive force and violating civil rights.

125. The City and Brian Manley knew about these policies and required Austin police to comply with them.

126. The City and Brian Manley developed and issued these policing policies with deliberate indifference to Mike Ramos and other Black and Hispanic Austinites' civil rights.

127. The City and Brian Manley were aware of the obvious consequences of these policies. Implementation of these policies made it predictable that Mike's civil rights would be violated in the manner they were, and the City and Brian Manley knew that was likely to occur.

128. These policies were the moving force behind Taylor's violation of Mike's civil rights and thus, proximately caused Mike's death and Ms. Ramos's damages.

129. Ultimately, when the City failed and refused to discipline Taylor for his clearly established constitutional violations, it approved of and ratified his conduct which itself establishes

a custom of the APD. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 755 (5th Cir. 2009). When a municipality approves a subordinate's conduct and the basis for it, liability for that conduct is chargeable against the municipality because it has "retained the authority to measure the official's conduct for conformance with their policies." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion); *Groden v. City of Dallas*, 826 F.3d 280, 284 (5th Cir. 2016); *see also Balle v. Nueces Cnty., Tex.*, 690 Fed. App'x 847, 852 (5th Cir. 2017). Under *Praprotnik*, "post hoc ratification by a final policymaker is sufficient to subject a city to liability because decisions by final policymakers are policy." *Hobart v. City of Stanford*, 916 F. Supp. 2d 783, 793 (S.D. Tex. 2013) (citing *Praprotnik*, 485 U.S. at 127); *see also Rivera v. City of San Antonio,* No. SA-06-CA-235-XR, 2006 WL 3340908, at *13 (W.D. Tex. Nov. 15, 2006) (disagreeing with the City that post hoc approval of prior conduct cannot be the moving force behind a constitutional violation.); *Santibanes v. City of Tomball, Tex.*, 654 F. Supp. 2d 593, 613 (S.D. Tex. 2009) (where chief of police approved of the officer's use of force, even though the officer's conduct violated the police department's use of force policy, "it is reasonable to infer that Sergeant Williams used deadly force with the knowledge that the City would exact no consequence for his actions."); *Rivera v. City of San Antonio* No. SA-06-CA-235-XR, 2006 WL 3340908, at *13 (W.D. Tex. 2006) (citing *Grandstaff v. City of Borger*, 767 F.2d 161, 170 (5th Cir. 1985) ("Where police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force requirement is satisfied.").

V. Damages

130. **Actual damages.** Brenda Ramos incorporates sections I through IV above into this section on damages. Defendants' acts and/or omissions were the cause of Mike Ramos's death and the following damages to Plaintiffs:

a. Estate of Mike Ramos (Survival Claim; Tex. Civ. Prac. & Rem. Code § 71.021).

1. Conscious pain and mental anguish suffered by Mike Ramos prior to his death; and

2. Funeral and burial expenses.

b. Brenda Ramos (as wrongful death beneficiary of Mike Ramos; Tex. Civ. Prac. & Rem. Code § 71.004).

1. Mental anguish—the emotional pain, torment, and suffering experienced by Brenda Ramos because of the death of her son, Mike—that Brenda Ramos sustained in the past and that she will, in reasonable probability, sustain in the future;

2. Loss of companionship and society—the loss of the positive benefits flowing from the love, comfort, companionship, and society that Brenda Ramos would have received from Mike Ramos had he lived—that Brenda Ramos sustained in the past and that she will, in reasonable probability, sustain in the future;

3. Pecuniary loss—loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that Brenda Ramos would have received from Mike Ramos had he lived—that Brenda Ramos sustained in the past and that she will, in reasonable probability will sustain in the future.

140. **Punitive/Exemplary Damages** against Taylor. Punitive/exemplary damages are recoverable under Section 1983 when the conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. Here, the conduct of Taylor was done with evil motive or intent, or at the very least, Taylor was reckless or callously indifferent to the federally protected rights of the Plaintiff and Mike Ramos. As such, Plaintiff requests punitive and exemplary damages to deter this type of conduct in the future.

141. **Prejudgment and post-judgment interest.**

142. **Costs of court.**

143. **Reasonable and necessary attorney's fees** incurred by Plaintiff through trial, and reasonable and necessary attorney's fees that may be incurred by Plaintiff for any post-trial proceedings, or appeal, interlocutory or otherwise, pursuant to 42 U.S.C. § 1988.

VI. Request for jury trial

144. Ms. Ramos requests a jury trial.

VII. Prayer

131. For all these reasons, Plaintiff Brenda Ramos requests that the City of Austin and Christopher Taylor be summoned to appear and answer her allegations. After a jury trial regarding her claims, Ms. Ramos seeks to recover the damages listed above in an amount to be determined by the jury and any other relief to which she shows herself justly entitled, including her attorney's fees and expenses under 42 U.S.C. §1988(b), court costs, and pre- and post-judgment interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **February 18, 2022**, a true and correct copy of this *Plaintiffs' Second Amended Complaint* has been forwarded to the following via the Federal Rules of Civil Procedure.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS	§	
Plaintiff,	§	**CIVIL ACTION NO. 1:20-cv-1256-RP**
v.	§	
CITY OF AUSTIN AND CHRISTOPHER TAYLOR,	§	
Defendants.	§	

DEFENDANT CITY OF AUSTIN'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant City of Austin files this Motion to Dismiss Plaintiff's Second Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure as follows:

I. NATURE OF THE LAWSUIT

Plaintiff brings this civil rights action as a result of injuries and damages she alleges she sustained as the result of the death of her son, Mike Ramos, during an officer-involved shooting in a parking lot of an apartment complex in Austin, Texas on April 24, 2020. Plaintiff filed her Second Amended Complaint against the City and Officer Christopher Taylor alleging various constitutional violations under 42 U.S.C. §1983. (Doc. 45). In particular, Plaintiff alleges that the City's "institutionally racist and aggressive policing culture" and policies led to Ramos's death. Plaintiff also asserts that the City's inadequate training, supervision, investigation and discipline constituted a deliberate indifference to a deprivation of constitutional rights in this case.

For the reasons set forth below, the Court should dismiss all of Plaintiff's claims against the City since Plaintiff's allegations fail to state a claim upon which relief can be granted. *See* Fed. R.

Civ. P. 12(b)(6).

II. MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

In reviewing a motion to dismiss, the "court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (internal quotes and citations omitted). To overcome a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *see also Culberson v. Lykos*, 790 F.3d 608, 616 (5th Cir. 2015). A plaintiff's lawsuit will not survive a motion to dismiss if the facts pleaded do not raise the right to relief "above the speculative level," even if the facts are viewed in the light most favorable to the plaintiff. *Twombly*, 550 U.S. at 555. "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Taylor v. Books A Million*, 296 F.3d 376, 378 (5th Cir. 2002) (quoting *Fernandez–Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993)).

III. PLAINTIFF'S SECTION 1983 CLAIMS AGAINST THE CITY SHOULD BE DISMISSED.

A. Insufficient Facts to Establish a Policy or Practice

Contrary to federal pleading requirements, Plaintiff failed to plead an express policy of the Austin Police Department that led to any of the alleged constitutional violations. It is well-settled that to bring a Section 1983 suit against a city, a plaintiff must allege the implementation or execution of a policy or custom that was officially adopted by the city. Specifically, "[a]

plaintiff must identify: '(1) an official policy (or custom), of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy or custom.'" *Valle v. City of Houston*, 613 F.3d 536, 541-42 (5th Cir. 2010) (quoting *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002). Liability can attach only through "acts directly attributed to it through some official action or imprimatur." *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009) (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)) (internal quotations removed). *Respondeat superior* liability is insufficient to establish constitutional liability against a city. *See Monell v. Dep't of Social Service of City of New York*, 436 U.S. 658 (1978).

Moreover, the Fifth Circuit has recently confirmed that to survive a motion to dismiss, a plaintiff's *Monell* pleadings "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ratliff v. Aransas County*, 948 F.3d 281, 285 (5th Cir. 2020), quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In *Ratliff*, the Fifth Circuit affirmed the dismissal of the plaintiff's *Monell* claim when the complaint failed to establish an official custom or policy of excessive force because the only facts the plaintiff alleged with any specificity related to the incident which was the subject of the lawsuit. *Id.* "[T]o plead a practice so persistent and widespread as to practically have the force of law, [the plaintiff] must do more than describe the incident that gave rise to his injury." *Id.*, quoting *Pena v. Rio Grande City*, 879 F.3d 613, 622 (5th Cir. 2018).

Plaintiff cites to investigative reports regarding alleged racist behavior of individuals within the Austin Police Department and the Austin City Council's criticism of Department leadership's alleged inadequate implementation of measures to eradicate police bias and racism. (Doc. 45, ¶¶ 108-110). Any argument that the findings of these investigative reports constitutes

a pattern tantamount to official policy fails. A plaintiff may show a "persistent, widespread practice of City officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Piotrowski*, 237 F.3d at 579 (quoting *Webster v. City of Houston*, 735 F.2d 838, (5th Cir. 1984) (en banc)). However, "[a]ctions of officers or employees of a municipality do not render the municipality liable under section 1983 unless they execute official policy as above defined." *Id.*

Plaintiff's Second Amended Complaint does not contain sufficient factual allegations to sustain such a claim. "A pattern requires similarity and specificity; '[p]rior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question.'" *Peterson v. City of Fort Worth*, 588 F.3d 838, 851-52 (5th Cir. 2009)(quoting *Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 383 (5th Cir. 2005). A pattern sufficient to support a *Monell* claim cannot be established by previous bad acts of the municipality unless those bad acts are specific and similar to the violation in question. *Id.; see also Crawford v. Caddo Parish Coroner's Office*, 2019 WL 943411, Feb. 25, 2019 (W.D. Louisiana)(Rule 12(b)(6) motion granted when plaintiff failed to allege specific facts to demonstrate policy or pattern of depriving African-Americans of fair and unbiased criminal procedures).

Here, Plaintiff's allegation of a pattern or custom of a "racist and violent policing culture" consists of an investigative report's documentation of a former assistant police chief's use of racist language and "anecdotal history" of other racist or sexist language of APD personnel. (Doc. 45, ¶ 108) None of these prior bad acts are specific and similar to the alleged violation in this case, i.e., Taylor's use of deadly force on Ramos. Plaintiff makes no allegations that any alleged pattern or practice of APD consisted of prior bad acts which were specific and similar to Taylor's use of

deadly force. Plaintiff's Second Amended Complaint fails to allege non-conclusory facts sufficient to establish an actual policy or custom of the Austin Police Department. As a result, this claim fails as a matter of law.

B. Insufficient Facts to Establish Moving Force Causation

Plaintiff's Second Amended Complaint alleges unconstitutional conduct by Officer Taylor, and the Second Amended Complaint is filled with general conclusions that Taylor acted pursuant to policies, practices, and customs of the City. The Second Amended Complaint contains a number of specific factual allegations regarding the incident itself and the actions of the officer along with detailed facts about Ramos's death. The Plaintiff also asserts that the City fostered an "institutionally racist and aggressive policing culture." The Second Amended Complaint, however, does not contain any specific non-conclusory facts to support the Plaintiff's claim that the alleged "policing culture" was the moving force of the alleged constitutional violation committed by Officer Taylor.

Plaintiff alleges that the "institutionally racist and aggressive policing culture" is demonstrated by several studies and reports that concluded that Austin police officers used more violence in minority neighborhoods and that African-Americans and Hispanics were more likely to be searched and arrested by APD officers during traffic stops. (Doc. 45, ¶¶ 104-107) However, the facts of this incident as alleged in the Second Amended Complaint did not involve a traffic stop or the search of a minority suspect during a traffic stop. Instead, as set forth in the Second Amended Complaint, this incident arose out of the Austin Police Department's response to a 911 call about a man pointing a gun at a woman while they were in a vehicle parked in an apartment complex parking lot. (Doc. 45, ¶¶ 8-12)

In order to hold a municipality liable under Section 1983 for the misconduct of one of its

employees, a plaintiff must initially allege that an official policy or custom "was a cause in fact of the deprivation of rights inflicted. *Spiller v. City of Texas City, Police Dept.*, 130 F.3d 162, 167 (5th Cir. 1997), quoting *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994). The description of a policy or custom and its relationship to the underlying constitutional violation, moreover, cannot be conclusory, it must contain specific facts. *Spiller*, 130 F.3d at 167.

In *Spiller*, the Fifth Circuit affirmed the trial court's dismissal under Fed. R. Civ. P. 12 (b)(6) of a plaintiff's §1983 claim against a municipality for the alleged wrongful arrest of the plaintiff for disorderly conduct. *Spiller*, 130 F.3d at 167. The plaintiff contended that the police department had policies of operating "in a manner of total disregard for the rights of African American citizens" and "engag[ing] in conduct toward African American citizens without regard to probable cause to arrest." *Id.* The Fifth Circuit found that the plaintiff's complaint failed to allege specific non-conclusory facts to demonstrate how these alleged policies were causally connected to the officer's alleged misconduct. *Id.*

The Plaintiff in this case likewise fails to allege specific non-conclusory facts that demonstrate that the officer's alleged constitutional violation was caused by the City's alleged policy or custom of racially disproportionate traffic stops. Plaintiff's conclusory allegations of moving force causation are clearly insufficient to support a *Monell* claim. Plaintiff makes the conclusory allegation that her son's death "is a direct result of the racism that has permeated policing in Austin," but offers no specific facts to support a claim that the alleged racism was the moving force of her son's death.

The Plaintiff's only other factual allegations regarding the City's alleged policies and customs are citations to investigative reports regarding alleged racist behavior of individuals within the Austin Police Department and the Austin City Council's criticism of Department leadership's

alleged inadequate implementation of measures to eradicate police bias and racism. (Doc. 45, ¶¶ 109-110). Yet, again, Plaintiff alleges no specific, non-conclusory facts which demonstrate that bias or racism played any role in this incident much less was the moving force of the death of Ramos. Plaintiff's Second Amended Complaint points to no action or statement of Officer Taylor or others that demonstrates that any "racist culture" of the Austin Police Department was the moving force of Taylor's decision to use deadly force on Ramos. As a result, Plaintiff's claim against the City fails as a matter of law.

C. Inadequate Training and Supervision Policies.

Plaintiff also alleges that the City had a policy, practice or custom of "[c]hoosing not to adequately train officers regarding civil rights protected by the United States Constitution…" (Doc. 45, ¶ 124c) "A municipality's culpability for a deprivation of right is at its most tenuous where the claim turns upon a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). Failure-to-train claims require sufficient factual allegations to allow the court to draw the reasonable inference that: (1) the municipality's training procedures were inadequate; (2) the municipality was deliberately indifferent in adopting its training policy; and (3) the inadequate training policy directly caused the constitutional violation. *See Sanders-Burns v. City of Plano*, 594 F.3d 366, 381 (5th Cir. 2010). Further, a failure to train claim cannot be based upon a single incident. Rather, a plaintiff must demonstrate "at least a pattern of similar incidents in which the citizens were injured . . . to establish the official policy requisite to municipal liability under section 1983." *Snyder v. Trepagier*, 142 F.3d 791, 798 (5th Cir. 1998) (quoting *Rodrigues*, 871 F.2d at 554-55.

For liability to attach based upon an inadequate training claim, the plaintiff "must allege with specificity how a particular training program is defective." *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005). With either a failure to train or failure to supervise claim,

the plaintiff must show: "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Goodman v. Harris County*, 571 F.3d 388, 395 (5th Cir. 2009); *Waters v. City of Hearne*, 2015 WL 10767483, (W.D. Tex. January 14, 2015)(insufficient allegations of inadequate training or policy of racially profiling ethnic minorities for purpose of investigative stops).

Here, Plaintiff has not included any specific, non-conclusory facts which support a claim for either failure to train or supervise. The Second Amended Complaint fails to identify an actual, specific training policy, describe any training procedures, and fails to provide *any* factual support to show a plausible conclusion that the City was indifferent to unconstitutional police action. Plaintiff's Second Amended Complaint contains no factual allegations regarding the City's existing training policies or the training or supervision provided to Officer Taylor. Similarly, the Second Amended Complaint contains no facts regarding deliberate indifference in adopting its policies, and no non-conclusory facts that show that any such training or supervision directly caused the alleged constitutional violation. Therefore, this claim should be dismissed.

D. Inadequate Disciplinary Policies.

Plaintiff alleges that the City had inadequate disciplinary policies by "condoning such disproportionate use of excessive force against people of color…" and "[m]aking the deliberate choice not to discipline officers for—and deter officers from—using excessive force and violating civil rights." (Doc. 45, ¶124 (b)(g)). Again, Plaintiff's Second Amended Complaint provides only conclusory allegations with no specific factual allegations about the City's disciplinary policies. Plaintiff has not alleged any prior complaints against the individual defendant or any

pattern of complaints by other citizens. Plaintiff has not presented non-conclusory factual allegations about deliberate indifference in adopting the disciplinary policies. Absent these kinds of allegations, Plaintiff fails to state a claim upon which relief can be granted. *See Piotrowski*, 237 F.3d at 581-82. Finally, there are no non-conclusory factual allegations to show that the alleged inadequate disciplinary or investigatory policies were the moving force behind Plaintiff's alleged constitutional injuries.

Plaintiff's ratification theory asserted in the Second Amended Complaint likewise fails. Plaintiff alleges that "when the City failed and refused to discipline Taylor for his clearly established constitutional violations, it approved of and ratified his conduct which itself establishes a custom of the APD." (Doc. 45, ¶ 129) Plaintiff's only factual allegation regarding the ratification theory is that "APD placed Taylor and Pieper on administrative duty but, upon information and belief, did not terminate Taylor nor subject him to discipline." (Doc. 45, ¶ 95)

This conclusory allegation that APD did not discipline Taylor is insufficient to support municipal liability under a ratification theory. The Fifth Circuit has recognized a municipality's liability under the theory of ratification only in very limited circumstances. Ratification occurs when a subordinate's actions are subject to review by the municipality's authorized policymakers, and the authorized policymakers approve a subordinate's actions and the improper basis for them. *James v. Harris County*, 508 F. Supp.2d 535, 554 (S.D. Tex. 2007)(quoting *City of St. Louis v. Praprotnick*, 485 U.S.112, 121 (1988)). However, the Fifth Circuit has stated that the theory of ratification is limited to "extreme factual situations." *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 848 (5th Cir. 2009); *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir. 1998). A municipality can be held liable under a theory of ratification only if the version of the story ratified by the city was manifestly indefensible. *Coon v. Ledbetter*, 780 F.2d 1158, 1162 (5th Cir. 1986).

The Fifth Circuit has stated that its precedent "does not stand for the broad proposition that if a policymaker defends his subordinates and if those subordinates are later found to have broken the law, then the illegal behavior can be assumed to have resulted from an official policy." *Peterson*, 588 F.3d at 849, quoting *Coon*, 780 F.2d at 1161. Courts have stressed that the mere fact that policymakers failed to take disciplinary action does not prove that they knew of and approved the illegal character of the officers' actions or that the actions accorded with municipal policy. *Allen v. City of Galveston*, 2008 WL 905905 at p. 8 (S.D. Tex. 3-31-08) citing *Milam v. City of San Antonio*, 113 Fed. Appx. 622, 626 (5th Cir. 2004).

Ratification creates liability only where "a municipality's final policymakers are held effectively to have made policy or condoned creation of a custom by ratifying the unconstitutional or illegal actions of subordinate officers or employees." *Allen v. City of Galveston*, 2008 WL 905905 at p. 8 (S.D. Tex. 3-31-08) citing *Turner v. Upton County*, 915 F.2d 133, 137 (5th Cir. 1990). Thus, a plaintiff is required to present sufficient evidence not merely that a policymaker knew and approved of the officer's conduct and the alleged constitutional violation, but that the policymaker knew that the officer's conduct violated the plaintiff's civil rights because the conduct was unlawful and clearly unconstitutional. See *Allen v. City of Galveston*, 2008 WL 905905 at p. 8 (S.D. Tex. 3-31-08).

Plaintiff contends that the City ratified Taylor's alleged unconstitutional conduct since it did not discipline Taylor. The conduct of Taylor does not rise to the level of an "extreme factual situation" where the conduct was manifestly indefensible. The facts of this case as alleged in the Second Amended Complaint are not remotely similar to the facts of the very few cases in which courts have found ratification claims to be viable.

In *Grandstaff v. City of Borger*, 767 F.2d 161, 165 (5th Cir. 1985), police officers opened

fire on a landowner after the police engaged in a high-speed chase with a suspect who drove onto the landowner's ranch. The officers "poured" gunfire into the landowner's truck and killed the landowner without any evidence suggesting that he was the suspect involved in the high-speed chase. *Id.* The Fifth Circuit characterized the actions of the officers and supervisors as an "incompetent and catastrophic performance, there were no reprimands, no discharges, and no admissions of error." *Id.* at 171. The Fifth Circuit held that the City could be liable under §1983, noting that if an "episode of such dangerous recklessness obtained so little attention and action by the City policymaker, the jury was entitled to conclude that it was accepted as the way things are done and have been done in the City of Borger." *Id.;* see also *Hobart v. City of Stafford*, 916 F.Supp.2d 783, 797-98 (S.D. Tex. 2013)(officer's actions of firing a weapon, while losing consciousness, at an unarmed mentally ill individual without any awareness of the presence of innocent bystanders was manifestly indefensible).

Plaintiff has not alleged specific facts that Taylor's actions in this case were manifestly indefensible nor has Plaintiff alleged specific non-conclusory facts to support a theory that APD's review of the incident and lack of discipline demonstrates that the officer's alleged actions accorded with municipal policy such that the City can be held liable under a theory of ratification. As a result, this claim should be dismissed.

PRAYER

Defendant City of Austin respectfully requests that the Court grant its Motion to Dismiss and dismiss all claims against the City of Austin with prejudice and with all costs assessed to the Plaintiffs.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this 29th day of March, 2022.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS *Plaintiff,*	§	
v.	§	CIVIL ACTION NO. 1:20-cv-01256-RP
THE CITY OF AUSTIN and CHRISTOPHER TAYLOR, *Defendants.*	§	

DEFENDANT CHRISTOPHER TAYLOR'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT AND SUPPORTING BRIEF

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES Defendant, Christopher Taylor (hereinafter "Officer Taylor"), the individual defendant in the above-entitled and numbered cause, and moves that this Court dismiss Plaintiff's Second Amended Complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted, and in support would respectfully show the Court as follows:

I. SUMMARY OF THE ARGUMENT

1. The incident videos incorporated into Plaintiff's Second Amended Complaint reflect that Officer Christopher Taylor's conduct did *not* constitute a violation of the Fourth Amendment as a matter of law—and no amount of blatant textual contradictions of those videos can change that reality. The Fifth Circuit mandates the use of its two-prong *Hathaway* test for analyzing cases where pedestrian officers shoot into moving vehicles potentially being used as weapons. The *Hathaway* test thus must—as a matter of law—be applied to this case's facts to determine if no reasonable police officer could have believed that Ramos posed a possible threat to the officers standing near his car.

2. The test's prongs deal with (1) time, and (2) perceived proximity, respectively. Applied here, Officer Taylor had (1) a split second—the amount of time it takes for a car to travel approximately one-to-two car lengths—to decide whether to use deadly force to stop a car that (2) ***his fellow police officers were actively scrambling away from to escape the car's path***, thus putting in any officer's mind observing such scene a perceived close proximity to the suddenly-moving vehicle. Pursuant to such test, reasonable officers witnessing those circumstances could have considered Ramos's car a potentially deadly threat to the officers scrambling away from it, and that using deadly force to stop that deadly threat would not be unreasonable.

3. Even if this Court disagrees regarding the reasonableness of his actions, Officer Christopher Taylor would still be entitled to Qualified Immunity. ***The Supreme Court strictly enforces the requirement to identify an analogous case and explain the analogy for the purposes of satisfying the "clearly established law" prong of Qualified Immunity***. *Irwin* is a controlling Fifth Circuit case on largely similar facts: after commands to stop were refused, police officers fired at the driver of a car moving toward ***the general direction*** of nearby police officers. Just as

the District Court had done previously, the Fifth Circuit researched all pre-existing controlling case law, found no factually similar analogous cases, and consequently affirmed the granting of Qualified Immunity as a result.

4. Just as in *Irwin*—which was decided ***after*** the incident that forms the basis of this lawsuit—Officer Taylor likewise lacked any pre-existing "clearly established" legal precedents in April of 2020 that would have provided him the requisite legal notice. Dismissal is appropriate as a result.

II. ARGUMENTS & AUTHORITIES

A. Standard for Dismissal under Rule 12(b)(6).

5. A motion to dismiss pursuant to Rule 12(b)(6) challenges a plaintiff's complaint on the basis that it fails to state a claim upon which relief may be granted.[1] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[2] "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.[3] "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."[4] "To withstand a Rule 12(b)(6) motion, [a] complaint must allege 'more than labels and conclusions,'" and "a formulaic recitation of the elements of a cause of action will not do."[5]

6. For the purposes of Rule 12(b)(6), a complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"[6] A "complaint 'does not need detailed

[1] *See* FED. R. CIV. P. 12(b)(6).
[2] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
[3] *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).
[4] *Id*. (quoting *Twombly* at 556).
[5] *Norris v. Hearst Tr.*, 500 F.3d 454, 464 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).
[6] *Iqbal*, 556 U.S. at 678.

factual allegations,' but must provide the plaintiff's grounds for entitlement to relief – including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'"[7] "Conversely, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court."[8] A court need not "strain to find inferences favorable to the plaintiffs."[9]

B. Standard for Qualified Immunity.

7. Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss an action barred by Qualified Immunity.[10] It is Plaintiff's burden to plead and prove specific facts overcoming Qualified Immunity for each applicable claim.[11] Courts use a two-prong analysis to determine whether an officer is entitled to Qualified Immunity.[12] A plaintiff must show (1) the official violated a constitutional right; and (2) the constitutional right was "clearly established" at the time of the defendant's alleged misconduct.[13] If Plaintiff fails to satisfy either prong here, Officer Taylor is immune from suit as a matter of law.[14]

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[7] *Cuvillier v. Sullivan*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).
[8] *Id.* (quotation and alteration omitted).
[9] *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 361 (5th Cir. 2004) (quoting *Westfall v. Miller*, 77 F.3d 868, 870 (5th Cir. 1996)).
[10] *See Bustillos v. El Paso Cnty. Hosp. Dist*., 226 F. Supp. 3d 778, 793 (W.D. Tex. 2016) (Martinez, J.) (dismissing a plaintiff's claim based on qualified immunity).
[11] *See Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009); *see also Elliot v. Perez,* 751 F.2d 1472, 1479 (5th Cir. 1985).
[12] *Cole v. Carson*, No. 14-10228, 2019 WL 3928715, at *5 (5th Cir. Aug. 20, 2019), as revised (Aug. 21, 2019).
[13] *Reed v. Taylor*, 923 F.3d 411, 414 (5th Cir. 2019).
[14] *Zarnow v. City of Wichita Falls*, 500 F.3d 401, 407 (5th Cir. 2007).

8. A right is clearly established when "the contours of the right [are] sufficiently clear [such] that a reasonable official would understand that what he is doing violated that right."[15] Because Qualified Immunity shields "all but the plainly incompetent or those who knowingly violate the law," ***the Fifth Circuit considers Qualified Immunity the norm, and admonishes courts to deny a defendant immunity only in rare circumstances.***[16] Officer Taylor raises the defense of Qualified Immunity here in response to all of Plaintiff's claims alleged against him.[17] It is thus Plaintiff's burden to plead and prove that Officer Taylor is not entitled to such protections. Plaintiff's Second Amended Complaint and the incident videos it incorporates fail to meet that burden.

C. Videos of the subject incident have been incorporated by reference for this Court's consideration—and take precedence over the Complaint itself.

9. Pursuant to controlling Fifth Circuit and Supreme Court precedents, "court[s] may take into account documents incorporated into the complaint by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned" when analyzing a 12(b)(6) motion to dismiss.[18] In addition to documents, videos may also be incorporated by reference, including but not limited to body cam and dash cam videos as part of motions to dismiss

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[15] *Werneck v. Garcia*, 591 F.2d 386, 392 (5th Cir. 2009) (citations omitted); *see also Freeman v. Gore*, 483 F.3d 404, 411 (5th Cir. 2007) (the court applies an objective standard "based on the viewpoint of a reasonable official in light of the information available to the defendant and the law that was clearly established at the time of defendant's actions."); *see also Kinney v. Weaver*, 367 F.3d 337, 349-50 (5th Cir. 2004), quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

[16] *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (internal quotation marks omitted) (emphasis added).

[17] *See generally* Pl.'s Second Am. Compl., Dkt. # 45.

[18] *Meyers v. Textron, Inc.*, 540 F. App'x 408, 409 (5th Cir. 2013) (per curiam) (*citing Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (also citing § 1357 Motion to Dismiss Practice Under Rule 12(b)(6)); *see also* FED. R. CIV. P. 10(c) (acknowledging incorporation by reference in federal pleadings).

§1983 claims.[19] As this Court has reiterated itself, ***"[i]n deciding a motion to dismiss, a court may consider video evidence attached as an exhibit to the complaint; when doing so, 'the court is not required to favor plaintiff's allegations over the video evidence***.'"[20]

10. Plaintiff's Second Amended Complaint references "Austin police dashcam and body-worn camera videos" of the subject incident, and provides hyperlinks for the Court to retrieve and view all such videos.[21] One of the hyperlinks directs to a City of Austin website that contains the cited videos in a manner obviously intended for public consumption, making the videos inherently "matters of public record" that this Court may consider for the purposes of this motion even if Plaintiff had not incorporated them explicitly—which she did.[22] If an allegation in a complaint is contradicted by the contents of an exhibit incorporated by reference into the complaint, then "***indeed the exhibit and not the allegation controls***."[23] "[T]he Court is not required to accept any [plaintiffs'] characterization of [incorporated or attached exhibits] because the exhibit controls over contradictory assertions."[24] As the Fifth Circuit has held, "[a]lthough courts must construe evidence in light most favorable to the nonmoving party, ***we will not adopt a plaintiff's characterization of the facts where unaltered video evidence contradicts that account***."[25] Accordingly, this Court can *and should* consider the subject incident videos to be both relevant

[19] *Scott v. White*, No. 1:16-CV-1287-RP, 2018 WL 2014093, * 1 (W.D. Tex. April 30, 2018).
[20] *Id.* at *1 (emphasis added) (citing *Hartman v. Walker*, 685 F. App'x 366, 368 (5th Cir. 2017)).
[21] Pl.'s Second Am. Compl., pg. 17, fn. 9, Dkt. # 45.
[22] *Id.*
[23] *See U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 377 (5th Cir. 2004) (emphasis added) (*citing Simmons v. Peavy–Welsh Lumber Co.*, 113 F.2d 812, 813 (5th Cir.), cert. denied, 311 U.S. 685 (1940).
[24] *Roberto Garza v. Allstate Vehicle and Prop. Ins. Co.*, No. 7:22-CV-00067, 2022 WL 1046156, at *3 (S.D. Tex. Apr. 6, 2022).
[25] *Thompson v. Mercer*, 762 F.3d 433, 435 (5th Cir. 2014) (citing *Scott v. Harris*, 550 U.S. 372, 381 (2007).

and controlling when determining whether or not Plaintiff's Second Amended Complaint contains a claim against Officer Taylor for which relief may be granted.

D. An application of this case's facts to the mandatory two-prong *Hathaway* test precludes the existence of a Fourth Amendment violation, and thus Plaintiff has no claim against Officer Taylor for which relief may be granted.

11. The video footage incorporated by reference reveals no actionable Fourth Amendment violation as a matter of law pursuant to *Hathaway* and its progeny. To state an excessive force claim, a plaintiff must show "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness was ***clearly unreasonable***."[26] District Courts—including this one—across the Fifth Circuit have recognized that the two-prong *Hathaway* test is binding in "cases that involve [pedestrian officers] shooting at vehicles" ***for the purposes of the reasonableness inquiry***.[27]

12. The Fifth Circuit has reliably upheld and applied this two-prong legal test since its inception in *Hathaway*.[28] In *Hathaway*, the Fifth Circuit "surveyed the relevant case law and identified two 'central' factors in the reasonableness inquiry in these kinds of cases: (1) the limited

[26] *Ontiveros v. City of Rosenberg*, 565 F.3d 379, 382 (5th Cir. 2009) (emphasis added).
[27] *Dudley v. Bexar Cnty.*, No. 5:12-CV-357-DAE, 2014 WL 6979542, at *5 (W.D. Tex. Dec. 9, 2014) (noting "[i]n cases that involve shooting at vehicles, there are two "central" factors in the reasonableness inquiry: (1) the limited time [the] officer[] ha[s] to respond to the threat from the vehicle; and (2) the closeness of the officers to the projected path of the vehicle.") (internal quotes removed); *see also Irwin*, 2021 WL 75452, at *5 (noting "[f]or cases involving deadly force by a pedestrian-officer against an individual fleeing by vehicle, the Fifth Circuit has identified two more specific considerations: (1) the limited time an officer has to respond to the threat from the vehicle; and (2) the closeness of [an] officer to the projected path of the vehicle.") (internal quotes removed); *see also Malbrough v. City of Rayne*, 2019 WL 1120064, at *11 (W.D. La. Mar. 11, 2019), aff'd sub nom. *Malbrough v. Stelly*, 814 F. App'x 798 (5th Cir. 2020).
[28] *See Hathaway v. Bazany*, 507 F.3d 312, 321 (5th Cir. 2007) (adopting the temporal and proximity test) (adopting in part *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005)); *see also e.g. Sanchez v. Edwards*, 433 F. App'x 272, 275 (5th Cir. 2011).

time an officer has to respond to the threat from the vehicle; and (2) the closeness of the officer to the projected path of the vehicle."[29]

13. The two-prong test was recently applied by the Fifth Circuit in *Malbrough*.[30] The Fifth Circuit reiterated that there are "two factors in determining that the officer's use of deadly force was reasonable [in cases involving shooting at vehicles]: (1) the limited time the officer had to respond, and (2) the officer's proximity to the path of the vehicle."[31] Even more recently, the Fifth Circuit decided *Irwin*—discussed in more detail *infra*—along those same two *Hathaway* factors as required for any Fifth Circuit case where police officers fire into a moving vehicle.[32]

i. The proximity prong of the *Hathaway* test bears out that a reasonable officer from Officer Taylor's vantage point would have considered his fellow officers to be in the possible path of Ramos's vehicle.

14. It is easier to conceptualize the *Hathaway* test here by considering the two factors inversely. The second proximity prong considers how close the endangered officers or bystanders were positioned relative to the *possible* path of the vehicle. The word "*possible"* must be emphasized, because the Fifth Circuit mandates that, for the purposes of the *Hathaway* test, the "[potentially endangered person's] location matters, but ***it's not relevant whether, in hindsight, he was ever in real danger. We must ask whether it would have appeared to a reasonable officer on the scene that [the Defendant-Officer,] other officers, or bystanders were in danger***."[33] The incorporated video footage in this case clearly reflects that "it would have ***appeared*** to a reasonable officer"—from the perspective of Officer Taylor—the "other officers…were in danger."

[29] *Sanchez*, 433 F. App'x at 275.
[30] *Malbrough v. Stelly*, 814 F. App'x 798, 803-04 (5th Cir. 2020).
[31] *Id.* at 804.
[32] *Irwin v. Santiago*, No. 21-10020, 2021 WL 4932988, at *2 (5th Cir. Oct. 21, 2021).
[33] *Malbrough*, 814 F. App'x at 804 – 05 (emphasis added).

15. The dash camera footage of APD Officer Valerie Taveres is particularly instructive regarding what a reasonable officer would have perceived from Officer Taylor's vantage point.[34] Taveres' dash cam footage depicts a rear view of four nearby pedestrian police officers standing to the left of Officer Taylor when he utilized deadly force in their defense. These four officers would have been in—or at least in close proximity to—the direct path of Ramos's vehicle if he had continued driving straight forward rather than turning. It is the proximity of those four officers who must be legally considered for evaluating the *Hathaway* proximity prong.

16. After standing relatively motionless for several minutes, the four police officers at 7:02 begin scrambling backwards away from Ramos's vehicle as soon as it begins to move.[35] Their body language and instinctual reactions seen on video make it undeniable that they believe they might possibly be in the path of Ramos's vehicle—and thus in danger of being run over by it. More importantly here, it is undeniable that another officer witnessing such instinctual reactions would perceive that the threat to those officers was real.

17. The officers are discussed from left to right herein. As soon as Ramos's car takes off, the first officer jumps inside the leftmost police vehicle through the front driver side door to get out of the way of Ramos's car. The second officer quickly scrambles backwards to get behind the same leftmost police vehicle, ostensibly using it as a protective barrier to put the vehicle between him and Ramos's car. The third and fourth officers likewise scramble backwards to get out of the way of Ramos's car, one of whom shelters behind a different police vehicle for protection from Ramos's oncoming vehicle.[36] A reasonable police officer who perceives his fellow officers

[34] *See* **Exhibit No. 2**, Supplemental Video No. 2, "Dash Camera of Officer Benjamin Hart", 03:46 – 7:23. Available at http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020.
[35] *See* **Exhibit No. 2**, "Dash Camera of Officer Benjamin Hart", 07:02 – 7:08.
[36] *Id.*

reacting to a suspect's vehicle lurching forward by jumping into—and sheltering behind—nearby vehicles would very plausibly believe those officers were in the path of the vehicle. People do not frantically scramble to get out of the way of cars headed *away* from them.

18. The Court also has for its consideration a top-down helicopter view of the scene soon after the shooting.[37] As the view rotates, the short, 9-second helicopter video immediately depicts the four police vehicles that arrived and were positioned specifically to block the only motor vehicle exit out of the apartment parking lot.[38] A reasonable officer would operate under the belief that—because the only motor vehicle exit was blocked by police vehicles and the officers standing next to them—Ramos's options were necessarily limited to submitting to arrest, resisting, fleeing on foot, ***or driving through and over*** the nearby police officers with his car to escape. The helicopter video also depicts a minivan parked directly in front of the strategically positioned police vehicles—perhaps one-to-two car lengths in front of them—which is clearly the same minivan parked directly to the right of Ramos's Prius when he put his car in gear and drove forward.[39] The cell phone video Plaintiff incorporated by reference likewise shows that Ramos's car was pointed directly at—or at the very least *in the general vicinity* of—nearby police officers when it initially moved forward and Officer Taylor made his split second decision.[40] Ramos's vehicle can be seen where it eventually came to a stop after Ramos was incapacitated.[41] In conjunction, the videos

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[37] *See* **Exhibit No. 1**, Supplemental Video No. 1, "APD Helicopter Footage", 00:01 – 00:09. Available at http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020.

[38] *Id.*; *see also See* Pl.'s First Am. Compl, pg. 4-5, Dkt. # 5 ("Officers strategically parked their patrol vehicles, effectively blocking the exit and mitigating the risk of flight.").

[39] *Compare* **Exhibit No. 1**, "APD Helicopter Footage", 00:01 – 00:09 *with* **Exhibit No. 3**, "Critical Incident Video Briefing Video", 10:48 - 11:05 (depicting minivan next to Ramos's Prius, providing reference of proximity of path of vehicle).

[40] Pl.'s Second Am. Compl., pg. 17, fn. 8, Dkt. # 45, 00:40 – 00:45 (video available at https://www.youtube.com/watch?v=7dQMDiUpLHU).

[41] **Exhibit No. 1**, "APD Helicopter Footage", 00:05 – 00:09.

show that Ramos's car was ***very*** close in proximity to where the pedestrian officers were scrambling behind the police vehicles to get out of the way, and that Plaintiff's burden of proving that no reasonable officer would perceive the scrambling officers to be potentially in the path of the vehicle will be insurmountable.

19. Plaintiff will no doubt attempt to argue that Ramos's car's right turn meant that the subject pedestrian officers positioned in front of his car were—when viewed from the comfort and hindsight of an office chair[42]—not in real danger. Pursuant to the controlling legal test, actual but-for danger is not relevant to the analysis, just as it would make no difference if a court later determined that a suspect's gun was actually loaded with blanks. The only thing that legally matters is whether a reasonable officer would *perceive* danger in the circumstances faced. As the Fifth Circuit put it when applying the *Hathaway* test last year, Plaintiff would "[need] to show that [the other officers] were far enough away from [Ramos's Prius] and its path, as it moved forward, that no reasonable officer could have ***thought*** anyone was in danger."[43] Such a finding would be arguably impossible here in light of the collective video evidence. Plaintiff's claim must consequently fail pursuant to an application of the binding *Hathaway* test.

ii. Officer Taylor had only a split second to make the decision to use deadly force to potentially save the lives of the nearby police officers scrambling out of the car's path—satisfying the temporal prong of the *Hathaway* test.

20. The temporal prong of the *Hathaway* test likewise obviates the existence of any actionable Fourth Amendment claim here, because the video footage reflects the split-second nature of the

[42] *See Stroik v. Ponseti*, 35 F.3d 155, 158–59 (5th Cir. 1994) ("[w]hat constitutes reasonable action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.").
[43] *Malbrough,* 814 F. App'x at 805. (emphasis added).

potential danger of Ramos's vehicle. The dash cam footage of Officer Cantu-Harkless,[44] as well as the helicopter video discussed *supra,* shows just how close Ramos's vehicle was to the police officers who scrambled to get out of the car's path. Based on the footage, Ramos's vehicle was perhaps one—*maybe* two—car lengths away from the front of Officer Cantu-Harkless' police vehicle, and thus one-to-two car lengths away from the officers standing beside it.[45] No evidence is needed to understand how long it would take a modern motor vehicle to travel that short of a distance.[46] ***Because Ramos's vehicle could bridge that gap in a split second, Officer Taylor had even less time to make the incalculably difficult decision of whether to utilize deadly force to protect the nearby officers scrambling backwards away from the suddenly-moving car.*** Ramos's vehicle started moving at 11:01, and Officer Taylor's gunshot can be heard at 11:02.[47] The temporal prong, measured in the time the officer has to decide whether to use deadly force, applied here reflects the quintessential "split-second decision" that federal law gives police officers breathing room to decide under the protections of Qualified Immunity.[48] Plaintiff's incorporated video evidence thus nullifies any claim for which relief may be granted against Officer Taylor pursuant to the binding *Hathaway* test under both the proximity and temporal prongs.

E. No law existed that was so clearly established that—"in the blink of an eye"—every reasonable officer would have known it immediately.

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[44] *See* **Exhibit No. 3**, "Critical Incident Video Briefing Video", 07:38 – 11:14. Available at http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020.
[45] *See e.g.* **Exhibit No. 3**, "Critical Incident Briefing Video", 11:01.
[46] *See e.g. id.* at 11:01 – 11:02 (depicting Ramos's vehicle easily travelling the distance of one car length in less than one second).
[47] *Id*.
[48] *See Graham v. Connor*, 490 U.S. 386, 387 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and ***its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary*** in a particular situation.")(emphasis added).

21. To overcome Qualified Immunity, Plaintiff here must show that Officer Taylor's actions were unreasonable in light of clearly established law.[49] As noted by the Fifth Circuit in 2019, "excessive-force claims often turn on 'split-second decisions' to use lethal force. That means ***the law must be so clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately***."[50]

22. Courts "cannot deny Qualified Immunity without identifying a case in which an officer acting under similar circumstances was held to have violated the Fourth Amendment, and without explaining why the case clearly proscribed the conduct of that individual officer."[51] As the Fifth Circuit reiterated in a 2020 decision, "***[t]he Supreme Court strictly enforces the requirement to identify an analogous case and explain the analogy.***"[52] No such clearly established case precedent existed in April of 2020 that would have sprung into every reasonable officers' mind in the split second between when Officer Taylor's fellow officers began scrambling to escape the path of the vehicle at 11:01, and when he fired his weapon at 11:02 in the hopes of preventing them from being injured or killed.

23. The absence of the requisite clearly established law applicable to this case is reflected in *Irwin*, a January 2021 decision from the Northern District of Texas' Honorable Jane J. Boyle.[53] *Irwin* is factually proximate to this case. The *Irwin* Defendant-Officers saw the plaintiff drive into a fence, and exited their own vehicle with their firearms drawn to approach the car on foot. "When

[49] *Wyatt v. Fletcher*, 718 F.3d 496, 502 (5th Cir. 2013) (citing *Michalik v. Hermann*, 422 F.3d 252, 258 (5th Cir. 2005)).
[50] *Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) (emphasis added) (citing *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 582 (5th Cir. 2009)).
[51] *Joseph on behalf of Est. of Joseph v. Bartlett*, 981 F.3d 319, 345 (5th Cir. 2020); *see also Irwin v. Santiago,* No. 3:19-CV-2926-B, 2021 WL 75452, at *7 (N.D. Tex. Jan. 8, 2021).
[52] *Joseph,* 981 F.3d at 346.
[53] *See generally Irwin v. Santiago*, 2021 WL 75452, at *2.

Irwin's vehicle continued rolling forward despite the Defendant-Officers' commands, they collectively fired seven shots at the driver's side of Irwin's vehicle."[54] The Court noted that there was a genuine material dispute about whether or not the police officer—alleged to be in danger—was standing directly in the path of the vehicle, or whether the officer was instead only standing "to the side of the front" of the vehicle, and thus not directly in the vehicle's path.[55]

24. The *Irwin* court granted the Defendant-Officers the protections of Qualified Immunity, because the court found no significantly similar controlling legal precedents that would "provide notice that it is unlawful to shoot at a vehicle that is rolling forward, failing to heed officers' commands to stop, ***as an officer stands 'to the side of the front' of the vehicle.***"[56] Whether or not the police officers in this case were in hindsight standing ***directly*** in the path of Ramos's vehicle, or merely instead "to the side of the front" of it, is thus irrelevant.

25. The *Irwin* court first considered the plaintiff's offering of *Lytle,* a Fifth Circuit decision holding that a jury could find a constitutional violation in Plaintiff's offered summary judgment narrative—the *Lytle* officer opened fire on a fleeing vehicle, with no bystanders anywhere near the path of the vehicle, and where the officer did not start shooting until the suspect's car "had made it three or four houses down the block."[57] In contrast, a reasonable officer in the place of Officer Taylor would absolutely perceive that his fellow officers were in the path of Ramos's vehicle based on their instinctual physical reactions to escape from the car seen on video. Moreover, Ramos's vehicle had also certainly not travelled three to four houses away before Officer Taylor discharged his weapon.

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[54] *Irwin v. Santiago*, 2021 WL 75452, at *2.
[55] *Id.* at *5, 7.
[56] *Id.* at *7 (emphasis added).
[57] *Id.* at *6 (citing *Lytle v. Bexar Cty., Tex.*, 560 F.3d 404, 418 (5th Cir. 2009) (holding the cited facts as true because it was required to do so for the purposes of summary judgment).

26. The *Irwin* court next considered the plaintiff's offering of *Garner*, for the general overall notion of when deadly force is reasonable. The court rejected outright the practice of relying on *Garner* alone, rather than a factually analogous decision:

> [A]s reiterated in *Mullenix*, the Supreme Court has rejected the "use of *Garner*'s 'general' test for excessive force" as clearly established law. Rather, courts must determine "whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the situation [he] confronted[.]"[58]

The *Irwin* court also struck out on its own to find an analogous prior precedent, but ultimately determined that no such controlling precedent existed. The *Irwin* court's review of the controlling cases it did find only "further bolster[ed] the Court's conclusion that the Defendant–Officers did not have 'fair warning' that their conduct violated the Fourth Amendment."[59]

27. Finally, the *Irwin* court took note of a handful of out-of-circuit cases, but found them to be legally insufficient to put a police officer working within the confines of the Fifth Circuit's jurisdiction on notice of the right at issue. "[T]he Fifth Circuit sets a high bar for out-of-circuit authority to clearly establish the law—there must be a 'robust' consensus among the other circuits. And the analogous cases from other circuits do not meet this bar."[60] In the time period between the 2018 conduct—analyzed in *Irwin*—and the early 2020 events of this case, no "'robust' consensus" has suddenly developed that would have provided sufficient legal notice to Officer Taylor that shooting at a driver who is driving toward officers scrambling to get out of the way

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[58] *Irwin v. Santiago,* 2021 WL 75452, at *7 (citing *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)).

[59] *Id.* at *7 (citing *e.g. Sanchez*, 433 F. App'x at 273-75 (5th Cir. 2011) (per curium) (concluding the defendant–officers acted reasonably when they shot at the plaintiff's car as it accelerated in the direction of ***one of the officers, who was "positioned near the front of the car***"); *see also e.g. Est. of Shaw v. Sierra*, 366 F. App'x 522, 524 (5th Cir. 2010) (holding no constitutional violation occurred where the defendant–officers fired after the vehicle "accelerated toward [an officer] who was approaching the vehicle on foot" and standing "directly in front of [the] vehicle").

[60] *Irwin v. Santiago*, 2021 WL 75452, at *7 (citing *Morrow v. Meachum*, 917 F.3d 870, 879–80 (5th Cir. 2019)).

would be unconstitutional—and especially not to the extent that every officer would know it "in the blink of an eye." Officer Taylor is consequently entitled to the protections of Qualified Immunity as a matter of law.

F. The Fifth Circuit's recent decision to affirm *Irwin* due to a complete lack of any analogous prior case law should leave no doubt—Plaintiff's claim fails to overcome Qualified Immunity must be dismissed.

28. In October of 2021, the Fifth Circuit affirmed the above-referenced *Irwin* decision, which should leave no doubt that Plaintiff's eventual dismissal is inescapable based on the video evidence.[61] The granting of Qualified Immunity in *Irwin* despite the finding of a factual dispute about whether any officer was in the vehicle's direct path—and thus in hindsight whether the officers were even in true danger—is *incredibly* instructive. Both courts assumed as true the *Irwin* plaintiff's contention that "[n]either officer 'was positioned directly in front or in the pathway of Irwin's vehicle.'"[62] The District Court and Fifth Circuit also both held that a jury could accordingly find a "material dispute about the objective reasonableness of the Officers' conduct," or in other words a jury could look at the *Irwin* videos and conclude that the force was unreasonable or excessive—and thus potentially unconstitutional.[63] Plaintiff will no doubt argue the same in her Response. Even if this Court is persuaded by such an argument, the end result must necessarily be the same as it was in *Irwin* due to the lack of any directly analogous clearly established law at the time of the subject incident:

> Turning to the Qualified Immunity inquiry, we conclude that the district court did not err in deciding that there is no clearly established law demonstrating that the officers' conduct constituted an excessive use of force. The particular facts that are material here—Irwin's failure to heed officers' commands to stop, Officer Santiago's position, and the brief period of time it took for the Officers to perceive and react to the direction of Irwin's vehicle—are ***not sufficiently analogous to the***

[61] *Irwin v. Santiago*, No. 21-10020, 2021 WL 4932988, at *2 (5th Cir. Oct. 21, 2021).
[62] *Id.* at *1.
[63] *Id.* at *3.

> ***facts of our cases finding excessive force such that officers Santiago and Roberts would have been "on notice" that their conduct was unconstitutional***… we think that ***it was <u>not</u> a matter of clearly established law*** that Officers Santiago and Roberts were unreasonable in firing on Irwin's vehicle. We therefore AFFIRM the district court's grant of summary judgment for the defendants on the basis of Qualified Immunity.[64]

The same is true here. The facts of *Irwin* and this case are remarkably similar in terms of vehicle proximity—i.e. that the officers were standing *at the very least* to the side of the vehicles—and the short time available to respond to the threat.[65] The subject incident also predated the 2021 *Irwin* decision, which is crucially important because the *Irwin* decision is the first Fifth Circuit decision that would henceforth put future officers on notice of the potential unconstitutional nature of such actions.

29. As the Fifth Circuit concluded, the dispositive hinge in *Irwin* was that the "the projected path of Irwin's vehicle was in the officer's direction, ***at least generally***, whereas [in the prior case law] the vehicle was moving ***away*** from the officer."[66] No reasonable person could watch the incorporated videos and determine that Ramos's car was moving in the *diametrically opposite* direction of the pedestrian officers, or that Ramos's car was not facing the officer's direction, "***at least generally.***" Any contention to the contrary is blatantly contradicted by the incorporated video evidence.[67]

30. Accordingly, no clearly established law existed on April 24, 2020 that an officer could not use deadly force against the driver of a vehicle moving in the *general* direction of other officers.

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[64] *Irwin v. Santiago*, 2021 WL 4932988, at *3 (emphasis added).
[65] *Id.* at fn. 1, providing links to two videos of the incident at issue in *Irwin*.
[66] *Id.*
[67] *See e.g.* Pl.'s Second Am. Compl., pg. 175, Dkt. # 45 (Plaintiff's new pleadings make an obvious but ill-fated end-around attempt to avoid *Irwin,* including by having the temerity to represent that "[n]either Taylor nor any other officer was in front of the Prius or to its side when Taylor fired his fatal shots" despite video evidence directly to the contrary.).

Officer Taylor's split-second decision that day to defend the nearby pedestrian officers should consequently be afforded the protections of Qualified Immunity promised to all first responders forced to make such decisions.

IV. PRAYER

WHEREFORE PREMISES CONSIDERED, Defendant Christopher Taylor respectfully requests that the Court dismiss each of Plaintiff's claims against him, and for all other and further relief to which he may be justly entitled in either law or equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2022, a copy of Defendant's Motion was electronically filed on the CM/ECF system, which will automatically serve a Notice of Electronic Filing on the following attorneys of record:

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Exhibit 1

Video: helifootage 4-24-20.mp4

To be produced to the Court on a USB Flash Drive and to Counsel via Dropbox Link

Exhibit 2

Video: DashCam 4-24-20 (Hart).mp4

To be produced to the Court on a USB Flash Drive and to Counsel via Dropbox Link

Exhibit 3

Video: Critical Incident Briefing 4-24-20.mp4

To be produced to the Court on a USB Flash Drive and to Counsel via Dropbox Link

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Brenda Ramos, On Behalf Of Herself and The Estate of Mike Ramos	§	
Plaintiff,	§	
	§	**Civil Action No. 1:20-cv-01256-RP**
v.	§	
	§	
The City of Austin and Christopher Taylor,	§	
Defendants.	§	

PLAINTIFF'S RESPONSE TO DEFENDANT CITY OF AUSTIN'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

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TO THE HONORABLE ROBERT PITMAN:

Plaintiff Brenda Ramos, on behalf of herself and the Estate of Mike Ramos, files this Response to Defendant City of Austin's Motions to Dismiss Second Amended Complaint. Defendant's Motion should be denied. (Doc. 47). In support of her opposition to Defendant City of Austin's Motion, Plaintiff shows the following:

I. Introduction

The City has asked this Court to dismiss Plaintiff's claims against it for failing to state a claim upon which relief can be granted. (Doc. 47). The City claims that Plaintiff's allegations of racial profiling and policies that ratified or approved the use of unnecessary force against minority citizens is insufficient to establish a *Monell*[1] claim. These motions should be denied.

II. Argument and Authorities

A. The applicable standard for the City's motion to dismiss.

A "strong framework of policy considerations . . . militate[s] against granting motions to dismiss for failure to state a claim[.]" *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). Thus, in the Fifth Circuit, motions to dismiss under Rule 12(b)(6) "are viewed with disfavor and are rarely granted." *Lormand v. U.S. Unwired, Inc.,* 565 F.3d 228, 231 (5th Cir. 2009) (quoting *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005)); *see also Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011). And, in the motion to dismiss context, Plaintiff's allegations must be taken as true. *See Ashcroft v. Iqbal,* 556 U.S. 662, 696 (2009) ("a court must take the allegations as true, no matter how skeptical the court may be."); *Alexander v. Verizon Wireless Servs., L.L.C.,* 875 F.3d 243, 249 (5th Cir. 2017) ("We take all factual allegations as true and construe the facts in the light most favorable to the plaintiff.").

[1] *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978).

In the municipal liability context, "only minimal factual allegations should be required at the motion to dismiss stage." *Thomas v. City of Galveston, Tex.*, 800 F. Supp. 2d 826, 842–43 (S.D. Tex. 2011); *see also Speck v. Wiginton*, 606 F. App'x 733, 735–36 (5th Cir. 2015) (per curiam). A municipal-liability claim thus satisfies the federal pleading standard if it describes, for instance: "(1) past incidents of misconduct by the defendant to others; (2) multiple harms that occurred to the plaintiff himself; (3) the involvement of multiple officials in the misconduct; (4) the specific topic of the challenged policy or training inadequacy," ***or*** (5) "misconduct that occurred in the open," "together with any additional elaboration possible." *Flanagan v. City of Dall., Tex.*, 48 F. Supp. 3d 941, 947 (N.D. Tex. 2014) (Lynn, J.) (adopting report & recommend. of Tolliver, Mag. J.) (emphasis added). "Those types of details, together with any additional elaboration possible, help to (1) 'satisfy the requirement of providing not only fair notice of the nature of the claim, but also grounds on which the claim rests;' and (2) 'permit the court to infer more than the mere possibility of misconduct.'" *Id.*

> In the context of municipal liability ... it is exceedingly rare that a plaintiff will have access to or personal knowledge of specific details regarding the existence or absence of internal policies or training procedures prior to discovery. Accordingly, a pleading may survive a motion to dismiss with minimal, general factual allegations about what the policy is. To establish that the city's training procedures were inadequate, it is sufficient for the plaintiff to generally plead the training was deficient and to provide some facts identifying the training and demonstrating the alleged inadequacy.

Dawes v. City of Dallas, 3:17-CV-1424-X-BK, 2021 WL 1200229, at *3 (N.D. Tex. Mar. 12, 2021), report and recommendation adopted sub nom. *Dawes v. City of Dallas*, No. 3:17-CV-1424-X-BK, 2021 WL 1192222 (N.D. Tex. Mar. 30, 2021).

Finding a complaint insufficient even when it describes the specific topic of the targeted policy, procedures, or failures in supervision, training, and discipline—and elaborates to the extent possible without discovery—imposes a different, impermissibly high standard of the sort the Western District has rejected. *See Ybarra v. Davis*, 489 F. Supp. 3d 624, 633–34 (W.D. Tex. Sept. 24, 2020).

B. The City's cases are inapposite.

Here, the City's three cases on insufficiency of allegations are not comparable. First, *Pistrowski v. City of Houston* dealt with a plaintiff whose allegations merely related to the plaintiff's experience alone and did not cite to a historic policy underlying the plaintiff's complaint. 237 F.3d 567, 580–81 (5th Cir. 2001) (Doc. 47 at 4). That is unlike this case where Ms. Ramos's complaint outlines seven different policies each applied to multiple incidents in the Austin Police Department's ("APD") history continuing to present day. (Doc. 45 at 20–21). Moreover, these APD policies were reviewed in both internal and external reports commissioned by the City and found to be deficient. (Doc. 45 at 20-24). Second, *Peterson v. City of Fort Worth* involved a summary judgment—not a motion to dismiss—where the plaintiff failed to provide *enough evidence* and merely pointed to different instances of excessive force with different mechanisms of injuries. *See* 588 F.3d 838, 851–52 (5th Cir. 2009) But, this is a motion to dismiss with allegations taken as true, and the Complaint alleging the same types of injuries multiple times in similar contexts—contexts recognized and provided by the City's own reports. Third, *Crawford v. Caddo Parish Coroner's Office* involved a plaintiff who only made conclusory allegations, such as "operate[d] in a manner of total disregard for the rights of African American citizens." *See* No. 17-cv-1509, 2019 WL 943411 (W.D. La. Feb. 25, 2019) (Doc. 47 at 4). Instead, the Complaint here explains in detail how each of the seven policies have resulted in unconstitutional action. (Doc. 45 at 20-24).

C. Plaintiff adequately pled sufficient facts to establish liability under *Monell*.

1. Plaintiff's pleadings allege an official policy or custom.

In order to plead liability under *Monell*, a plaintiff must prove: (1) an official policy or custom, of which (2) a policy maker can be charged with actual or constructive knowledge,[2] and (3) a constitutional violation whose 'moving force' is that policy or custom. *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002). The City first asserts that Plaintiff has failed plead facts establishing an official custom or policy that led to any constitutional violation. (Doc. 47 at 2).

An official policy generally takes one of two forms:

> (1) A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> (2) A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.

Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984); *see also Burge v. St. Tammany Par.,* 336 F.3d 363, 369 (5th Cir. 2003).

Plaintiff outlined that the City had the following policies, practices, and customs on April 24, 2020, that led to Mike Ramos's death:

a. Disproportionate use of excessive force against people of color,

b. Condoning such disproportionate use of excessive force against people of color

c. Choosing not to adequately train officers regarding civil rights protected by the United States Constitution,

d. Choosing not to adequately supervise officers regarding the use of force against people of color,

[2] Plaintiff has alleged that Former Police Chief Brian Manley, Assistant Chief Newsom, the City Council, the City Manager, and the Mayor all had actual or constructive knowledge of these policies or customs. The City does not allege that Plaintiff failed to identify a policy maker.

> e. Choosing not to intervene to stop excessive force and civil rights violations by its officers,
>
> f. Choosing not to investigate excessive violence and civil rights violations by its officers, and
>
> g. Making the deliberate choice not to discipline officers for—and deter officers from—using excessive force and violating civil rights.

(Doc. 45 at 28–29). In addition, Plaintiff alleged that "internal audits of the APD have found that officers receive training that encourages a paramilitary approach to policing." (Doc. 45 at 19).

These listed policies were universally criticized in reports authored internally by the Austin Office of Police Oversight, Equity Office, and Office of Innovation and externally by numerous outside consultants hired by the City itself. (Doc. 45 at 19–24). The Austin City Council publicly recognized that the City's policing policies have directly given rise to serious abuses by Austin police officers, and the City Council had demanded reform of the policies that directly led to Mike Ramos's death. (Doc. 45 at 23–24). "A pattern [of abuses] could evidence not only the existence of a policy but also official deliberate indifference." *Piotrowski v. City of Houston,* 237 F.3d 567, 582 (5th Cir. 2001). That is because policymakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action." *Board of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 407 (1997) (police may, "in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need.").

Moreover, as laid out in Plaintiff's pleadings, less than a month after Mike was killed, investigative reports revealed that APD had no plans to change its policies:

> The elected members of City Council have no confidence that current Austin Police Department leadership intends to implement the policy and culture changes required to end the disproportionate impact of police violence on Black Americans, Latinx Americans, other nonwhite ethnic communities.

> ***The measures that current Austin Police Department leadership have been willing to implement are inadequate and resemble the same flawed police training and command expectations that have existed in the past.***

(Doc. 45 at 23–24 (emphasis added)). These racist policies were more than mere oversight, but rather reflect a deliberate choice by Chief Manley and the APD to continue to implement disproportionate, unconstitutional treatment against people of color, even after the effect of such policies and customs became known. As the Fifth Circuit held in *Grandstaff v. Borger,* "the subsequent acceptance of dangerous recklessness by the policymaker tends to prove his preexisting disposition and policy." 767 F.2d 161, 171 (5th Cir. 1985). The court noted, "Following this incompetent and catastrophic performance, there were no reprimands, no discharges, and no admissions of error. The officers testified at the trial that no changes had been made in their policies. … If prior policy had been violated, we would expect to see a different reaction." *Id.* Likewise, the failure of the City or the APD to punish Officer Taylor or to make any reasonable attempt to implement meaningful changes in light of Mike's death emphasizes the point – this is how things have always been done.

2. Plaintiff adequately pled that the City's policies or customs were the moving force causation of the violation of Mike Ramos's constitutional rights.

Next, the City claims that Plaintiff's Second Amended Complaint "does not contain any specific non-conclusory facts to support the Plaintiff's claim that the alleged 'policing culture' was the moving force of the alleged constitutional violation committed by Officer Taylor." (Doc. 47 at 5). To prove that a policy, practice, or custom is the moving force behind the constitutional right violation, a plaintiff need only show that: (1) the policy itself violated federal law or authorized or directed the deprivation of federal rights; or (2) the policy was adopted or maintained by the municipal's policymakers with "deliberate indifference" as to its known or obvious consequences by way of at least a pattern of similar violations. *See Williams v. City of Denton, Tex.,* No. 4:17-cv-

00811, 2019 WL 438403, at *7 (E.D. Tex. Jan. 10, 2019), *report and recommendation adopted,* 2019 WL 430913 (E.D. Tex. Feb. 4, 2019) (citing *Johnson v. Deep E. Reg'l Narcotics Trafficking Task Force,* 379 F.3d 293, 308-09 (5th Cir. 2004)). In the context of municipal liability, deliberate indifference means that "it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights." *Rhyne v. Henderson Cty.*, 973 F.2d 386, 392 (5th Cir. 1992).

Plaintiff does just that, when she pled not only a training policy that itself violated federal law, but also a pattern of similar violations that stem from that same training policy. *Rivera v. City of San Antonio* No. SA-06-CA-235-XR, 2006 WL 3340908, at *13 (W.D. Tex. 2006) (citing *Grandstaff v. City of Borger*, 767 F.2d 161, 170 (5th Cir. 1985) ("Where police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force requirement is satisfied.")). As laid out above, APD's policies and customs led to an increased use of force against minority citizens compared to white citizens. *See supra* at 7–9. The City Council, the City Manager, the Mayor, and Chief Manley all had actual or constructive knowledge of APD customs and policies, which were the moving forces behind the constitutional violations at issue here.

"[A] plaintiff must establish that the policy was the moving force behind the violation. In other words, a plaintiff must show direct causation. This means that 'there must be a direct causal link' between the policy and the violation, not merely a 'but for' coupling between cause and effect." *Lupi v. Diven*, No. 1:20-CV-207-RP, 2020 WL 6324396, at *10 (W.D. Tex. Oct. 27, 2020). Plaintiff's pleadings establish that causal link – namely that the APD had a known history of violence against people of color. Officer Taylor was indoctrinated into this racist training and required to follow the policies set out in the APD's paramilitary, racist approach to policing. Implementation of these policies made it predictable a citizen of color would be subject to unconstitutional and deadly police

violence, and the City and Chief Manley knew such incidents were likely to occur. Thus, the City's policies directly caused Mike's death. Moreover, the APD's policy or custom of failing to discipline or even investigate officers using excessive force against people of color led directly to Mike's death: had Taylor been subject to discipline or investigation after the murder of Dr. Marius DeSilva (*see infra* at 14), then he would not have been on duty, or would not have felt he could act with impunity, in responding to the incident involving Mike. These facts are not conclusory but are in fact derived from specific studies and findings by the Austin City Council and investigative reports that were instigated prior to the murder of Mike Ramos.

3. Plaintiff's Second Amended Complaint sufficiently pleads *Monell* liability.

As detailed herein, a municipal-liability claim satisfies the federal pleading standard if it describes, "(1) past incidents of misconduct by the defendant to others; (2) multiple harms that occurred to the plaintiff himself; (3) the involvement of multiple officials in the misconduct; (4) the specific topic of the challenged policy or training inadequacy," ***or*** (5) "misconduct that occurred in the open," "together with any additional elaboration possible." *Flanagan*, 48 F. Supp. 3d at 947.

Here, Plaintiff pled that there were past instances of deadly force conducted by Officer Taylor and Officer Krycia, for which they were not punished or reprimanded. (Doc. 45 at 19). There were also investigative reports detailing the racist behavior that was tolerated and encouraged within the APD, and the consistent use of violence against minority citizens. (Doc. 45 at 20–24).

The facts pleaded established in the single incident that led to his murder, Mike Ramos's constitutional rights were violated in multiple ways: Officers refused to accept his surrender and raised hands, failed to use proper communication procedures among the multiple officers at the scene, leading to confusion and unclear directives, shooting Mike with non-lethal projectiles, and ultimately, using unnecessary deadly force against Mike.

Plaintiff's pleaded facts also establish that APD mobilized seven officers in seven police cruisers, as well as back up with a helicopter and a canine, all to investigate two people sitting in a car. APD knew that Officers Taylor and Krycia had previously killed Dr. Marius DeSilva in an unjustified use of deadly force less than a year prior. *See infra* at 14.

Officer Taylor was indoctrinated into APD's racist culture at a training academy that encouraged military-style policing and served under a chief who condoned violence against people of color by choosing to never find fault even in the most troubling cases. It was these official policies that led Taylor—despite all the evidence to the contrary—to view Mike Ramos as a threat instead of a person who was unarmed, complying with police orders to the best of his ability, and scared for his life. After Mike Ramos's death, the City shut down and reorganized the APD training academy. (Doc. 45 at 19–20). On its face, this turnabout is a tacit acknowledgement that the prior iteration of the APD training academy is what led to Mike's death.

These allegations are more than sufficient under *Monell*.

E. Plaintiff pled a valid claim for inadequate training.

To prevail on a failure to train theory, Plaintiff must plead facts plausibly establishing "(1) that the municipality's training procedures were inadequate, (2) that the municipality was deliberately indifferent in adopting its training policy, and (3) that the inadequate training policy directly caused the violations in question." *Ybarra*, 489 F. Supp. 3d at 634.

Starting as early as 2016, investigations into the APD's policies and procedures revealed that the APD used more violence against people of color. In December 2019, less than five months before Mike was killed, the Austin City Council commissioned an investigation into the historic and disproportionate use of violence against people of color, and the complaints of racism within the APD. The results of those investigations showed numerous and consistent policies that would and did lead to constitutional violations. Plaintiff's Second Amended Complaint references 12

internal and external, City-commissioned reports that lay out the inadequate training, supervision, and discipline policies of the APD, including in particular, a "paramilitary approach to policing." (Doc. 45 at 19). APD officers were trained to resort to violence first, particularly against people of color.

The training was such that when receiving an emergency call for two people sitting in a car, with no report of violent activity, the APD responded with seven officers (Christopher Taylor, Darrell Cantu-Harkless, Benjamin Hart, James P. Morgan, Karl Krycia, Valarie Tavarez, Katrina Ratcliff, and a trainee, Mitchell Pieper) in seven police cruisers, as well as back up with a helicopter and a canine. Officers swarmed Mike's car with weapons drawn and their police cruisers blocking him in. When Mike got out of his car and surrendered, Officers responded by shooting him with a "less lethal" round. Ultimately, Mike was shot with an assault rifle in the back of the head as he attempted to flee. This exaggerated response was due to the paramilitary training these officers received, and as expected, led to unnecessary and deadly violence.

In pleading deliberate indifference, a plaintiff can either "(1) demonstrate a pattern of violations fairly similar to what ultimately transpired in the instant case, or (2) demonstrate that 'single-incident' liability exists because it was highly predictable that a constitutional violation would result from a particular failure to train." *Dawes*, 2021 WL 1200229, at *4. For example, if police, when exercising their discretion, so often violate constitutional rights that the need for further training is obvious to city officials, the failure to implement further training can show deliberate indifference." *Id.* Plaintiff pleaded a consistent, recognized pattern of the APD in ignoring the constitutional rights of its citizens of color. Prior to Mike's death, the City was aware of the problem. Prior to Mike's death, the City failed to address the problem or to implement any new policies or procedures. Subsequent to Mike's death, the City shut down the APD training academy, and reopened it a year

later, after a substantial reorganization that focused on de-escalation, community engagement, and addressing systemic inequalities and racism in the APD. (Doc. 45 at 19–20; *see also id.* at 5 ("[T]he City was aware of the shootings and of the problem caused by the allegedly inadequate training, pointing to comments made by the now-former Chief of Police, the criticisms aimed at the police department, and the policies the now-former Chief of Police proposed to implement. Thus, Plaintiffs have adequately pled that the City was deliberately indifferent in adopting its training policy.").

As to causation, as shown above, Plaintiff has met her burden to plead facts showing that the inadequate training was a moving force behind Mike's death. *Id.; see also supra* at 9–11.

F. Plaintiff pled a valid claim for inadequate disciplinary policies.

Similarly, to prevail on a failure to discipline claim, Plaintiff must show: (1) the municipality failed to discipline its employees; (2) that failure to discipline amounted to deliberate indifference; and (3) the failure to discipline directly caused the constitutional violations in question. *See Deville v. Marcantel*, 567 F.3d 156, 171 (5th Cir. 2009).

As shown in Plaintiff's pleadings, Officer Taylor (and Officer Krycia) had previously killed Dr. Mauris DeSilva (also a person of color) during a mental health episode on July 31, 2019, responding to his mental health crisis as if it were the scene of a violent crime. (Doc. 45 at 18-19). The APD allowed Taylor and Krycia to return to duty, and neither was punished or suspended for his actions. Subsequently, on April 24, 2020, Taylor shot and killed Mike Ramos under similar circumstances, using deadly force that was unreasonable, uncalled for, and out of line with the circumstances of the situation. Again, Taylor was not disciplined for his deadly actions, and the Special Investigations Unit of the APD refused to swear out a warrant for his arrest. By contrast, Taylor was indicted by a grand jury for the murders of Mike Ramos and Dr. DeSilva, indicating that the APD's investigation was not based on a fair assessment of the facts, but rather on a history

of refusing to hold its officers accountable. Krycia was also indicted by a grand jury for the death of Dr. DeSilva.

Ultimately, when the City failed and refused to discipline Taylor for his clearly established constitutional violations, it approved of and ratified his conduct, which itself establishes a custom of the APD. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 755 (5th Cir. 2009). When a municipality approves a subordinate's conduct and the basis for it, liability for that conduct is chargeable against the municipality because it has "retained the authority to measure the official's conduct for conformance with their policies." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion); *Groden v. City of Dallas*, 826 F.3d 280, 284 (5th Cir. 2016); *see also Balle v. Nueces Cty., Tex.*, 690 F. App'x 847, 852 (5th Cir. 2017). Under *Praprotnik*, "post hoc ratification by a final policymaker is sufficient to subject a city to liability because decisions by final policymakers are policy." *Hobart v. City of Stanford*, 916 F. Supp. 2d 783, 793 (S.D. Tex. 2013) (citing *Praprotnik*, 485 U.S. at 127); *see also Rivera v. City of San Antonio,* No. SA-06-CA-235-XR, 2006 WL 3340908, at *13 (W.D. Tex. Nov. 15, 2006) (disagreeing with the City that post hoc approval of prior conduct cannot be the moving force behind a constitutional violation.); *Santibanes v. City of Tomball, Tex.*, 654 F. Supp. 2d 593, 613 (S.D. Tex. 2009) (where chief of police approved of the officer's use of force, even though the officer's conduct violated the police department's use of force policy, "it is reasonable to infer that Sergeant Williams used deadly force with the knowledge that the City would exact no consequence for his actions.").

Moreover, as Plaintiff pled, investigative reports revealed evidence of racist behavior and retaliation:

> We listened to many anecdotes illustrating inappropriate comments over the years through which APD personnel expressed concern about racist behavior, but also

> sexist behavior, and ***dissimilar treatment in the handling of officer discipline*** and those who may be served by APD chaplain services with the denial of marital services to same sex couples. There are some real cultural issues that are in need of attention.
>
> Tatum Law was able to establish that [Austin Police] Chief Manley had reason to inquire as to [Assistant Chief] Newsom's conduct . . . The October 7, 2019, email received by Chief Manley alleging similar facts to those later alleged in the October 30, 2019, complaint about AC Newsom's use of the derogatory term "nigger" in text messages to refer to African Americans provided sufficient information . . . ***Chief Manley did not send these allegations for review or investigation.***
>
> Whether it is about a grievance or misconduct there is an overwhelming sentiment among officers, at or previously involved with the Austin Police Department, and regardless of rank, that an officer, or even civilian staff member, ***who wishes to right a wrong, complain about improper conduct, or participate in an investigation such as this one, must be prepared in the present climate and culture to face almost certain retaliation, and not necessarily from Chief Manley, directly or solely***.
>
> …
>
> The elected members of City Council have no confidence that current Austin Police Department leadership intends to implement the policy and culture changes required to end the disproportionate impact of police violence on Black Americans, Latinx Americans, other nonwhite ethnic communities.
>
> ***The measures that current Austin Police Department leadership have been willing to implement are inadequate and resemble the same flawed police training and command expectations that have existed in the past***.

(Doc. 45 at 23–24 (emphasis added)). These policies were more than mere oversight. Rather, Chief Manley and the APD implemented policies and customs that resulted in disproportionate, unconstitutional treatment of people of color. And ultimately, the widespread practice of fostering racism and encouraging violence against people of color meant that Taylor was "undeterred from violating [Mike's] constitutional rights because he did not fear discipline." *Ramirez v. Escajeda*, 298 F. Supp. 3d 933, 944 (W.D. Tex. 2018). In other words, the City and Chief Manley acted with deliberate indifference in failing to discipline constitutional violations by APD officers. This

custom of failing to discipline officers for violent, discriminatory behavior led to the use of excessive, deadly force against Mike.

G. Additional discovery will allow Plaintiff further opportunity to establish liability against the City and Officer Taylor.

Every time the City's policing policymaker, Chief Manley, ignored or defied advice that was meant to revise policies to save the lives of people of color, he was deliberately indifferent to those populations' civil and constitutional rights to life, liberty, and the pursuit of happiness. This is the tip of the iceberg of evidence that Plaintiff will develop through discovery regarding her claim against the City. For instance, the reams of advice and counsel of Austin's past Police Monitors Margo Frasier and Judge Clifford Brown, former Citizen Review Panel, current Director of Office of Police Oversight Farah Muscadin, and current Community Police Review Commission are not all public record. Ms. Ramos alleges that Austin had an official policy of ignoring and defying this advice (which she will seek in discovery). Due to pending criminal investigations, prosecutorial privileges, and discovery limitations, material evidence remains unavailable to Plaintiff which could inform her allegations. The police released select videos, but not all. The original, unedited videos have not been made available. The autopsy has not been released. The officers' and witness statements have not been released. All this evidence will further establish liability against the City and Officer Taylor.

III. Conclusion and Prayer

For these reasons, Plaintiff Brenda Ramos, on behalf of herself and the Estate of Mike Ramos, respectfully requests that the City of Austin's Motion to Dismiss Second Amended Complaint be denied. Plaintiff further requests such other relief which she may be justly and equitably entitled.

Dated: April 26, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2022, a true and correct copy of the above and foregoing advisory was electronically filed via the Court's CM/ECF system, which will automatically serve all counsel of record.

/s/ Shelby J. White
Shelby J. White

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Brenda Ramos, On Behalf Of Herself and The Estate of Mike Ramos	§	
Plaintiff,	§	
	§	**Civil Action No. 1:20-cv-01256-RP**
v.	§	
	§	
The City of Austin and Christopher Taylor,	§	
Defendants.	§	

PLAINTIFF'S RESPONSE TO DEFENDANT CHRISTOPHER TAYLOR'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

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Rules

TO THE HONORABLE ROBERT PITMAN:

Plaintiff Brenda Ramos, on behalf of herself and the Estate of Mike Ramos, file this Response to Defendant Christopher Taylor's Motion to Dismiss Second Amended Complaint. (Doc. 49). Defendant's Motion should be denied. In support of her opposition to Defendant Christopher Taylor's Motion, Plaintiff shows the following:

I. Introduction

Officer Taylor has asked this Court to dismiss Plaintiff's claims against him for failing to state a claim upon which relief can be granted. (Doc. 49). Officer Taylor alleges that there is not clearly established legal precedent that would have provided him the requisite notice that he was not allowed to shoot a fleeing suspect who posed no danger to himself, his fellow officers, or bystanders, despite his indictment for murder for these actions. This motion should be denied.

II. Argument and Authorities

A. The applicable standard for Taylor's Motion to Dismiss.

The pleading stage is not the point at which plaintiff must establish the level of proof necessary to ultimately prevail. *See Mann v. Adams Realty Co*., 556 F.2d 288, 293 (5th Cir. 1977). Indeed, a "strong framework of policy considerations . . . militate[s] against granting motions to dismiss for failure to state a claim[.]" *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). Thus, in the Fifth Circuit, motions to dismiss under Rule 12(b)(6) "are viewed with disfavor and are rarely granted." *Lormand v. U.S. Unwired, Inc.,* 565 F.3d 228, 231 (5th Cir. 2009) (quoting *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005)); *see also Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011). A complaint will not be dismissed just because it contains an imperfect statement of the legal theory supporting the claim asserted. *Johnson v. City of Shelby,* 135 S. Ct. 346, 346 (2014). Federal pleading rules simply

call for "a short and plain statement of the claim showing that the pleading is entitled to relief." *Id.* (citing Fed. R. Civ. P. 8(a)(2)).

The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid claim when it is viewed in the light most favorable to the plaintiff. *Great Plains Tr. Co. v. Morgan Stanley Dean Witter*, 313 F.3d 305, 312 (5th Cir. 2002). Two primary principles guide the plausibility analysis. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). First, the court must "liberally construe the complaint in favor of the plaintiff[.]" *Id.* Second, the court must "accept all well-pleaded factual allegations as true." *Id.; see also Sonnier v. State Farm Mut. Auto. Ins. Co.,* 509 F.3d 673, 675 (5th Cir. 2007). Courts do not evaluate the merits of the allegation but only consider whether plaintiff has adequately pled a legally cognizable claim. *United States ex rel. Riley v. St. Luke's Episcopal Hosp*., 355 F.3d 370, 376 (5th Cir. 2004). Thus, a pleading simply needs to provide "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary claims or elements." *Morgan v. Hubert*, 335 F. App'x 466, 470 (5th Cir. 2009) (internal quotation omitted).

Moreover, Rule 12(b)(6) restricts courts considering dismissal to "the contents of the pleadings and the attachments thereto." *Villarreal v. Wells Fargo Bank, N.A.*, 814 F.3d 763, 766 (5th Cir. 2016); *see also Great Plains*, 313 F.3d at 314. On the other hand, the Court may not consider any basis for dismissing Plaintiff's claims that relies on facts not shown on the face of the complaint or on evidence attached to a defendant's motion. Guided by these principles, it follows that dismissal may not be based on the movant's allegations that the facts are not as the plaintiff alleges them to be.

1. The pleading standard applicable to Plaintiff's excessive force claims.

Once a defendant properly invokes qualified immunity, assessing a defendant's entitlement to the defense consists of two separate inquiries. First, courts ask whether the facts as alleged in

the complaint show that the defendant's conduct was objectively unreasonable in violation of a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part by Pearson v. Callahan*, 555 U.S. 223, 236 (2009). If such a violation is found, courts then determine whether the complaint has sufficiently alleged that the right was "clearly established" at the time. *Id.* A right may be clearly established "despite notable factual distinctions between the precedents relied on and the cases then before the Court." *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008). In both steps of this analysis, the Court must view the allegations in the light most favorable to the plaintiff to determine whether the complaint states a valid claim. *Great Plains Trust*, 313 F.3d at 312. The key concern is whether the complaint has adequately alleged that the defendant officer was on notice that the conduct violated the plaintiff's constitutional rights.

2. To rebut a qualified immunity defense at the pleading stage, a plaintiff need only allege a plausible constitutional violation and conduct that, if assumed to be true, is objectively unreasonable.

Showing a defendant is not entitled to a quality immunity defense at the pleading stage does not impose on a plaintiff the demanding standard of negating both prongs of the defense with evidence. Unlike at the summary judgment stage, when evidence is considered, and not just the pleadings, "[a]t that earlier stage, it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness'." *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) (emphasis in original). Moreover, "[i]n showing that the defendant's actions violated clearly established law, the plaintiff need not rebut every conceivable reason that the defendant would be entitled to qualified immunity, including those not raised by the defendant." *Cotropia*, 721 F. App'x at 360.

B. The video footage does not take precedence over the Complaint itself.

1. Plaintiff does not expressly adopt or rely on any video, but in fact criticizes the incompleteness of the available video evidence.

Taylor argues that the video evidence disproves Plaintiff's version of events, and thus, Plaintiff's version of events should be disregarded. (Doc. 49 at 5-6). Taylor's argument is wrong for two reasons: First, Plaintiff does not "expressly adopt" the videos by reference. Second, the video referred to in Plaintiff's complaint supports Plaintiff's version of events.

Taylor's argument is incorrectly premised on the notion that the allegations of Plaintiff's complaint incorporated these videos by reference. (Doc. 49 at 6) (arguing that "Plaintiff's Second Amended Complaint references 'Austin police dashcam and body-worn camera videos' of the subject incidence and provides hyperlinks for the Court to retrieve and view all such videos."). Taylor fails to point out that the exact same portion of Plaintiff's complaint *expressly criticizes* the videos for not being authentic, for appearing to be edited, for being incomplete, and for bearing indications of unreliability:

> [9] http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020 (last visited Feb. 17, 2022). The videos that are currently available publicly appear to have been edited by APD. And, only some of the videos from certain officers are available. Footage is unavailable at all for officers Krycia, Morgan or Ratcliff. No bodycam has been made available from officers Krycia, Morgan, Tavarez or Ratcliff. Also, the timestamps are inconsistent, some by more than 3 seconds and one by more than 5 minutes.

(Doc. 45 at 17 fn.9).

Taylor cites this Court's decision in *Scott v. White*, No. 1:16-CV-1287-RP, 2018 WL 2014093 (W.D. Tex. April 30, 2018), as authority for considering the videos in deciding this motion to dismiss. (Doc. 49 at 5-6, fn. 19). *White*, however, held that "a court may consider video evidence *attached as an exhibit to the complaint* . . . ." *Id.* at *3 (emphasis added). In this case, the police videos were *not* attached as an exhibit to the complaint, but instead were merely referenced in a footnote. Significantly, the same footnote made allegations that criticized the videos for being

inauthentic, edited, and incomplete. In *White*, there is no indication that the complaint had made similar allegations criticizing the videos.

As further pointed out in Plaintiff's Response to Defendant's Motion to Stay Discovery Based on the Pending Qualified Immunity Threshold Determination, neither Taylor nor the City of Austin has produced the *complete, unedited* videos of the shooting, the autopsy, and officer and witness statements. (Doc. 36 at 7). Complete, unedited footage of the shooting is especially important because Taylor's Motion to Dismiss (Doc. 45) relies on his assertion that the video supports his version of events. Taylor cannot simultaneously allege that the video footage supports his qualified immunity claim while also denying Plaintiff and this Court access to the unedited footage. Presumably the unedited footage will be produced during discovery, which is precisely why the qualified immunity issue should not be decided in this case at the pleadings stage.

Taylor also asserts that the video discredits Plaintiff's version of events. The U.S. Supreme Court has held that, because the nonmovant's version of the events was "so utterly discredited" by a videotape "that no reasonable jury could have believed him," the court "should have viewed the facts in the light depicted by the videotape," not in a light most favorable to the nonmovant. *See Scott v. Harris*, 550 U.S. 372, 380-81 (2007) (cited in Doc. 49 at 6 fn. 25). But *Scott* was decided on a motion for summary judgment, not a 12(b)(6) motion to dismiss on the pleadings. Moreover, subsequent cases have "since made clear, *Scott* was not an invitation for trial courts to abandon the standard principles of summary judgment by making credibility determinations or otherwise weighing the parties' opposing evidence against each other any time a video is introduced into evidence." *Aguirre v. City of San Antonio*, 995 F.3d 395, 410 (5th Cir. 2021). Rather, *Scott* sets a "difficult" and "demanding" standard for discrediting evidence, and "when video evidence is ambiguous or in fact supports a nonmovant's version of events, or when there is any evidence

challenging the video's accuracy or completeness, the modified rule from *Scott* has no application." *Id.*

This Court has held that similar deference must be given to the plaintiff when comparing the allegations of a plaintiff's complaint to video evidence that has been attached to the complaint as an exhibit. *See White*, 2018 WL 2014093 at *3 ("That said, the standard for adopting video evidence over a plaintiff's allegations 'is a demanding one: a court should not discount the nonmoving party's story unless the video evidence provides so much clarity that a reasonable jury could not believe his account.'") At the pleading stage, the "party's story" must surely include the party's own allegations that the video evidence is not authentic, has been altered, and is incomplete – as Plaintiff alleged here. (Doc. 45 at 17 fn. 9).

The videos relied upon by Taylor in his motion do not alter the standard of review. First, the video evidence supports Plaintiff's version of events and shows that Mike's vehicle was not endangering Taylor, other police officers, or bystanders. Rather, Mike is clearly turning away from the officers, moving towards a dead end in the apartment complex:

> Taylor and the officers were in no immediate or imminent danger, nor did they have reason to believe anyone else was in danger. The police outnumbered Mike, eight-to-one. The police stood well behind the front of their vehicles. They wore ballistic vests, and they were locked and loaded. The police had backup. No police officer was caught alone, unarmed, or unaware. Mike posed no threat. It was not nighttime or dark. They were not in unfamiliar territory. They had drawn a map and entered cautiously, keeping a "good distance" back. They stood behind their large police vehicles for protection, a safe distance away from the path Mike's vehicle took as it slowly inched out of the parking spot to his right, away from officers.
>
> …
>
> The Prius turned away from Taylor and all officers and headed slowly in the opposite direction. As the Prius inched away toward the dead end blocked by dumpsters, Taylor opened fire, shooting three rounds from his assault rifle into the side window of the Prius and striking Mike in the back of the head. Neither Taylor nor any other officer was in front of the Prius or to its side when Taylor fired his fatal shots.

(Doc. 45 at 14–15). As noted in the still image from Taylor's body camera at the moment he fired his rifle three times, Taylor was the closest of any officer and he was a substantial distance from the car. But most importantly, the Prius is driving *away* from the officers:

(Doc. 45 at 16).

Ultimately, however, Taylor's version of events is not supported by the video. Even a cursory review reveals that the video – if anything – supports the claims alleged by Plaintiff. As such, the video and more importantly, Taylor's version of the event, does not alter this Court's obligation to construe the Plaintiff's version of the facts in the light most favorable to her, as alleged in the complaint. *See Ramirez v. Martinez,* 716 F.3d 369, 374 (5th Cir. 2013); *see also Darden v. City of Fort Worth, Tex.,* 866 F.3d 698, 705 (5th Cir. 2017) (noting that "the standard imposed by the Supreme Court is a demanding one: a court should not discount the moving party's story unless the video evidence provides so much clarity that a reasonable jury could not believe his account.").

2. Taylor cannot base a Rule 12(b)(6) motion on matters outside the Plaintiff's pleadings.

Taylor attaches to his motion video links to unauthenticated video clips that were not attached as exhibits to Plaintiff's pleadings and have not been produced in discovery. Plaintiff objects to Taylor's reliance on these matters outside the pleadings, and that otherwise are unauthenticated, and ask that they be struck from Taylor's motion.

It is well settled that a Rule 12(b)(6) motion is to be determined based on the four-corners of the plaintiff's pleadings. *See Villarreal v. Wells Fargo Bank, N.A.,* 814 F.3d 763, 766 (5th Cir. 2016) ("A district court is limited to considering the contents of the pleadings and the attachments thereto when deciding a motion to dismiss under Rule 12(b)(6)."); *see also Indest v. Freeman Decorating, Inc.,* 164 F.3d 258, 261 (5th Cir. 1999) ("We may not look beyond the pleadings."). Rule 12 itself provides that if "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d).

In fact, as set out above, the factual allegations in the plaintiff's complaint are to be taken as true. *See Cinel v. Connick,* 15 F.3d 1338, 1341 (5th Cir. 1994). Only where the plaintiff's complaint relies on the exhibits as part of their pleadings can evidence outside the four corners of the complaint be considered. *See Hartman v. Walker,* 685 F. App'x 366, 368 (5th Cir. 2017); *Villarreal,* 814 F.3d at 766. Otherwise, when considering a motion to dismiss like this one, the video recordings and the other exhibits cannot be considered. *See Garrett v. Crawford*, No. SA-15-CV-261-XR, 2016 WL 843391, at *7 (W.D. Tex. Mar. 1, 2016) ("While Crawford and Aguillone urge the Court to examine video of the incident that show Garrett was not cooperative, such an inquiry would be inappropriate by the Court when considering a motion to dismiss."); *Robles v. Aguilar,* No. 16-cv-07038-MEJ, 2017 WL 950966, at *2 (N.D. Ca. March 10, 2017) ("The Court will not consider the video recording on this Motion to Dismiss, especially where Plaintiff has neither attached the video to the Complaint nor relied upon it to state a claim."). Since Plaintiff does not rely on the additional videos or any other exhibits attached to Taylor's motion in Plaintiff's pleadings, Taylor cannot rely on these matters here.

3. Even if the body-cam video and other documents attached to Taylor's Motion could be considered, they are not admissible.

To be admissible, evidence must be authenticated. Fed. R. Evid. 104(b), 901. Said another way, to rely on any item as evidence—whether a document, weapon, photograph, or audio or video

recording—that party must first establish the item's genuineness—*i.e.,* "that the item is what the proponent claims it is." Fed. R. Evid. 901(a). This generally requires the affidavit of a person with knowledge or evidence that the process or system being relied on produces an accurate result. *See, e.g.*, Fed. R. Evid. 901(b)(1), (9). For video recordings, like the ones Taylor references in his Motion, authentication also requires the proponent to show that the camera functioned properly, that the operator was competent in operating the equipment, and that the recording fairly and accurately represents the scene depicted. *See Turner v. Knight Transp., Inc.,* No. 1:13-CV-02864, 2016 U.S. Dist. LEXIS 41101, *2-3, 2016 WL 1259891 (W.D. La. March 28, 2016).

Taylor made no effort to authenticate any of the video or other documents included in his Motion. Accordingly, Plaintiff objects to all of it as being inadmissible here and, for this reason as well, and ask that such evidence be excluded from consideration here. In addition, Plaintiff objects to the Court's consideration of Exhibit 3 (the "Critical Incident Briefing") because the video contains voluminous hearsay statements, statements that are made without a showing of personal knowledge, and quasi-expert opinions without Taylor having provided an evidentiary foundation for any of it.

C. Taylor's actions were objectively unreasonable and violated clearly established law.

1. Taylor's use of force was excessive and objectively unreasonable.

Taylor cites *Hathaway v. Bazany* for the proposition that the court must consider two factors in assessing the reasonableness of an officer's actions: (1) the limited time the officer had to respond, and (2) the officer's proximity to the path of the vehicle. 507 F.3d 312, 321 (5th Cir. 2007). Yet application of those factors to the facts here shows that Taylor was not justified in shooting Mike. In *Hathaway*, the suspect's vehicle was accelerating directly towards the officer and in fact ultimately struck him. *Id.* at 316. Likewise, in *Malbrough v. Stelly*, the suspect reversed and smashed his vehicle into the police cruiser behind him, and then accelerated into the officers

that surrounded the car, causing the officers to scramble to get out of the way. 814 F. App'x 798, 799 (5th Cir. 2020).

By contrast, in this case Plaintiff has alleged, and the video reveals, that the officers were not in the path of Mike's car. Rather, he clearly and deliberately turned away from them and was moving slowly. (Doc. 45 at 15). And he was ultimately shot after the car was facing away from the officers and traveling towards a dead end with no bystanders. (Doc. 45 at 15). Thus, this was neither a case of split-second decisions due to a quickly accelerating car, or one in which the officers were endangered by the car's path. Rather, Taylor shot at an unarmed victim whose slow-moving flight endangered no one. The law is clearly established that this is unconstitutional and objectively unreasonable.

2. The law is clearly established that a police officer cannot shoot a fleeing suspect who poses no danger to the officer or others.

The law is also clearly established on this point. It is beyond debate that "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Tennessee v. Garner*, 471 U.S. 1, 2 (1985). Plaintiff relies on *Lytle v. Bexar Cnty., Texas*, where the Fifth Circuit found that the parties "genuinely disputed the direction and distance that the [vehicle] had traveled at the moment [the officer] fired," 560 F.3d 404, 408 (5th Cir. 2009). As a result, in accepting the plaintiff's version of events, the court found "it has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others. This holds as both a general matter, and in the more specific context of shooting a suspect fleeing in a motor vehicle." *Id.* at 417–18. Plaintiff's allegations establish that Mike was moving away from

the officers at a slow rate of speed, and that his flight did not endanger the officers or bystanders. As such, the case law is clearly established that Taylor was not justified in using deadly force.[1]

Taylor's reliance on *Irwin v. Santiago*, No. 21-10020, 2021 WL 4932988 (5th Cir. Oct. 21, 2021), does not alter the fact that the law is clearly established that shooting and killing an unarmed man driving slowly away from officers is unconstitutional. The facts in *Irwin* are distinguishable because "the projected path of Irwin's vehicle was in the officer's direction, at least generally, whereas in *Lytle* and *Flores* the vehicle was moving away from the officer." *Id*. at *3. At the same time, *Irwin* acknowledges that *Lytle* does constitute clearly established law in circumstances like these, where the officer is "positioned behind a vehicle that was moving away from him as he fired." *Id*. And, *Irwin* is unpublished and therefore "is not precedent" in this case. *Id*. at n. *.

Taylor's use of force is premised on his version of events—namely, that Mike's car was endangering him and his fellow officers by driving *towards* them. But, as shown above, the video does not support his claim, and Plaintiff's facts as pled must be taken as true. Viewing these facts and reasonable inferences from them in a light most favorable to Plaintiff—as the Court must—no immediate threat existed to justify Taylor's use of deadly force. Because Plaintiff posed "no

[1] Notably, Justice Willett of the Fifth Circuit is critical of requiring plaintiffs to "cite functionally identical precedent that places the legal question 'beyond debate' to 'every' reasonable officer." *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willet, J., concurring). He observed a trend in which many courts avoid the harder question of "whether the challenged behavior violates the Constitution" by "skipping to the simpler prong: no factually analogous precedent." *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 227 (2009)). "But the inexorable result is 'constitutional stagnation'—fewer courts establishing law at all, much less clearly doing so." *Id.* at 498–99. Thus, the "Catch-22":

> Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because those questions are yet unanswered. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. . . . The current "yes harm, no foul" imbalance leaves victims violated but not vindicated; wrongs are not righted, wrongdoers are not reproached, and those wronged are not redressed. It is indeed curious how qualified immunity excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations.

Id. at 499.

immediate threat to [the officers] and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Cole v. Carson,* 935 F.3d 444, 453 (5th Cir. 2019) (quoting *Garner*, 471 U.S. at 11); *Lytle*, 560 F.3d at 417–18. Thus, while the facts may not yet be clearly established, the law is. *Reyes v. Bridgwater*, 362 F. App'x. 403, 409 (5th Cir. 2010). Because there was no imminent threat, the use of deadly force was not objectively unreasonable.

III. Conclusion and Prayer

For these reasons, Plaintiff Brenda Ramos, on behalf of herself and the Estate of Mike Ramos, respectfully requests that the Defendant Christopher Taylor's Motion to Dismiss Second Amended Complaint be denied. Plaintiff further requests such other relief which she may be justly and equitably entitled.

Dated: April 12, 2022

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2022, a true and correct copy of the above and foregoing advisory was electronically filed via the Court's CM/ECF system, which will automatically serve all counsel of record.

/s/ Shelby J. White
Shelby J. White

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Brenda Ramos, On Behalf Of	§	
Herself and The Estate of	§	
Mike Ramos	§	
Plaintiff,	§	
	§	**Civil Action No. 1:20-cv-01256-RP**
v.	§	
	§	
The City of Austin and	§	
Christopher Taylor,	§	
Defendants.	§	

ORDER DENYING DEFENDANT CHRISTOPHER TAYLOR'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

Came to be heard on this day Defendant Christopher Taylor's Motion to Dismiss Second Amended Complaint [Doc. 49]. The Court, having considered the Motion, Plaintiff's Response, the evidence, and the argument of counsel, if any, is of the opinion that the Motion should be DENIED.

It is, therefore, ORDERED, ADJUDGED and DECREED that Defendant Christopher Taylor's Motion to Dismiss Second Amended Complaint [Doc. 49] is DENIED.

SIGNED on this _____ day of _____, 2022.

_____
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS	§	
Plaintiff,	§	**CIVIL ACTION NO. 1:20-cv-1256-RP**
v.	§	
CITY OF AUSTIN AND CHRISTOPHER TAYLOR,	§	
Defendants.	§	

DEFENDANT CITY OF AUSTIN'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

TO THE HONORABLE ROBERT PITMAN, UNITED STATES DISTRICT COURT JUDGE:

Defendant City of Austin files this Reply in support of its Motion to Dismiss Plaintiff's Second Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure as follows:

I. INTRODUCTION

The City's Motion to Dismiss identifies the flaws in Plaintiff's Second Amended Complaint including the total absence of non-conclusory facts regarding the City's alleged policies and moving force causation. The Plaintiff's response does nothing to ameliorate these flaws and, as a result, the Court should dismiss the Plaintiff's claims against the City.

A. Insufficient Facts to Establish a Policy or Practice

Plaintiff's response, like her Second Amended Complaint, recites investigative reports regarding alleged racist behavior of individuals within the Austin Police Department and the Austin City Council's criticism of department leadership's alleged inadequate implementation of measures to eradicate police bias and racism. Plaintiff's reliance on reports regarding APD traffic stops and

discretionary arrests such as driving with an invalid license and marijuana possession, as well as inappropriate comments by APD personnel, hardly constitutes a pattern tantamount to official policy sufficient to state a claim for relief under *Monell.*

A plaintiff may show a "persistent, widespread practice of City officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Piotrowski*, 237 F.3d at 579 (quoting *Webster v. City of Houston*, 735 F.2d 838, (5th Cir. 1984) (en banc)). However, "[a] pattern requires similarity and specificity; '[p]rior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question.'" *Peterson v. City of Fort Worth*, 588 F.3d 838, 851-52 (5th Cir. 2009)(quoting *Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 383 (5th Cir. 2005). A pattern sufficient to support a *Monell* claim cannot be established by previous bad acts of the municipality unless those bad acts are specific and similar to the violation in question. *Id.*

None of the prior bad acts described in the Second Amended Complaint are specific and similar to the alleged violation in this case, i.e., Taylor's use of deadly force on Ramos. Plaintiff provides no specific facts to support her allegations that any alleged pattern or practice of APD consisted of prior bad acts which were specific and similar to Taylor's use of deadly force. Plaintiff's Second Amended Complaint fails to allege non-conclusory facts sufficient to establish an actual policy or custom of the Austin Police Department. As a result, this claim fails as a matter of law.

B. Insufficient Facts to Establish Moving Force Causation

Plaintiff's response makes many pronouncements that APD's alleged racist culture caused Ramos's death, but fails to identify actual facts alleged in the Second Amended Complaint which

support moving force causation. The Second Amended Complaint does not contain any specific non-conclusory facts to support the Plaintiff's claim that the alleged "policing culture" was the moving force of the alleged constitutional violation committed by Officer Taylor. It takes more than a conclusory allegation that "[Ramos's] tragic death is a direct result of the racism that has permeated policing in Austin" to adequately allege specific facts to support the causation element of a *Monell* claim.

In order to hold a municipality liable under Section 1983 for the misconduct of one of its employees, a plaintiff must initially allege that an official policy or custom "was a cause in fact of the deprivation of rights inflicted. *Spiller v. City of Texas City, Police Dept.,* 130 F.3d 162, 167 (5th Cir. 1997), quoting *Leffall v. Dallas Indep. Sch. Dist.,* 28 F.3d 521, 525 (5th Cir. 1994). The description of a policy or custom and its relationship to the underlying constitutional violation, moreover, cannot be conclusory, it must contain specific facts. *Spiller,* 130 F.3d at 167.

Plaintiff's response does not address *Spiller,* where the Fifth Circuit held that allegations that a police department had policies of operating "in a manner of total disregard for the rights of African American citizens" and "engag[ing] in conduct toward African American citizens without regard to probable cause to arrest" failed to allege specific non-conclusory facts to demonstrate how these alleged policies were causally connected to the officer's alleged misconduct. *Id.* Plaintiff attempts to distinguish *Crawford v. Caddo Parish Coroner's Office,* 2019 WL 943411, Feb. 25, 2019 (W.D. Louisiana), by arguing that the allegations in *Crawford* were only conclusory, while the Complaint in this case "explains how each of the seven policies have resulted in unconstitutional action." (Doc. 55, p. 3) The problem is that Plaintiff's Second Amended Complaint does not explain factually how APD's alleged policies were the moving force of **Taylor's** alleged unconstitutional action.

Plaintiff's conclusory allegations of moving force causation are clearly insufficient to support a *Monell* claim. Plaintiff makes the conclusory allegation that her son's death "is a direct result of the racism that has permeated policing in Austin," but offers no specific facts to support a claim that the alleged racism was the moving force of her son's death. Plaintiff pronounces that Officer Taylor followed APD's "racist policies," yet alleges no specific, non-conclusory facts which demonstrate that bias or racism played any role in this incident much less was the moving force of the death of Ramos. Plaintiff's Second Amended Complaint points to no action or statement of Officer Taylor or anyone else connected to the Austin Police Department that demonstrates that any "racist culture" of the Austin Police Department was the moving force of Taylor's decision to use deadly force on Ramos.

Similarly, Plaintiff's Second Amended Complaint fails to allege non-conclusory facts demonstrating that the alleged inadequate training was the moving force of the death of Ramos. The only facts alleged in the Second Amended Complaint regarding APD's training are that the City "reorganized and reimagined" the APD Training Academy from a "paramilitary" style training to courses which focus on "diversity, equity and inclusion" and an emphasis on "de-escalation and communication skills." (Doc. 45, pp. 19-20). The Second Amended Complaint does not, however, allege specific non-conclusory facts to demonstrate how the alleged training policies were causally connected to Taylor's decision to use deadly force on Ramos. As a result, Plaintiff's claim against the City fails as a matter of law.

B. Insufficient Facts to Establish Inadequate Disciplinary Policies were the Moving Force of the alleged Constitutional Violation.

To prevail on a failure to discipline claim, Plaintiff must show: (1) the municipality failed to discipline its employees; (2) that failure to discipline amounted to deliberate indifference; and (3) the failure to discipline directly caused the constitutional violations in question. *Deville v.*

Marcantel, 567 F.3d 156, 171 (5th Cir. 2009). A plaintiff must identify the individual supervisor who failed to supervise or discipline and demonstrate that the supervisor had subjective knowledge that the police officer posed a serious risk to commit constitutional violations. *James v. Harris Cty.*, 508 F.Supp.2d 535, 551-52 (S.D. Tex. 2011). Plaintiff has not done so here. Plaintiff's Second Amended Complaint alleges, based solely on a civil complaint filed in another case, that Officer Taylor used deadly force in a separate incident and was not disciplined for that incident. (Doc. 45, pp. 18-19) Plaintiff does not allege that Officer Taylor has been found civilly liable in the other action or that he has been guilty of a criminal offense arising out of a separate incident. Unproven allegations about another incident hardly constitute the specific, non-conclusory allegations required to support a *Monell* claim based on inadequate discipline.

Moreover, Plaintiff's alleged facts also fail to state a claim under Plaintiff's ratification theory. Plaintiff alleges that Officer Taylor was only placed on administrative leave and was not disciplined following either the prior use of deadly force incident or the incident which is the subject of this lawsuit. Plaintiff does not allege that APD's disciplinary process has been completed with regard to either incident. However, even if Plaintiff alleged that the disciplinary process had been completed and no discipline was issue, the mere fact that policymakers failed to take disciplinary action does not prove that they knew of and approved the illegal character of the officers' actions or that the actions accorded with municipal policy. *Allen v. City of Galveston,* 2008 WL 905905 at p. 8 (S.D. Tex. 3-31-08) citing *Milam v. City of San Antonio,* 113 Fed. Appx. 622, 626 (5th Cir. 2004). As set forth in the City's Motion to Dismiss, the facts of this case as alleged in the Second Amended Complaint are not remotely similar to the facts of *Grandstaff* and the other rare few cases in which courts have found ratification claims to be viable.

Plaintiff has not alleged specific facts that Taylor's actions in this case were manifestly

indefensible nor has Plaintiff alleged specific non-conclusory facts to support a theory that APD's review of the incident and lack of discipline demonstrates that the officer's alleged actions accorded with municipal policy such that the City can be held liable under a theory of ratification. As a result, this claim should be dismissed.

PRAYER

Defendant City of Austin respectfully requests that the Court grant its Motion to Dismiss and dismiss all claims against the City of Austin with prejudice and with all costs assessed to the Plaintiff.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN L. RILEY, LITIGATION DIVISION CHIEF

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this 3rd day of May, 2022.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS *Plaintiff,*	§	
	§	No. 1:20-cv-01256-RP
v.	§	
THE CITY OF AUSTIN and CHRISTOPHER TAYLOR, *Defendants.*	§	JURY DEMANDED

DEFENDANT CHRISTOPHER TAYLOR'S REPLY IN SUPPORT OF THE MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES Defendant, Christopher Taylor (hereinafter "Officer Taylor"), and hereby replies to the response of Brenda Ramos (hereinafter "Plaintiff") for judgment on the pleadings. Pursuant to Federal Rule of Civil Procedure 12(b)(6), Plaintiff's Second Amended Complaint fails to state a claim upon which relief can be granted and should be dismissed.

I. ARGUMENTS AND AUTHORITIES

A. Plaintiff argues that this Court's 12(b)(6) evaluation may not consider "any basis for dismissing Plaintiff's claims that relies on facts not shown on the face of the complaint." This argument is untethered from the case law and ***this Court's*** own jurisprudence. The video evidence is ripe for consideration.

a. This Court may consider the videos because Plaintiff has now attached the videos to both her First Amended Complaint, and now her Second Amended Complaint. They are demonstrably authentic videos of the incident, and Plaintiff utterly failed to articulate her unsubstantiated claim that they have been deceptively edited.

1. Plaintiff desperately wants to hide the videos of the incident from this Court's consideration—because the videos are dispositive, and the content therein demonstrably confers Qualified Immunity to Officer Taylor under *Hathaway* and *Irwin*.[1] Plaintiff consquently dedicates her entire Response to insisting that the videos are beyond this Court's power to review, and argues that this "Court may not consider any basis for dismissing Plaintiff's claims that relies on facts not shown on the face of the complaint or on evidence attached to a defendant's motion."[2]

2. Plaintiff's arguments are simply wrong. In *Walker*, the Fifth Circuit laid out what items a District Court should consider: "(1) the facts set forth in the complaint, (2) ***documents attached to the complaint***, and (3) matters of which judicial notice may be taken under Federal Rule of Evidence 201."[3] ***This Court*** has also explicitly recognized in *Scott* it may consider video evidence during the 12(b)(6) stage that is "attached as an exhibit to the complaint" and that when doing so,

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[1] *Hathaway v. Bazany*, 507 F.3d 312, 321 (5th Cir. 2007); *see also Irwin v. Santiago*, No. 21-10020, 2021 WL 4932988, at *3 (5th Cir. Oct. 21, 2021) ("[the officer] presents, and we have only been able to find, circuit precedent establishing a Fourth Amendment violation where an officer was positioned *behind* a vehicle that was *moving away from him* as he fired.") (emphasis original).

[2] Pl. Resp. to Def. Taylor's 2nd Mot. to Dismiss, pg. 7, Dkt. # 56. (Defendant references the Pacer pagination for the sake of clarity).

[3] *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019) (emphasis added).

"the court is not required to favor plaintiff's allegations over the video evidence."[4] After this video review in *Scott*, this Court partially ***granted*** an officer's motion for judgment on the pleadings on the basis of Qualified Immunity.[5]

3. Plaintiff engages with *Scott* in subsection "B" of her Response. Within, Plaintiff desperately tries to distinguish *Scott* by making the cheeky argument that she ***did not actually*** attach and reference these incident videos "but instead [the videos] were merely referenced in a footnote."[6] This arrant argument is distinction without a difference, and the undersigned cannot think of a better or clearer way to incorporate a video into a complaint than by using a hyperlink to a YouTube video. Nevertheless, Plaintiff goes on to quibble that the videos further cannot be considered because Plaintiff has now suddenly criticized them for being "inauthentic, edited, and incomplete."[7]

4. Plaintiff first incorporated these "critical incident" videos in her First Amended Complaint.[8] Tellingly, the First Amended Complaint was completely uncritical of the videos and made no allegation that the videos were in some way tainted. Now facing the reality of dismissal, Plaintiff's Second Amended Complaint does an about-face and excoriates these videos as deceptively "edited"[9]— and Plaintiff's Responses goes so far as to claim they are not real or are somehow "inauthentic."[10]

5. Yet Plaintiff makes no effort in her response to allege ***why*** or ***how*** the videos are deceptively edited or otherwise unfit for this Court's consideration—and Plaintiff has ***certainly***

[4] *Scott v. White*, No. 1:16-CV-1287-RP, 2018 WL 2014093, *1 (W.D. Tex. April 30, 2018).
[5] *Id*. at *10.
[6] Pl. Resp. to Def. Taylor's 2nd Mot. to Dismiss, pg. 9, Dkt. # 56.
[7] *Id*. at 10.
[8] Pl. 1st Am. Compl. pg. 1, Dkt. # 5.
[9] Pl. 2nd Am. Compl. pg. 17, fn. 9, Dkt. # 45.
[10] Pl. Resp. to Def. Taylor's 2nd Mot. to Dismiss, pg. 10, Dkt. # 56.

not made any competent showing that the videos are somehow not real. Under *Irwin*, the videos do not need to show every conceivable angle from every conceivable body-camera perspective. Instead, under *Irwin*'s jurisprudence, Officer Taylor is entitled to qualified immunity if the relevant footage shows that the APD officers were generally in front of or to the side of Ramos's vehicle when Officer Taylor made the split-second decision to shoot to protect himself or his fellow officers from the vehicle.[11] So long as these moments are captured by the video footage—which they are—this Court can make its Qualified Immunity determination. Plaintiff's arguments for discounting the linked videos are accordingly unsubstantiated in her briefing and unmoored from the case law.

b. In the Fifth Circuit, the Court may consider documents that a Defendant attaches to a 12(b)(6) motion that are referred to in the plaintiff's complaint and are central to the plaintiff's claims. Plaintiff's "admissibility" arguments accordingly lack merit.

6. Plaintiff's dubious claim that she did not attach the incident videos by hyperlinking them does not change the fact that this Court may consider them in its 12(b)(6) analysis. Crucially the Fifth Circuit ***also*** advised in *Walker* that a Defendant may attach documents or evidence to a 12(b)(6) motion if they are central to a plaintiff's claim and referenced in the Complaint. The *Walker* Court held:

> "When a defendant attaches documents to its motion that are referred to in the complaint and are central to plaintiff's claims, the court may also properly consider those documents."[12]

[11] *Irwin*, 2021 WL 4932988, at *3.
[12] *Walker*, 938 F.3d at 735.

The Fifth Circuit went on to note that, in so doing, the Defense is merely assisting the District Court in making the elementary determination if a claim has been stated based on the evidence central to determining if Plaintiff has established the "basis of the suit."[13]

7. Here—no matter which way Plaintiff wishes to split hairs—she certainly referred to the incident videos in her Second Amended Complaint.[14] It is further beyond dispute that the videos depict the incident "central to the plaintiff's claims" of excessive force under the Fourth Amendment.[15] The defense is accordingly well within its rights to explicitly attach and rely on the videos at the other end of the hyperlink referenced by the Plaintiff to debunk her Complaint's unsupported editorialization of the events depicted by the video she continues to reference—and the Court is within its power to consider them.

8. Furthermore, Plaintiff makes clear in her response that these incident videos and recordings—which were released to the public—are the only tangible information and evidence she has regarding the incident to support her claim for a Fourth Amendment violation.[16] These videos are thus Plaintiff's "basis of the suit."[17] Accordingly, Plaintiff's complaints that the videos are "inadmissible" because no affidavit has been filed attesting to their "genuineness" is completely unmoored from the applicable standard.[18] ***It is Plaintiff who cited and referred to these videos***. The Defense merely clipped them and attached them as exhibits—as is the Defense's right under *Walker*.[19] These videos are thus ripe for this Court's review.

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[13] *Id*.
[14] Pl. 2nd Am. Compl. pg. 17, fn. 9, Dkt. # 45.
[15] Pl. 2nd Am. Compl. pg. 24, ¶ 112, Dkt. # 45.
[16] Pl. Resp. to Def. Taylor's 2nd Mot. to Dismiss, pg. 10, Dkt. # 56 (complaining that the public videos are all Plaintiff has to go on because discovery has not yet started in this case).
[17] *Walker*, 938 F.3d at 735.
[18] Pl. Resp. to Def. Taylor's 2nd Mot. to Dismiss, pg. 14, Dkt. # 56.
[19] *Walker*, 938 F.3d at 735.

9. In sum, Plaintiff's Response in opposition dedicates the gravamen of her arguments towards concealing these videos from this Court. Such occlusion is not surprising, because Plaintiff's case crumbles in light of the videos—they demonstrably depict that Officer Taylor is entitled to Qualified Immunity under *Irwin*. In the Fifth Circuit, "[the Court] will not adopt a plaintiff's characterization of the facts where unaltered video evidence contradicts that account."[20]

B. In *Irwin* the Fifth Circuit analyzed a directly on point case to this fact pattern and found that the Officer was entitled to Qualified Immunity. Plaintiff makes no attempt to distinguish this case, she instead asks this Court to hide its eyes from the videos—and take her at her word. This Court should decline Plaintiff's invitation to refrain from considering the video evident she provided.

10. In *Irwin*, Garland City Police Officers got out of their car and approached the decedent's car on foot to investigate after he ran his vehicle off the road.[21] The Fifth Circuit then recounted the facts as follows:

> Officer Santiago was standing "toward the front driver's side" and Officer Roberts was "toward the back driver's side." Neither officer "was positioned directly in front or in the pathway of Irwin's vehicle." Irwin then turned his steering wheel to the right, away from Officer Santiago and toward the sidewalk. He began to "slowly roll his vehicle forward." Officer Santiago was near the left side of the vehicle as it passed by on the curb, while Officer Roberts stood in the roadway to the back of Irwin's vehicle and in the adjacent lane. As Irwin passed near Officer Santiago, having already driven past Officer Roberts, both officers began shooting.[22]

11. Here, the incident video depicts a scene even more fraught than what the Fifth Circuit described in *Irwin*. In the case at hand, officers observed Ramos diving back into his car after the less-lethal impact round failed to secure his arrest.[23] Officers had not yet searched his car and had every reason to believe—based on the 911 call—that Ramos had a gun in the car that officers thought, at the time, he had very recently pointed at his passenger.

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[20] *Thompson v. Mercer*, 762 F.3d 433, 435 (5th Cir. 2014).
[21] *Irwin*, 2021 WL 4932988, at *1.
[22] *Id*. (cleaned up).
[23] **Ex. 3**, *Cantu-Harkless Dash cam*, **10:45 – 10:50**, Dkt. # 49.3.

12. Ten seconds later, and after numerous officers begged him "do not leave"—Ramos drove his car slowly ***forward*** for at least two seconds toward the officers.[24] The first shot happened at 11:02, just as Ramos's car jerked to the right—meaning that the rightward shift in Ramos' car and the first shot happened ***simultaneously***. In this split second, the dash camera of Officer Taveres captured the officers to the left of Officer Cantu-Harkless's Patrol Vehicle ***scrambling*** out of the way of the projected path of Ramos's car had he continued driving straight.[25] The post-incident helicopter view of the area demonstrably shows that ***had Ramos continued going straight and continued accelerating***, he would have barreled between Cantu-Harkless's Patrol Vehicle and the grassy median—directly where officers were standing.[26]

13. Accordingly, the facts depicted by these incident videos, and the facts analyzed by *Irwin*, are entirely comparable for the purposes of Qualified Immunity. In *Irwin*, the Fifth Circuit held:

> Irwin's failure to heed officers' commands to stop, Officer Santiago's position [to the side of the car] and the brief period of time it took for the Officers to perceive and react to the direction of Irwin's vehicle—are not sufficiently analogous to the facts of our cases finding excessive force such that Officer[s] Santiago and Roberts would have been "on notice' that their conduct was unconstitutional. ***Irwin presents, and we have only been able to find*** circuit precedent establishing a Fourth Amendment violation where an officer ***was positioned behind a vehicle that was moving away from him as he fired.***[27]

Accordingly, the *Irwin* Court found that—after applying the *Hathaway* factors—the officers were entitled to Qualified Immunity, and that *Lytle* and *Flores* did not apply because the *Irwin* officers were not "behind" the car when they made the decision to use their firearms.

14. As discussed above, the incident videos ***demonstrably show*** that the APD Officers were not ***behind*** Ramos's Prius when Officer Taylor made the split-second decision to shoot in order to

[24] **Ex. 3,** *Cantu-Harkless Dash cam*, **11:00 – 11:02**, Dkt. # 49.3.
[25] **Ex. 2,** *Taveres Dash cam*, **7:02**, Dkt. # 49.2.
[26] **Ex. 1**, *APD Helicopter Footage*, **00:01**, Dkt. # 49.1.
[27] *Irwin*, 2021 WL 4932988, at *3 (cleaned up) (emphasis added).

stop the moving car that was at most one to two car lengths away. The videos are so clear on this front that "no reasonable jury could" believe Plaintiff's allegation to the contrary.[28] Nevertheless, Plaintiff makes an ill fated attempt to distinguish *Irwin* on this score in the last two paragraphs of her Response.

15. First, Plaintiff claims that *Irwin*'s facts are distinguishable because ***this case*** is like *Lytle* and *Flores*.[29] This assertion is untethered from reality. In *Lytle*, the *Irwin* court noted that "it was assumed for the purposes of summary judgment that the officer shot a vehicle driving away from him that was three to four houses down the block."[30] Similarly, in *Flores*, the *Irwin* court noted that it was undisputed that "a police officer approached a parked car from behind" and "[w]hile at some distance, the car started to pull away and the officer shot it in the rear bumper."[31] Accordingly—in claiming that this case is similar to *Flores* and *Lytle* instead of *Irwin*—Plaintiff Ramos is engaging in the same exact false analogies that failed for the *Irwin* plaintiff.

16. Second, Plaintiff Ramos is similarly loose with her factual interpretation of the incident. For example, in her only attempt to analyze the incident videos in her Response, Plaintiff ***contradicts her own complaint*** in claiming that Officer Taylor was the closest officer to Ramos's car. In her Complaint she acknowledges that Officer Cantu-Harkless was "the closest officer to him."[32] Yet in her Response, Plaintiff's recitation of the video shifts yet again to fit her narrative, claiming that "Taylor was the closest of any officer and he was a substantial distance from the car."[33]

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[28] *Scott*, 2018 WL 2014093, at *1.
[29] *See Lytle v. Bexar County, Texas*, 560 F.3d 4040, 409 (5th Cir. 2009); *see also Flores v. City of Palacios*, 381 F.3d 391, 395, 399 (5th Cir. 2004).
[30] *Irwin*, 2021 WL 4932988, at *3.
[31] *Id*.
[32] Pl. 2nd Am. Compl. pg. 9, ¶ 47, Dkt. # 45.
[33] Pl. Resp. to Def. Taylor's 2nd Mot. to Dismiss, pg. 12, Dkt. # 56.

17. Plaintiff's loose interpretation of both the law and the facts is telling. Plaintiff essentially argues that ***only her word*** matters at this stage of the litigation—not evidence she provided—and she has staked her entire Response on her desperation to keep the incident videos outside of this Court's review. This Court should decline Plaintiff's invitation to do so. As in *Scott*, the videos are ripe for review,[34] and they are dispositive—because they clearly depict that "the projected path of [Ramos's] vehicle was in the officer's direction, at least generally…"[35] Accordingly, Officer Taylor is entitled to Qualified Immunity under *Irwin*.[36]

III. PRAYER

WHEREFORE PREMISES CONSIDERED, Defendant Christopher Taylor respectfully requests that his Motion to Dismiss be in all things granted, and for such other relief, general or special, legal or equitable, to which he may justly be entitled.

Respectfully submitted,

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[34] *Scott*, 2018 WL 2014093, at *1.
[35] *Irwin*, 2021 WL 4932988, at *3.
[36] *Id*.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May, 2022, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail and/or Regular U.S. Mail, in accordance with the Federal Rules of Civil Procedure, as follows:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS	§	
***Plaintiff*,**	§	**No. 1:20-cv-01256-RP**
V.	§	
THE CITY OF AUSTIN AND CHRISTOPHER TAYLOR	§	**JURY DEMANDED**
***Defendants*.**	§	

PLAINTIFF'S MOTION TO STRIKE
OR, IN THE ALTERNATIVE,
PLAINTIFF'S MOTION FOR RELIEF UNDER RULE 56(D)

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I. Summary of Motion

In support of his pending Rule 12(b)(6) Motion to Dismiss (Dkt. No. 49), Defendant Christopher Taylor submitted as evidence three exhibits that fall outside the pleadings. The exhibits in question are three videos designated by Defendant Taylor as Exhibits 1, 2 and 3 (referred to collectively herein as the "Taylor Exhibits"). As shown by expert declaration testimony attached to this motion, the Taylor Exhibits *are not the same videos* that are referenced by URL (and criticized) in footnote 9 of Plaintiff's Second Amended Complaint (Dkt. 45). Instead, the Taylor Exhibits are videos that have been *newly created* by Taylor and/or his legal team for purposes of this litigation. *See* Leiloglou Declaration at ¶5 and ¶¶21-22 (attached to this motion as Exhibit A). These newly created videos appear to have been generated using a "screen-grab" tool by someone who was watching, over an internet connection, the APD "Community Briefing" videos that had been uploaded to YouTube. *See* Leiloglou Declaration at ¶5 and ¶22.

The videos submitted to the Court as the Taylor Exhibits essentially are a copy of a copy of a copy of the original video recordings that depict the shooting of Mike Ramos. *See* Leiloglou Declaration at ¶23. For this reason, the Exhibits cannot be used for a reliable forensic analysis of the events at issue in this lawsuit (the police shooting of Mike Ramos). *See* Leiloglou Declaration at ¶6 and ¶¶23-24. This is especially problematic for Defendant Taylor's Motion to Dismiss, in which he asks the Court to draw inferences regarding the timing of shots fired in relation to the movement of Ramos's vehicle during a 1-2 second interval, *requiring a comparison of audio and video components of the Taylor Exhibits.*[1] But, the integrity of the synchronization of the audio

[1] *See, e.g.*, Dkt. 49 at 2, 9-11, 12 ("Ramos's vehicle started moving at 11:01, and Officer Taylor's *gunshots can be heard* at 11:02.") (emphasis added); Dkt. 63 at 7 ("The first shot happened at 11:02, just as Ramos's car jerked to the right – meaning that the rightward shift in Ramos' car and the first shot happened ***simultaneously.***") (emphasis in original).

and video tracks of the Taylor Exhibits cannot be assured. *See* Leiloglou Declaration at ¶¶7-9, ¶¶19-20 and ¶23. Taylor has submitted no evidence showing that he or his legal team has verified the integrity of the audio / video synchronization. Indeed, he did not submit any evidence to authenticate the newly created Taylor Exhibits at all.

Plaintiff files this Motion to Strike the Exhibits because they fall outside the pleadings and are not appropriate for the Court to consider on a 12(b)(6) motion to dismiss. "If, on a motion under 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion *must be treated as one for summary judgment* under Rule 56." Fed. R. Civ. P. 12(d) (emphasis added). If the Court chooses not to exclude the Taylor Exhibits and instead treats his motion as a Rule 56 motion for summary judgment, then Plaintiff moves in the alternative for relief under Rule 56(d) and requests that the Court delay a ruling on Taylor's pending motion until the parties have engaged in adequate discovery. Plaintiff requests Rule 56(d) relief so that she can obtain all relevant videos of the shooting of Mike Ramos (multiple dashcam, bodycam, and helicopter videos), and conduct a proper forensic analysis of the videos with the assistance of a forensic video expert.

II. Factual and Procedural Background

A. Defendants have not released any of the original video recordings to the pubic or produced any of them to Plaintiff in discovery.

This lawsuit arises from the fatal shooting of Mike Ramos by Austin Police Officer Christopher Taylor on April 24, 2020. *See* Plaintiff's Second Amended Complaint (Dkt. No. 45) at ¶¶8-97. Taylor has been indicted by a Grand Jury on charges of first-degree murder for shooting Mike Ramos, and currently Taylor awaits a criminal trial.

Taylor's shooting of Mike Ramos was captured on video from several cameras at different angles. Multiple police officers with body-worn cameras were present at the time, along with

several police vehicles equipped with dash cameras, and at least one police helicopter overhead.[2] *None* of these videos have been produced to Plaintiff so far in this lawsuit.[3] Defendant Taylor filed a pending Motion to Stay *all* discovery in this lawsuit. (Docket No. 32)

Soon after Mike Ramos was fatally shot, the Austin Police Department publicly released certain "Community Briefing" videos in an effort to provide its own public-relations spin on Mike Ramos's tragic killing. The Community Briefing videos consist of cherry-picked portions of selected videos, along with written and spoken editorial commentary that was added in post-production editing of the videos.

Plaintiff's Second Amended Complaint mentions the Community Briefing videos by referencing the City of Austin website URL where the videos are hosted. *See* Docket No. 45 at p. 17 fn 9. The complaint makes clear, however, that "[t]he videos that are currently publicly available appear to have been edited by APD. And, only some of the videos from certain officers are available. Footage is unavailable at all for officers Krycia, Morgan or Ratcliff. No bodycam has been made available from officers Krycia, Morgan, Tavarez, or Ratcliff. Also, the timestamps are inconsistent, some by more than 3 seconds and one by more than 5 minutes." *See id.*

B. The Exhibits attached to Taylor's Motion to Dismiss are not the same videos that are referenced (and criticized) in Plaintiff's Complaint. The Taylor Exhibits were newly created for this litigation by him or his legal counsel using a "screen-grab" tool.

In his Rule 12(b)(6) Motion to Dismiss, Taylor claims that he (and the Court) can rely upon the publicly-released Community Briefing videos because the videos "have been incorporated by

[2] In his Initial Disclosures, Taylor disclosed that the following additional officers were "on scene of the subject incident": Officer Mitchell Pieper, Officer Darrell Cantu-Harless, Officer Benjamin Hart, Officer James P. Morgan, Officer Karl Krycia, Officer Valarie Tavarez, and Officer Katrina Ratcliff.

[3] Discovery in this case essentially has not yet begun. Plaintiff and Defendant Taylor each have served Initial Disclosures pursuant to Rule 26(a)(1). The City of Austin so far has not even served its Initial Disclosures. Neither of the Defendants have produced any documents in this case, including the numerous video recordings of the shooting of Mike Ramos.

reference for this Court's consideration—and take precedence over the Complaint itself." *See* Taylor's Motion to Dismiss, Dkt. No. 49 at 5-7. *See also* Taylor's Reply in Support of Motion to Dismiss, Dkt. No. 63 at 2-4.[4]

But, the video Exhibits 1, 2 and 3 that Taylor submitted to the Court in support of his Motion to Dismiss (the "Taylor Exhibits") *are not the same videos* that are referenced by website URL in footnote 9 of Plaintiff's Second Amended Complaint. Instead, the Taylor Exhibits are newly created videos that have been generated by a "screen-grab" tool used by someone who was watching the Community Briefing videos through an internet browser over an internet connection. *See* Leiloglou Declaration at ¶5 and ¶22. Plaintiff's forensic video expert, Angelos Leiloglou,[5] was able to reliably conclude that the Taylor Exhibits were newly created using a screen-grab tool based upon the following observations:

- The Taylor Exhibits show a video framed by a web browser window with a "youtube.com" URL in the top address bar of the browser; and each video shows a "YouTube" icon near the top-left corner and a "Search" box to the right of the YouTube logo;
- Each of the Taylor Exhibits shows YouTube overlays for "Like," "Dislike," "Share," etc.; and each video shows an overlay displaying the number of "views" as of July 27, 2020;

[4] Plaintiff's response to the Motion to Dismiss explained why Plaintiff's Second Amended Complaint did not incorporate the Community Briefing videos by reference, in light of the Complaint's specific allegations that these videos have been edited in ways that make them inaccurate, and that the publicly-released videos are incomplete. *See* Plaintiff's Response to Motion to Dismiss, Dkt. No. 56 at 4-7.

[5] Leiloglou is an expert in forensic accident reconstruction and visualization, with extensive experience in forensic video analysis, including cases of police officer-involved shootings. *See* Leiloglou Declaration at ¶2, ¶¶11-12 and Exhibit A.

- Each video shows at the bottom that it has been uploaded to YouTube by accountholder "autintexasgov"; and
- At the beginning of each of the Taylor Exhibit videos, the YouTube controls overly (for play/pause, sound, etc.) are visible at first and then disappear after the first few seconds of each video.

See Leiloglou Declaration at ¶22. None of these YouTube overlays appear in the videos that are embedded in the City of Austin website that is referenced by URL in footnote 9 of Plaintiff's Second Amended Complaint. *See id.*

Based on these facts, Leiloglou states in his declaration: "As a result of my inspection and comparison of these videos, I can reliably conclude that Exhibits 1, 2 and 3 are not the same videos that are referenced in footnote 9 of Plaintiff's Second Amended Complaint. The videos submitted as Exhibits 1, 2 and 3 to the Court appear to have been created by a computer 'screen-grab' tool that generated a new video that displays a portion of the computer screen of a person who at the time was watching the uploaded videos on YouTube through a computer web browser." Leiloglou Declaration at ¶22.

C. Because the audio / video synchronization integrity has not been verified, the Taylor Exhibits cannot be relied upon for a forensic analysis of the Mike Ramos shooting.

In his Motion to Dismiss, Taylor urges the Court to use the Taylor Exhibits to draw certain inferences about the position, direction, and speed of Mike Ramos's vehicle at the exact moment that Taylor fired the fatal gunshots. *See* Taylor Motion to Dismiss, Dkt. No. 49 at 2, 9-11, 12; Taylor Reply in Support of Motion to Dismiss, Dkt. No. 63 at 7. For example, Taylor urges the Court to rely upon the Taylor Exhibits to conclude that "[t]he first shot happened at 11:02, just as Ramos's car jerked to the right – meaning that the rightward shift in Ramos' car and the first shot happened ***simultaneously***." *See* Taylor Reply, Dkt. No. 63 at 7 (emphasis in original). The

inferences urged by Taylor require the Court to rely upon and compare both the video track components of the Taylor Exhibits (to assess the position, direction, and speed of the vehicle) and the audio track components of the Taylor Exhibits (to determine the timing of the gunshots). *See, e.g.* Dkt. No. 49 at 12 ("Ramos's vehicle started moving at 11:01, and Officer Taylor's *gunshots can be heard* at 11:02.") (emphasis added). *See also* Leiloglou Declaration at ¶7.

Like most video recordings, the Taylor Exhibits consist of a video track coupled with one or more audio tracks. To accurately portray the recorded event, the video and audio tracks must be synchronized.[6] A common example of an out-of-sync video would be where a video displays a person speaking, but the audio portion of the video does not match the movement of the speaker's lips. *See* Leiloglou Declaration at ¶16.

Audio / video sync issues may originate from hardware or software issues that affect the camera device that is used to capture the original video recording. *See* Leiloglou Declaration at ¶19. Or, audio / video sync issues may be introduced in various ways after creation of the original video—for example, through manipulation (inadvertent or deliberate), through post-processing, compression / decompression algorithms, and algorithms used to process videos uploaded to YouTube or other online hosting websites. *See* Leiloglou Declaration at ¶¶19-20. It is well-known that videos hosted on YouTube are subject to processing algorithms that can cause the videos to lose synchronization of the audio and video tracks. *See* Leiloglou Declaration at ¶20.

Significantly, the use of a "screen-grab" tool to capture a web-hosted video is not a reliable way to preserve the integrity of the web-hosted recording:

> The screen-grab tool only captures what is displayed on an individual's computer screen, and thus is subject to hardware limitations of the computer being used, internet bandwidth speed limitations, and other technical issues that easily can

[6] For technical background on the separate audio and video tracks that comprise a video recording, and issues related to audio / video track synchronization, *see* Leiloglou Declaration at ¶¶15-20.

> cause the screen-grabbed video to differ significantly from the original video hosted on YouTube. Moreover, the screen-grab tool itself will often have various settings that can affect the captured video output, such as manipulating the video frame rate, resolution or pixel aspect ratio and compression codec, as well as manipulating the audio hertz rates or audio codec settings, etc. The use of a screen-grab tool inherently results in generational loss, which is the loss in quality between subsequent copies of digital data. It can be likened to taking a photocopy of a photocopy. *Significantly, use of a screen-grab tool to capture video from YouTube or other websites can cause video to playback at an inconsistent frame rate and introduce audio/video synchronization issues that will cause the screen-grabbed video to have audio/video synchronization that does not match the synchronization of the original web-hosted video.*

Leiloglou Declaration at ¶6 (emphasis added).

The Taylor Exhibits cannot be relied upon for a reliable forensic analysis of the shooting of Mike Ramos, or to draw the inferences that Taylor urges in his Motion to Dismiss, because the integrity of the audio / video track synchronization has not been verified. *See* Leiloglou Declaration at ¶7 and ¶24. The web-hosted videos on YouTube themselves are not reliable because they are, at best, a third generation copy of the original video recordings. *See* Leiloglou Declaration at ¶23. The use of a "screen-grab" tool to newly-create the Taylor Exhibits introduces additional possibility of synchronization error. *See* Leiloglou Declaration at ¶6.

A reliable forensic video analysis of the Mike Ramos shooting would require verification of the integrity of the audio / video sync of the recordings. *See* Leiloglou Declaration at ¶¶8-10. "This step would be an essential component of any reliable forensic video analysis in this case, given that Defendant Taylor is asking the Court to make factual inferences based upon temporal comparison of information derived from the audio track of the recordings (the timing of the gunshots) against information derived from the video track of the recordings (the speed and orientation of Mike Ramos's car at the exact millisecond of the gunshots)." Leiloglou Declaration at ¶10. With video recordings captured from multiple cameras at different angles, this could

reliably be done by a forensic video expert using known techniques such as spectrographic analysis, cross-correlation and acoustic multilateration. *See* Leiloglou Declaration at ¶17.

But Taylor submitted no evidence to the Court permitting verification of the audio / video sync of the Taylor Exhibits. Indeed, he did not even submit evidence to provide basic authentication of these newly created videos, as required by Fed. R. Evid. 901.

III. Motion to Strike

A. The Taylor Exhibits should be Stricken Under FRCP 12(b)(6) and 12(d).

"A district court is limited to considering the contents of the pleadings and the attachments thereto when deciding a motion to dismiss under Rule 12(b)(6)." *Villarreal v. Wells Fargo Bank, N.A.*, 814 F.3d 763, 766 (5th Cir. 2016). "The court may, however, also consider documents that a defendant attaches to a motion to dismiss if they are referred to in the plaintiff's complaint and are central to her claim." *Id.* (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000)) (internal quotations omitted). "Since the Fifth Circuit initially approved the practice of considering matters attached to a motion to dismiss in *Collins*, Fifth Circuit precedent clearly, unambiguously, and unyieldingly requires a reference to the document within the pleading. . . . Nothing suggests that an implicit reference is sufficient." *O'Malley v. Brown Bros. Harriman & Co.*, 2020 U.S. Dist. LEXIS 37333 at *8-9 (W.D. Tex. March 3, 2020) (collecting Fifth Circuit cases) (internal citations omitted).

When a Rule 12(b)(6) motion to dismiss presents evidence that falls outside the pleadings, the Court is authorized to strike such extrinsic evidence. *See* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to *and not excluded by the court*, the motion must be treated as one for summary judgment under Rule 56") (emphasis added). If the Court chooses not to exclude the extrinsic evidence, then the 12(b)(6) motion to dismiss must be converted to a Rule 56 motion for summary judgment. *See id.*

As shown above, the Taylor Exhibits to his motion to dismiss are not the same Community Briefing videos that a referenced by website URL in footnote 9 of Plaintiff's Second Amendment Complaint (and criticized in the Plaintiff's complaint as being edited, inaccurate, and incomplete). To the contrary, the Taylor Exhibits were newly created by Taylor or his legal team for purposes of this litigation. Unquestionably, Plaintiff's Second Amended Complaint did not incorporate the newly created Taylor Exhibits by reference. Plaintiff therefore urges the Court to exercise its discretion to exclude the Taylor Exhibits (Exhibits 1, 2 and 3 to his Motion to Dismiss).

B. If the Court converts Taylor's motion to dismiss to a Rule 56 motion for summary judgment, the Taylor Exhibits should be excluded under the Rules of Evidence.

"If the Court concludes that the attachment is a matter outside the pleadings and does not exclude it, Rule 12(d) *mandates* that the Court treat the motion to dismiss as one for summary judgment." *O'Malley*, 2020 U.S. Dist. LEXIS 37333 at *7-8. *See also* Fed. R. Civ. P. 12(d). But the district court has "complete discretion" to exclude the matters that fall outside the pleadings or alternatively to covert the motion to dismiss to a summary judgment motion. *See Isquith ex rel. Isquith v. Middle S. Utils., Inc.*, 847 F.2d 186, 193-94 and fn.3 (5th Cir. 1988).

If the Court exercises its discretion to convert Taylor's motion to dismiss to a summary judgment motion, the Taylor Exhibits nonetheless should be struck from the record. Rule 56 authorizes a party opposing a motion for summary judgment to make evidentiary objections to evidence submitted in support of a summary judgment motion. *See* Fed. R. Civ. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.").

The Taylor Exhibits should be excluded from the record on the basis of the following evidentiary objections:

1. **FRE 901 – lack of authenticity.** Taylor failed to submit any evidence that would authenticate the Taylor Exhibits. As discussed above, the Taylor Exhibits were newly-created for purposes of this litigation and are not self-authenticating. As the proponent of the evidence, Taylor bears the burden to submit evidence in support of authentication. *See* Fed. R. Evid. 901(a) ("To satisfy the requirement of authenticating or identifying an item of evidence, *the proponent must produce evidence* sufficient to support a finding that the item is what the proponent claims it is.") (emphasis added).
2. **FRE 106 – lack of completeness.** As previously discussed, Defendants in this case have not produced in discovery *any* of the video recordings of Mike Ramos's shooting. The City of Austin created the Community Briefing videos by cherry-picking selected portions of certain videos, and edited them in ways designed to advance a public relations campaign. The Taylor Videos are a screen-grabbed, degraded copy of the cherry-picked Community Briefing videos. This is insufficient to meet the completeness requirement of Evidence Rule 106, and Plaintiff objects to the Court's consideration of an incomplete video record. *See* Fed. R. Evid. 106 ("If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time.").
3. **FRE 702 – lack of reliability.** Defendant Taylor's motion to dismiss asks the Court to draw forensic inferences from the submitted Taylor Exhibits. Such inferences are more appropriately the subject of expert testimony based upon a reliable forensic analysis of the available evidence, using reliable forensic techniques. For reasons previously discussed, the Taylor Exhibits cannot be used to perform a reliable forensic video

analysis of the shooting of Mike Ramos. *See* Leiloglou Declaration at ¶¶6-10 and ¶¶23-24. Plaintiff objects to consideration of the Taylor Exhibits under Fed. R. Civ. P. 702. *See also Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

4. **FRE 802 – hearsay.** As previously discussed, the submitted Taylor Exhibits have been edited in various ways, including the insertion of written and verbal commentary regarding the events leading up to the shooting of Mike Ramos. The added commentary is not based on personal knowledge of a witness and consists of inadmissible hearsay. Plaintiff objects to such inadmissible hearsay under Fed. R. Evid. 802.

IV. In the Alternative, Motion for Relief Under Rule 56(d)

If the Court chooses to convert Taylor's Motion to Dismiss to a Rule 56 motion for summary judgment, then Plaintiff requests, pursuant to Rule 56(d), that the Court delay a ruling on the motion until the parties have time to engage in discovery. At this time, discovery in the case *has not even begun*. At a minimum, Plaintiff requests an opportunity to obtain all the relevant incident videos (original recordings) in discovery so that Plaintiff can conduct a reliable forensic video analysis with the assistance of a qualified expert. Plaintiff also should have the opportunity to cross-examine by deposition any witness who will offer forensic video testimony on behalf of Defendant Taylor.

Rule 56(d)[7] states:

> (d) 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). "Rule 56(d) motions for additional discovery are broadly favored and should be liberally granted because the rule is designed to safeguard the non-moving party from summary judgment motions that they cannot adequately oppose." *See Am. Family Life Assur. Co. v. Biles*, 714 F.3d 887, 894 (5th Cir. 2013) (internal quotations and citations omitted).

During discovery, Plaintiff expects to obtain all of the original video recordings of the shooting of Mike Ramos. The original, native recordings are essential for conducting a reliable forensic video analysis. *See* Leiloglou Declaration at ¶¶8-9. With the assistance of a forensic video expert, Plaintiff would be able to verify the integrity of the audio / video synchronization of the recordings. *See* Leiloglou Declaration at ¶10. In addition, Plaintiff's forensic video expert will perform a proximity and temporal analysis of the videos using Photogrammetry and High-Definition 3D Laser Scanning techniques. *See* Leiloglou Declaration at ¶26. These forensic video analysis techniques would permit Plaintiff's expert to accurately measure the distances between the vehicles, the officers, and Mike Ramos's vehicle throughout the incident, along with the path and speed / acceleration of Mike Ramos's vehicle. *See* Leiloglou Declaration at ¶26.

[7] Rule 56 was amended in 2010, and former subsection 56(f) was redesignated as subsection 56(d) without amendment. The 2010 advisory committee notes state that "[s]ubdivision (d) carries forward without substantial change the provisions of former subdivision (f)." *See* Advisory Committee Notes to Rule 56(d), 2010 Amendments. Thus, case law applying the former Rule 56(f) are applicable to current Rule 56(d). *See Stark v. Univ. of Miss.*, 2013 U.S. Dist. LEXIS 145551 at *6-7 (S.D. Miss. Oct. 8, 2013).

Discovery in this case has not even begun. Allowing Plaintiff to conduct the requested discovery is necessary for conducting a reliable forensic video investigation of the shooting of Mike Ramos. Under these circumstances, it would be an abuse of discretion for the Court to deny this request for Rule 56(d) relief, in the event the Court chooses to convert Taylor's Motion to Dismiss to a Rule 56 motion for summary judgment. *See, e.g., Bailey v. KS Mgmt. Servs., L.L.C.*, __ F. 4th __, 2022 U.S. App. LEXIS 14510 at *6, 2022 WL 1672850 (5th Cir. May 26, 2022) (finding abuse of discretion in denial of Rule 56(d) motion); *Hinojosa v. Johnson*, 277 Fed. Appx. 370, 378-79 (5th Cir. 2008) (same). "Our court generally assesses whether the evidence requested would affect the outcome of a summary judgment motion and has found an abuse of discretion where it can identify a specific piece of evidence that would likely create a material fact issue." *Bailey*, __ F.4th __, 2022 U.S. App. LEXIS 14510 at *6, 2022 WL 1672850.

Rule 56(d) also authorizes the Court to simply deny the motion on the grounds that Plaintiff has not had an opportunity for adequate discovery to oppose the motion. Plaintiff does not oppose the Court denying Taylor's pending motion altogether pursuant to Rule 56(d)(1).

V. Conclusion

For the foregoing reasons, Plaintiff requests that the Court strike Exhibits 1, 2 and 3 to Defendant Taylor's pending Motion to Dismiss (Dkt. No. 49). In the alternative, if the Court chooses to convert Taylor's Motion to Dismiss to a Rule 56 motion for summary judgment, the Plaintiff requests relief under Rule 56(d) so that Plaintiff has an opportunity to conduct appropriate discovery to oppose the converted motion.

Dated: June 8, 2022

Respectfully submitted,

HENDLER FLORES LAW, PLLC

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF CONFERENCE

I certify that I conferred with counsel for defendant Christopher Taylor on June 6, 2022 via email and on June 8, 2022 via telephone. Counsel for defendant Taylor is opposed to this motion.

/s/ Donald Puckett
Donald Puckett

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed via the court's CM/ECF system on June 8, 2022 which will serve all counsel of record.

/s/ Donald Puckett
Donald Puckett

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Brenda Ramos, On Behalf Of Herself and The Estate of Mike Ramos	§	
Plaintiff,	§	
	§	**Civil Action No. 1:20-cv-01256-RP**
v.	§	
	§	
The City of Austin and Christopher Taylor,	§	
Defendants.	§	

DECLARATION OF EXPERT ANGELOS LEILOGLOU

I. Introduction

1. My name is Angelos Leiloglou. I am over the age of eighteen (18), have never been convicted of a felony, and I am otherwise legally competent to make this affidavit and provide the testimony herein.

2. I am the Founder and Principal 3D Forensic Analyst at Forensic Viz, LLC, a company I started in February 2020. I was previously the Director of Visualization at Knott Laboratory, LLC and I have approximately 19 years of experience performing forensic analysis and visualization, including 8 years of video analysis, as discussed in more detail below. I am frequently asked to perform forensic video work as a consulting or testifying witness in civil and criminal cases (including substantial experience in cases that involve police officer shootings).

3. I have been retained as an expert witness by the law firm Hendler Flores Law on behalf of the Plaintiff Brenda Ramos for purposes of this case. Hendler Flores has agreed to pay Forensic Viz, LLC my standard hourly rates for all forensic video work I perform related to this case. My standard hourly rates are $250 per hour for forensic video investigation and analysis, and $350 per hour for time spent testifying live in a deposition or court hearing.

EXHIBIT A

4. To date, the scope of my assignment has been very narrow. I have been asked to consider three videos that Defendant Christopher Taylor submitted to the Court as Exhibits 1, 2 and 3 to his Motion to Dismiss Plaintiff's Second Amended Complaint (Docket No. 49), and to provide declaration testimony on the following questions:

- Are the videos submitted as Exhibits 1, 2 and 3 to Docket No. 49 the same videos that are referenced by URL link in footnote 9 on page 17 of Plaintiff's Second Amended Complaint (Docket No. 45)? If not, what are the differences?
- Would an expert in the field of forensic video analysis rely upon the videos designated as Exhibits 1, 2 and 3 to Docket No. 49, alone, for conducting a forensic video analysis of the shooting of Mike Ramos and/or to draw the specific factual inferences that Defendant Christopher Taylor urges the Court to make from the videos, as stated in Taylor's Motion to Dismiss?
- What additional materials, if any, would a forensic video expert require in order to conduct a reliable forensic video investigation of the shooting of Mike Ramos; and what additional steps, if any, would such an expert take to conduct a reliable forensic investigation of the shooting of Mike Ramos?

II. Summary of Testimony and Opinions

5. The videos submitted as Exhibits 1, 2 and 3 to Taylor's Motion to Dismiss (Docket No. 49) are not the same videos that are hosted on the City of Austin website and referenced by URL in footnote 9 on page 17 of Plaintiff's Second Amended Complaint. The videos submitted as Exhibits 1, 2 and 3 to the Court appear to have been created by a computer "screen-grab" or "screen-capture" tool that generated a new video that displays a portion of the computer screen of

a person who at the time was watching the uploaded videos on YouTube through a computer web browser.

6. A screen-grab tool is not a reliable way to download or capture a video that has been uploaded to YouTube or that is hosted on an internet website. The screen-grab tool only captures what is displayed on an individual's computer screen, and thus is subject to hardware limitations of the computer being used, internet bandwidth speed limitations, and other technical issues that easily can cause the screen-grabbed video to differ significantly from the original video hosted on YouTube. Moreover, the screen-grab tool itself will often have various settings that can affect the captured video output, such as manipulating the video frame rate, resolution or pixel aspect ratio and compression codec, as well as manipulating the audio hertz rates or audio codec settings, etc. The use of a screen-grab tool inherently results in generational loss, which is the loss in quality between subsequent copies of digital data. It can be likened to taking a photocopy of a photocopy. Significantly, use of a screen-grab tool to capture video from YouTube or other websites can cause video to playback at an inconsistent frame rate and introduce audio/video synchronization issues that will cause the screen-grabbed video to have audio/video synchronization that does not match the synchronization of the original web-hosted video.

7. In Defendant Taylor's motion to dismiss, he asks the Court to view the submitted videos and draw certain inferences about what happens during an approximately two-second time frame. Taylor's suggested inferences require the Court to consider both the audio and video portions of the submitted videos. For example, Taylor argues: "The first shot happened at 11:02, just as Ramos's car jerked to the right – meaning that the rightward shift in Ramos' car and the first shot happened ***simultaneously***." (Docket 63 at page 7, emphasis in original.) It is my opinion that no qualified forensic video expert would rely upon the submitted video Exhibits 1-3, standing

EXHIBIT A

alone, to reach this conclusion (and other similar conclusions urged by Defendant Taylor), and that doing so would not be considered a reliable methodology by other experts in the field of forensic video analysis.

8. First, in order to perform the most fair and accurate analysis of any video, it is important to have the original/native file. A proper forensic video analysis, for the specific inferences urged by Taylor, would require a careful analysis of the authenticity and integrity of the original videos and specifically the audio/video synchronization for each of the videos. I am unaware of any information suggesting that Taylor or his legal team have performed any analysis of the synchronization integrity. The evidence provided to the Court is not sufficient to permit the Court to confirm the synchronization integrity of the videos on its own. In fact, it would be very difficult (or perhaps even impossible) for a skilled forensic video expert to verify the synchronization integrity of the videos standing alone, without the benefit of additional video that captures the same events from other cameras at other angles.

9. To conduct a reliable forensic video analysis of the shooting of Mike Ramos, I would expect to review the original video recordings of the events from multiple angles captured from different cameras, if multiple video recordings exist. I have been informed that, in all likelihood, there are multiple officer body-worn camera videos, multiple vehicle dash-cam videos, one or more helicopter videos, and possibly civilian witness camera videos that all capture the events from different perspectives. Any forensic video investigation that did not take into consideration all available video sources would, for that reason alone, be considered unreliable by experts in this field.

10. Using multiple video sources, I (and other forensic video experts) would be able to use various techniques to verify the integrity of the audio/video sync for each video. This step

would be an essential component of any reliable forensic video analysis in this case, given that Defendant Taylor is asking the Court to make factual inferences based upon a temporal comparison of information derived from the audio track of the recordings (the timing of the gunshots) against information derived from the video track of the recordings (the speed and orientation of Mike Ramos's car at the exact millisecond of the gunshots).

III. Background and Qualifications

11. My CV is attached to this declaration as Exhibit A.

12. I have almost 20 years of extensive experience and expertise in forensic accident reconstruction and visualization. I have taught the principles of perspective and photogrammetry at the university level in the School of Architecture at Texas A&M University. I have presented and published numerous peer-reviewed papers on the topics of Photogrammetry, LiDAR technology and video analysis. I am an affiliate member of the National Academy of Forensic Engineers, a member of the International Association of Forensic and Security Metrology, National Association of Professional Accident Reconstruction Specialists, Society of Automotive Engineers, IEEE – Member of Computer Society on Visualization and an Associate member of the Audio Engineering Society. I have contributed to a book on documenting and preserving Officer-Involved Shooting Scenes. I have presented at numerous technical conferences and seminars on the topics of the reconstruction of incidents captured on video, including officer-involved shootings, body worn cameras, dash cameras, etc. I have worked on and am currently involved in many officer-involved shooting cases.

IV. Materials Considered

13. For purposes of considering the questions set forth in Paragraph 4 above and to allow me to provide this declaration testimony, counsel for Plaintiff provided me with (and I have relied upon) the following materials:

- Plaintiff's Second Amended Complaint (Docket No. 45);
- Defendant Taylor's Motion to Dismiss (Docket No. 49);
- Video Exhibits 1, 2 and 3 to Taylor's Motion to Dismiss (Docket Nos. 49-1, 49-2, and 49-3);
- Plaintiff's Response to Taylor's Motion to Dismiss (Docket No. 56); and
- Defendant Taylor's Reply on Motion to Dismiss (Docket No. 63).

14. On my own, I accessed and viewed the videos hosted at the following website URLs:

- https://www.austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020 (cited in Docket No. 45 at page 17, fn. 9) (multiple videos embedded on this page);
- https://www.youtube.com/watch?v=i9NPpWePa7Q (URL of video embedded on City of Austin website, as hosted on YouTube);
- https://www.youtube.com/watch?v=UAZZUO7FK3c (URL of video embedded on City of Austin website, as hosted on YouTube);
- https://www.youtube.com/watch?v=r6hYDpaI5s8 (URL of video embedded on City of Austin website, as hosted on YouTube).

V. Technical Background on Audio/Video Synchronization

15. A digital video recording is typically made up of two components: video and audio. The video component is called the video track and is simply a sequence of images (frames)

captured and played or displayed at a certain frequency. Video frequency is typically called frame rate and is described in frames per second (fps). The audio component is the sound that is captured along with the video, either by the microphone(s) on the source camera or some other external microphone. That sound or audio is captured separately as an audio track. The frequency or rate that audio is recorded and played at is called the sample rate and is measured in kilohertz (kHz). A video file may include a number of audio tracks (i.e., Left and Right).

16. Audio and video synchronization refers to the relationship of the timing between what is heard and what is seen when playing a video. More specifically it is the temporal relationship between the video track and the audio track(s). A common example of the lack of synchronization (desynchronization) is when you play a video and see a person's lips moving but the sound of what that person is saying (what you hear the person saying) does not line up with what you see their mouth saying. This is particularly a problem when attempting to analyze the timing of events of an incident based on the audio in instances when the source of a sound (i.e. an officer or a gunshot) is not seen in the video frame.

17. Where forensic analysis requires temporal comparison of audio and video portions of a video recording, the synchronization of the video and audio tracks must be confirmed. An out-of-sync video cannot reliably be used as is. In order to confirm the synchronization of the audio and video tracks of a video (or to accurately synchronize an out-of-sync video), an expert forensic video analyst can use known forensic techniques such as spectrographic analysis, cross-correlation and acoustic multilateration methods between multiple videos that recorded the incident from different positions.

18. Different video recording devices have different physical configurations and capabilities that give them varying degrees of ability to capture multi-track audio. Also, many

devices have settings that allow a user to manipulate the number of audio tracks captured, or to manipulate the quality of the captured video (resolution, frame rate, compression, audio codec, lossy versus lossless, etc.).

19. Synchronization issues can occur during the initial creation of the original video file due to camera settings or hardware issues, or be introduced later through: manipulation (inadvertently or deliberately), post-processing, compression/decompression algorithms, as well as algorithms used to process videos uploaded to YouTube and other online video hosting websites.

20. A simple Google search for "YouTube audio out of sync" will show that it is well known that videos uploaded, processed and hosted on YouTube often have audio and video tracks that are out-of-sync. As an example, I would point to the following articles or posts as accurately describing the ways in which YouTube applies processing algorithms to uploaded videos that alters the videos in various ways, including potential sync issues with the audio and video tracks:

- https://blog.google/products/youtube/what-does-youtube-do-your-video-after-you-upload-it/ (last visited June 3, 2022);
- https://support.google.com/youtube/answer/58134?hl=en&ref_topic=2888603 (last visited June 3, 2022);

VI. Discussion of Videos Designated Exhibits 1, 2 and 3

21. I visually inspected Exhibits 1, 2 and 3 and compared them to the web-hosted videos on the City of Austin website and YouTube.

22. As a result of my inspection and comparison of these videos, I can reliably conclude that Exhibits 1, 2 and 3 are not the same videos that are referenced in footnote 9 of Plaintiff's Second Amended Complaint. The videos submitted as Exhibits 1, 2 and 3 to the Court appear to

have been created by a computer "screen-grab" tool that generated a new video that displays a portion of the computer screen of a person who at the time was watching the uploaded videos on YouTube through a computer web browser. This conclusion is apparent from a simple visual inspection and comparison of the videos. Exhibits 1, 2 and 3 each show a video that is framed by a full web browser window with a "youtube.com" URL in the top address bar of the browser. Each video shows a "YouTube" icon near the top-left corner with a "Search" box to the right of the YouTube logo. Each video shows YouTube overlays for "Like," "Dislike," "Share," etc. Each video shows an overlay for the number of "views" as of July 27, 2020; and each video shows at the bottom that it has been uploaded to YouTube by accountholder "austintexasgov." None of these YouTube overlays appear in the original videos embedded on the City of Austin URL referenced in footnote 9 of Plaintiff's Second Amended Complaint and hosted on YouTube. It thus appears that the videos submitted to the Court have been generated by a computer "screen-grab" tool that generated a new video of someone watching the uploaded YouTube videos through a computer web browser. This is confirmed by close inspection at the beginning of each video, the YouTube controls overlay (play/pause, sound, settings, full screen buttons, etc.) at the bottom of the video is visible at first and then disappears in the first few seconds of each video. This is consistent with use of a screen-grab tool that is activated as the intended video capture is subsequently initiated in the web browser.

23. Furthermore, it is important to understand that the "original web-hosted video" in itself, includes generational loss because it is at minimum a 3rd generation copy of the original file captured by the source video camera (body worn camera or dash camera). To summarize, the videos submitted as Exhibits 1, 2 and 3 to Taylor's Motion to Dismiss (Docket No. 49), are a product of the following simplified steps: 1) acquisition – video captured by a source camera and

digitally stored on some form of digital storage medium (i.e. disc or computer hard drive); 2) Post Processing – the digital video is altered, edited, amended, with processes including resizing, redaction, clipping, adding titles, time-stamps, composited, etc.; 3) Uploading to YouTube – a very complex automated process in which algorithms are used to make many things happen, including format conversion, compression which all diminish the quality of the video; and finally, 4) the videos were captured by a screen-grab tool which further diminished the quality and integrity of the original video evidence captured by the source camera.

24. Because of the diminished quality of Exhibits 1, 2 and 3, and because the integrity of the audio/video synch has not been verified, these videos cannot reliably be used for a forensic analysis of the shooting of Mike Ramos, and they cannot reliably be used to draw the inferences and conclusions that Officer Taylor urges the Court to make in his Motion to Dismiss.

VII. Discussion of Reliable Forensic Video Investigation Techniques

25. In order to perform fair and accurate video analysis I would expect to be provided with and to consider any and all available video and audio files in their original form captured by any and all, officer body worn cameras, dash cameras, helicopters, drones, cell phones, surveillance cameras, etc.

26. In addition to confirming the audio and video synchronization of the original video using the techniques mentioned above, I would use Photogrammetry along with High-Definition 3D Laser Scanning technology, also referred to as Light Detection and Ranging (LiDAR) to perform proximity and temporal analysis on the provided video. Photogrammetry[1] is the science of obtaining reliable measurements from photographs or images; and is based on the principles of perspective and an area of math called projective geometry which were developed by scientists

[1] A video is simply a sequence of images and the application of Photogrammetry on a video is sometimes called Videogrammetry.

and artists like Michelangelo, Albrech Durer, Leonardo Davinci, and Leon Battista Alberti in the 1400s. Today the technology of LiDAR has given forensic scientists the ability to use Photogrammetry to accurately extract three-dimensional information from photographs and videos. Applying Photogrammetry, I would be able to accurately measure the distances between the vehicles, the officers, and the decedent throughout the incident. Furthermore, I would also be able to accurately determine the path and speed/acceleration of the Prius.

VIII. Conclusion

27. I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge. If called to testify under oath in court, I would provide the same testimony as set forth above.

Signed: 

Angelos G. Leiloglou, M. Arch.

Date: 6/3/2022

EXHIBIT A

EXHIBIT 1

ANGELOS G. LEILOGLOU, M. ARCH.

EDUCATION:

Master of Architecture, Texas A & M University, College Station, Texas
Bachelor of Environmental Design, Texas A&M University, College Station, Texas

EXPERIENCE:

Founder and Principal 3D Forensic Analyst, Forensic Viz, LLC, 2020 to present
Director of Visualization, Knott Laboratory, LLC, 2010 to 2020
Contract Forensic Animator, 2003-2010
Lecturer, College of Architecture, Texas A&M University 2002-2003
Faculty Member & Curriculum Developer, Design and Technology Academy, 1999-2002

FORENSIC VISUALIZATION & ACCIDENT RECONSTRUCTION:

Mr. Leiloglou produces advanced, state of the art, computer visualizations and sophisticated trial graphics for complex motor vehicle accidents, construction and industrial accidents and Officer Involved Shootings, based on forensic science. His visualizations and graphics have been admitted in Federal and State courts all over the United States. Mr. Leiloglou has collaborated with engineers on hundreds of vehicle accident reconstruction, industrial accidents, and shooting incidents, specializing in photogrammetric analysis of accident scene evidence including surveillance video, body worn cameras, and dash cameras to perform vehicle and pedestrian tracking for spatial and speed analysis.

His extensive experience and expertise include the areas of:

- Photogrammetry, videogrammetry, photo matching and matchmoving (camera tracking).
- Audio/Video Forensic Analysis
- Computer generated 3D modeling and animation, lighting, texturing and visual graphics.
- Night-time visibility and lighting simulation and analysis.
- Applications of motion capture technology for human motion and biomechanical analysis.
- High-Definition 3D Laser scanning - LiDAR.
- Drone/UAV 3D Mapping – FAA Part 107 – Commercial Pilot sUAS Certification
- DICOM 3D Visualizations

RESEARCH AND TEACHING:

Mr. Leiloglou taught various courses at the university level including, Design Communications and Architectural Design at the College of Architecture at Texas A&M University. During his academic career, Mr. Leiloglou researched in the areas of web-based interactive design and collaboration, and utilizing digital design tools and methods for conceptual design. While conducting research, Mr. Leiloglou continued to develop his expertise as follows:

- As a faculty member, he was part of a team that created and developed a specialized program called the Design and Technology Academy, which focused on the merging of design and digital technologies as a catalyst for holistic learning.
- He designed the curriculum for and taught Advanced Animation, Virtual Architecture and Electronic Media courses at the Design and Technology Academy.
- Mr. Leiloglou led a team commissioned to produce an interactive simulation depicting the user experience and community impact of a proposed light rail transit system in San Antonio, Texas.

PROFESSIONAL AFFILIATIONS:

IAFSM - International Association of Forensic and Security Metrology
NAPARS - National Association of Professional Accident Reconstruction Specialists
SAE - Society of Automotive Engineers
IEEE - Member of the Computer Society on Visualization
AES - Audio Engineering Society

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EXHIBIT A

PUBLICATIONS

1. Richard M. Ziernicki, Martin E. Gordon, Steve Knapp, and Angelos G. Leiloglou. "The Application of Matchmoving for Forensic Video Analysis of a Fatal Sprint Car Accident. Part I." Journal of the National Academy of Forensic Engineers. Vol. 38, No. 1, June 2021.
2. Richard M. Ziernicki, Martin E. Gordon, Steve Knapp, and Angelos G. Leiloglou. "The Application of Matchmoving for Forensic Video Analysis of a Fatal Sprint Car Accident. Part II." Journal of the National Academy of Forensic Engineers. Vol. 38, No. 1, June 2021.
3. Richard M. Ziernicki, William H. Pierce, and Angelos G. Leiloglou. "Forensic Engineering Analysis of Projectile Thrown from Phantom Vehicle." Journal of the National Academy of Forensic Engineers. (January 2021).
4. Richard M. Ziernicki, Angelos G. Leiloglou, Taylor Spiegelberg, and Kurt Twigg. "Forensic Engineering Application of Matchmoving Process." Journal of the National Academy of Forensic Engineers. (December 2018).
5. Richard M. Ziernicki and Angelos G. Leiloglou. "Newest Technologies Utilized in the Reconstruction of an Officer Involved Shooting Incident." Journal of the National Academy of Forensic Engineers. Vol. 34, No. 2, December 2017.
6. Richard M. Ziernicki, William H. Pierce and Angelos G. Leiloglou. "Advanced Forensic Engineering Analysis of a School Bus/Tractor Trailer Crash." Journal of the National Academy of Forensic Engineers. Vol. 33, No. 1, June 2016.
7. Richard M. Ziernicki, William H. Pierce and Angelos G. Leiloglou. "Forensic Engineering Usage of Surveillance Video in Accident Reconstruction." Journal of the National Academy of Forensic Engineers. (Dec. 2014).
8. Richard M. Ziernicki and Angelos G. Leiloglou. "New Technologies in Expert Opinion Preparation in the USA." Proceedings of XIII Bi-annual conference, Problems of Reconstruction of Road Accidents. Zakopane, Poland. (September 2013).

Book Contribution

Leiloglou, Angelos. (2020) Chapter 15 – Documenting Officer-Involved Shooting Scenes. In: Galvin, Robert. *Crime Scene Documentation—Preserving the Evidence and the Growing Role of 3D Laser Scanning*. CRC Press.

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TECHNICAL CONFERENCES AND SEMINARS

1. "Combining Laser Scanners, Drones and Photogrammetry to Reconstruct Incidents Captured on Video" Speaker. FARO: Public Safety and Forensics Summit, Virtual. 10 Dec. 2020.

   https://www.youtube.com/watch?v=TKTejDSGL2M

2. "JFK Assassination: What Modern Forensic Reconstruction Reveals" Speaker. FARO: Public Safety and Forensics Summit, Virtual. 10 Dec. 2020.

   https://www.youtube.com/watch?v=niyDUSF02Zc&t=395s

3. "Forensic Matchmoving – Testing the Single Bullet Theory and Reconstructing the JFK Assassination." Speaker. International Association of Forensic and Security Metrology (IAFSM). Nashville, TN. 25 Feb. 2020.

4. "Forensic Engineering Application of Matchmoving Process." Speaker. National Academy of Forensic Engineers Annual Meeting (NAFE). Phoenix, AZ. 13 Jan. 2018.

5. "Forensic Investigations and Technology." Speaker. National Society of Professional Engineers. Lakewood, CO. 27 Mar. 2015.

6. "Newest Technology in Forensic Investigations." Speaker. Rocky Mountain Health & Safety Conference by Colorado Safety Association (CSA). Westminster, CO. 20 May 2013.

7. "Using Photogrammetry for Forensic Investigations." Construction Safety & Claims Summit. Willis of Colorado. Speaker. Centennial, CO. 12 Sep. 2012.

MEDIA APPEARANCES

1. "Forensic Animation, The JFK Assassination & the Single Bullet Theory." A Thread of Evidence with Dr. Ron Martinelli, America Out Loud, 23 Nov. 2018.

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS	§	
***Plaintiff*,**	§	**No. 1:20-cv-01256-RP**
V.	§	
THE CITY OF AUSTIN AND CHRISTOPHER TAYLOR	§	**JURY DEMANDED**
***Defendants*.**	§	

ORDER ON PLAINTIFF'S MOTION TO STRIKE
OR, IN THE ALTERNATIVE,
PLAINTIFF'S MOTION FOR RELIEF UNDER RULE 56(D)

Before the Court is *Plaintiff's Motion to Strike or, in the Alternative, Plaintiff's Motion for Relief Under Rule 56(d)* (Dkt. No. 66). Having considered the briefs and arguments of the parties, along with the declaration testimony of Plaintiff's forensic video expert Angelos Leiloglou, the Court finds that good cause has been shown in support of Plaintiff's Motion to Strike. The Court finds that Exhibits 1, 2 and 3 that were submitted to the Court by Defendant Christopher Taylor in support of Taylor's Motion to Dismiss (Dkt. No. 49) present matters that fall outside the pleadings and are therefore inappropriate for the Court to consider in deciding Taylor's Rule 12(b)(6) motion to dismiss.

IT IS ORDERED that the Court hereby excludes from consideration Exhibits 1, 2 and 3 to Dkt. No. 49.

SO ORDERED this ___ day of June 2022.

_____
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS, *Plaintiff,*	§	
v.	§	CIVIL ACTION NO. 1:20-cv-01256-RP
THE CITY OF AUSTIN and CHRISTOPHER TAYLOR, *Defendants.*	§	

DEFENDANT CHRISTOPHER TAYLOR'S RESPONSE TO PLAINTIFF'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, PLAINTIFF'S MOTION FOR RELIEF UNDER RULE 56(d)

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES Defendant, Christopher Taylor, and files his response in opposition to Plaintiff's Motion to Strike or, in the Alternative, Plaintiff's Motion for Relief Under Rule 56(d) (Dkt. # 66), and in support thereof would respectfully show the Court as follows:

I. ARGUMENTS AND AUTHORITIES

A. Plaintiff expended money on an expert all for naught. If the Court has any concerns, the simplest solution would be to use the video excerpts as demonstrative guides while formally relying on the original videos Plaintiff incorporated into her Complaint.

1. Once again, Plaintiff desperately wants to suppress the videos of the incident from this Court's consideration, no doubt because the videos are dispositive in terms of conferring Qualified Immunity under *Hathaway* and *Irwin*.[1] In furtherance of her desired suppression, Plaintiff now files what is essentially a clandestine sur-reply without seeking leave of court—a point of contention discussed in more detail *infra*—and even retained a video expert to try to convince this Court that *a video of a spade no longer shows a spade*. Plaintiff's arguments and costs incurred are all for naught. If there are ultimately any concerns—which the defense maintains there should not be—those concerns can be assuaged with available easy solutions that would require no formal reliance on the video excerpts at issue.

2. Pursuant to the 2019 controlling *Walker* decision and other precedents, this Court may consider the attached video excerpts directly without any legal cause for concern because the videos at issue are "referred to in [Plaintiff's] complaint" and are "central to [Plaintiff's] claims".[2] Likewise, Plaintiff's Rule 56 arguments[3] asserting that the inclusion of the video excerpts

[1] *Hathaway v. Bazany*, 507 F.3d 312, 321 (5th Cir. 2007); *see also Irwin v. Santiago*, No. 21-10020, 2021 WL 4932988, at *3 (5th Cir. Oct. 21, 2021) (granting Qualified Immunity because "we have only been able to find [] circuit precedent establishing a Fourth Amendment violation where an officer was positioned *behind* a vehicle that was *moving away from him* as he fired.") (emphasis original).

[2] *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019) ("When a defendant attaches documents to its motion that are **referred to in the complaint** and are **central to the plaintiff's claims**, the court may also properly consider those documents.") (emphasis added); *see also Scott v. White*, No. 1:16-CV-1287-RP, 2018 WL 2014093, *1 (W.D. Tex. April 30, 2018) (**granting a motion for judgment on the pleadings in part based on consideration of video evidence incorporated into the complaint**) (emphasis added).

[3] *See* Pl.'s Mot. to Strike, Dkt. # 66, pgs. 10 – 13.

somehow converts Officer Taylor's motion into a motion for summary judgment, blatantly ignores *Walker* and the many other precedents establishing that materials referenced or incorporated within a Complaint may still be analyzed as part of a Rule 12(b)(6) motion—*not* as a summary judgment.[4]

3. If this Court does have any concerns with relying upon the video excerpts at issue because of—respectfully—pettifogging screen grab concerns or otherwise, there are other avenues that would allow this Court to grant Officer Taylor's Motion without needing to rely on the objected-to video excerpts. Pursuant to controlling Fifth Circuit and Supreme Court precedents, this Court may instead properly rely upon the original incident videos incorporated by Plaintiff directly through her citation and reference of the incident videos contained on a City of Austin website as videos "incorporated into the complaint by reference or integral to the claim, [videos] subject to judicial notice, [videos that are a matter] of public record, [or videos] appearing in the record of the case" when analyzing Officer Taylor's pending 12(b)(6) Motion to Dismiss.[5] If formal reliance on only the original Complaint-incorporated videos is desired, this Court could still utilize the video excerpts as demonstratives for easier viewing and an easier time locating the important moments in the original videos.

4. The undersigned also feels compelled to note that Plaintiff has never formally requested *any* original incident videos from Defendant City of Austin through discovery, despite this case having been on this Court's docket for over one year. Defendant Taylor has not requested any such

[4] The defense incorporates by reference all arguments made within his pending Motion to Dismiss and his Reply brief in support of the same, including but not limited to arguments related to what materials may be considered when ruling on a 12(b)(6) motion. *See* Dkts. # 49 & 63.

[5] *Meyers v. Textron, Inc.*, 540 F. App'x 408, 409 (5th Cir. 2013) (per curiam) (*citing Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (also citing § 1357 Motion to Dismiss Practice Under Rule 12(b)(6)); *see also* FED. R. CIV. P. 10(c) (acknowledging incorporation by reference in federal pleadings).

videos either, but only because his previously-filed motion to stay discovery—as well as any future similar motions—would prohibit him from doing so. However, *nothing* in Officer Taylor's motion to stay or otherwise has ever prohibited Plaintiff from propounding discovery seeking such videos from the City. In that context, Plaintiff's cry of wolf—that the only videos this Court has at its disposal are allegedly edited or unreliable copies—rings hollow. Plaintiff should not be allowed to evade an otherwise unassailable dispositive motion on the basis of video copies being allegedly unreliable while neglecting *to even try* to obtain and provide the original video footage for this Court's review and decision.

B. Plaintiff has filed a clandestine sur-reply while attempting to evade the legal requirement to seek leave from this Court permitting her to do so.

5. Plaintiff's motion to strike was impermissibly filed as a second-bite-at-the-apple rebuttal to video excerpts filed in support of Officer Taylor's motion to dismiss.[6] Plaintiff's lone procedural opportunity to object to the video excerpts at issue was to include them in her Response brief filed on April 26, 2022—***57 days ago from the date of this filing***.[7] Plaintiff lacks any grounds to suggest that she was surprised by the video excerpts—and thus somehow needed time to muster a defense by hiring an expert or otherwise—because Officer Taylor first provided and filed the same exact video excerpts ***over a year and three months prior*** to support the initial iteration of his motion to dismiss.[8]

6. If Plaintiff wanted to object to the video excerpts at issue then she was legally required to do so on or before the deadline for the filing of her Response brief—a deadline which has long

[6] *See* Def. Taylor's 2nd Mot. to Dismiss, Dkt. # 49.
[7] *See* Pl.'s Resp. to Def. Taylor's 2nd Mot. to Dismiss, Dkt. # 56; *see also* W.D. Tex. Civ. R. 7(d)(2) ("A response to [motions other than discovery or case management motions] shall be filed not later than 14 days after the filing of the motion" unless the party is amending the pleading in response to a "first motion" under Rule 12(b)).
[8] *See* Def. Taylor's Mot. to Dismiss, Dkt. # 7.

since passed.[9] Even if she *had* filed her objections and supporting affidavit timely, styling those objections as a motion to strike would have still been impermissibly fatal. "Exhibits attached to a dispositive motion are not 'pleadings' within the meaning of [Rule 7(a)] and are therefore not subject to a motion to strike under Rule 12(f)".[10] Thus, if Plaintiff henceforth intends to stubbornly maintain that her motion to strike is indeed a motion to strike then Plaintiff's motion must fail as an impermissible application of Rule 12(f).

7. The legal reality is that Plaintiff's motion to strike is nothing more than written objections to video excerpts that either (1) were due by the deadline to file her long-since-filed Response brief, or (2) could only otherwise be brought within a sur-reply, assuming all rules and precedents permitting the same were followed. Because her objections and supporting affidavit were not included in her Response brief, Plaintiff's only option now is thus to admit that her new objections—at best—were actually made in a *de facto* sur-reply improperly masked as a motion to strike. As demonstrated *infra*, however, Plaintiff failed to file the required motion for leave to allow her to file her *de facto* sur-reply.

8. Pursuant to Local Rule CV-7(e), "[a] party may file a reply in support of a motion. ***Absent leave of court, no further submissions on the motion are allowed***".[11] Local Rule CV-7(b) requires that a motion for leave be filed in order to request this Court's leave, and that a copy of the proposed sur-reply be attached as an exhibit to the motion for leave.[12] The exhibit containing the proposed sur-reply is not to be filed as a standalone pleading until this Court grants the

[9] *See* W.D. Tex. Civ. R. 7(d)(2).
[10] *Fox v. Michigan State Police Dep't*, 173 F. App'x 372, 375 (6th Cir. 2006); *see also Centex Homes v. Lexington Ins. Co.*, No. 3:13-cv-719-BN, 2014 WL 1225501, at *12 (N.D. Tex. Mar. 25, 2014) (citations omitted) (stating that Rule 12(f) applies only to pleadings as defined in Federal Rule of Civil Procedure 7(a)).
[11] W.D. Tex. Civ. R. 7(e).
[12] W.D. Tex. Civ. R. 7(b).

corresponding motion for leave.[13] Here, Plaintiff impermissibly filed her *de facto* sur-reply as a standalone motion with no corresponding motion for leave, rendering her *de facto* sur-reply procedurally fatal.[14]

C. Even if she had sought leave of court, Plaintiff would still fail to meet the legal burden to permit filing a sur-reply.

9. Even if she *had* requested the required leave, her motion for the same would still be doomed to fail because the circumstances of her *de facto* sur-reply fail to satisfy the legal burdens of "good cause" and "extraordinary circumstances". "Sur-replies are heavily disfavored in the Fifth Circuit".[15] This Court has consistently held that "[a]s a general practice, neither the Federal Rules of Civil Procedure nor the local rules of this Court permit the filing of a sur-reply".[16] Parties requesting leave to file a sur-reply are expected to "identify the new issues, theories, or arguments which ***the movant raised for the first time in its reply brief***" that would merit the need for a sur-reply.[17]

10. Sur-replies are also only legally permitted when a movant has shown "extraordinary circumstances" and "good cause".[18] In light of the precedents cited *supra*, such legal burden can only be satisfied by demonstrating that the proposed sur-reply explicitly addresses new

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[13] *Ibid*.
[14] *See generally* Pl.'s Mot. to Strike, Dkt. # 66.
[15] *Gonzales v. Hewlett Packard Enter. Co.*, CV 4:18-2527, 2020 WL 7482017, at *5 (S.D. Tex. Dec. 18, 2020) (citing *Warrior Energy Servs. Corp. v. ATP Titan M/V*, 551 F. App'x 749, 751 n.2 (5th Cir. 2014)); *see also Jefferson v. Hosp. Partners of Am.*, *Inc.*, No. CIV. A. H-08-1535, 2009 WL 8758090, at * 6 (S.D. Tex. May 18, 2009).
[16] *Donnelly v. Nissan Motor Co.*, No. 5:19-CV-0882-JKP, 2019 WL 6340153, at *1 (W.D. Tex. Nov. 26, 2019)
[17] *Mission Toxicology, LLC v. Unitedhealthcare Ins. Co.,* 499 F.Supp.3d 350, 359 (W.D. Tex. 2020) (emphasis added).
[18] *Silo Rest. Inc. v. Allied Prop. & Cas. Ins. Co.,* 420 F.Supp.3d 562, 571 (W.D. Tex. 2019) (holding that the movant had "not shown exceptional or extraordinary circumstances that warrant a sur-reply. Nor have they shown good cause for the relief requested.").

information first presented in a reply brief. Here, Plaintiff's *de facto* sur-reply does not respond to *any* "new issues, theories, or arguments" first raised in any reply brief. The video excerpts she now objects to were instead attached to and filed in support of *the initial Motion to Dismiss itself*, and were taken from Plaintiff's own live Complaint.[19] Plainly stated, Plaintiff's objections at issue fail to address—in any way, shape, or form—anything *first raised* in Officer Taylor's Reply brief, and Plaintiff's *de facto* sur-reply should thus be rejected as a matter of law.

11. "The purpose for having a motion, response, and reply is to give the movant the final opportunity to be heard".[20] Plaintiff should be denied a second bite at objecting to video excerpts first cited in Officer Taylor's motion to dismiss—including and especially because Officer Taylor first filed such excerpts ***over a year ago to date***, her deadline to object has long since passed, and because the videos at issue are merely excerpts of videos both referenced within, and explicitly incorporated by, Plaintiff's own Complaint. Officer Taylor respectfully requests that this Court decline to allow Plaintiff to strip him of the "final opportunity to be heard" that the law entitles him to for his motion to dismiss, especially when the heart of the motion is a defense as important as Qualified Immunity, and the corresponding community need for officers to act quickly "rather than stand down and jeopardize community safety".[21]

II. PRAYER

WHEREFORE PREMISES CONSIDERED, Defendant Christopher Taylor respectfully requests that Plaintiff's *de facto* sur-reply in opposition to Defendant's Motion to Dismiss be

[19] *See generally* Pl.'s Mot. to Strike, Dkt. # 66; Def. Taylor's 2nd Mot. to Dismiss, Dkt. # 49.
[20] *Racetrac Petroleum, Inc. v. J.J.'s Fast Stop, Inc.,* No. CIV.A. 3:01-cv-1397, 2003 WL 251318, *21 (N.D. Tex. Feb. 3, 2003).
[21] *See Cole v. Carson,* 935 F.3d 444, 465 (5th Cir. 2019) (Jones, J., dissenting) ("In the wide gap between acceptable and excessive uses of force, however, immunity serves its important purpose of encouraging officers to enforce the law, in 'tense, uncertain and rapidly evolving' split-second situations, rather than stand down and jeopardize community safety.").

denied, that his Motion to Dismiss be in all things granted, and for such other relief, general or special, legal or equitable, to which he may justly be entitled.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT CHRISTOPHER TAYLOR

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of June, 2022, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail and/or U.S. First Class Mail, in accordance with the Federal Rules of Civil Procedure, as follows:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS, *Plaintiff,*	§	
v.	§	CIVIL ACTION NO. 1:20-cv-01256-RP
THE CITY OF AUSTIN and CHRISTOPHER TAYLOR, *Defendants.*	§	

ORDER DENYING PLAINTIFF'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, PLAINTIFF'S MOTION FOR RELIEF UNDER RULE 56(d)

CAME ON this day to be considered, Plaintiff's Motion to Strike or, in the Alternative, Plaintiff's Motion for Relief Under Rule 56(d). After considering said motion and Defendant Taylor's response, the Court is of the opinion that the Motion should be DENIED.

It is therefore, ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Strike or, in the Alternative, Plaintiff's Motion for Relief Under Rule 56(d) (Dkt. # 66) is DENIED.

SIGNED this _____ day of _____, 2022.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS	§	
***Plaintiff*,**	§	**No. 1:20-cv-01256-RP**
V.	§	
THE CITY OF AUSTIN AND CHRISTOPHER TAYLOR	§	**JURY DEMANDED**
***Defendants*.**	§	

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO STRIKE
OR, IN THE ALTERNATIVE,
PLAINTIFF'S MOTION FOR RELIEF UNDER RULE 56(D)

Plaintiff Brenda Ramos files this Reply in support of her Motion to Strike or, in the Alternative, Motion for Relief Under Rule 56(d) (Dkt. No. 66).

I. Summary of Reply

Defendant Taylor's Response (Dkt. No. 67) to Plaintiff's Motion (Dkt. No. 66) is remarkable in that in fails to contest *any* of the substantive points set forth in Plaintiff's motion. Taylor's Response makes *no attempt to deny* that: (1) Taylor's pending Motion to Dismiss (Dkt. No. 49) is premised entirely upon newly-created exhibits that fall outside Plaintiff's pleadings; (2) Defendant Taylor failed to present evidence to authenticate the newly-created exhibits; (3) Defendant Taylor failed to verify the integrity of the audio / video synchronization of either the newly-created exhibits or the videos that are hosted on the City of Austin's website; and (4) none of these videos reliably can be used for a forensic video analysis of the shooting of Mike Ramos or to draw the inferences that Taylor urges in his Motion to Dismiss.

The legal implication of these undisputed facts is that the Court *must* grant the relief requested in Plaintiff's Motion—either striking the newly-created exhibits, or else converting

Taylor's motion to a Rule 56 motion for summary judgment and granting Plaintiff the requested Rule 56(d) relief.

In his Response brief, Taylor argues that Plaintiff's Motion is untimely and an improper sur-reply. Taylor's arguments are incorrect. Under Fifth Circuit authority cited below, a party must be given at least 10 days' notice that the court may convert a Rule 12 motion to dismiss to a Rule 56 motion for summary judgment; and the party opposing the motion may continue to exercise its Rule 56 procedural rights until such time. Indeed, the Fifth Circuit has held that a party may continue to exercise its Rule 56 rights to submit opposing evidence, object to the evidence submitted, and/or move for relief under Rule 56(d) until the Court rules on the converted 12(b)(6) motion. Plaintiff's Motion to Strike and Alternative Motion for Rule 56(d) is merely an exercise of Plaintiff's Rule 56 procedural rights, within the timeframe provided by the rules of procedure and Fifth Circuit precedent.

II. Reply

A. Defendant Taylor's Response Fails to Contest Any of the Essential Points from Plaintiff's Motion.

Plaintiff's Motion asserts that the exhibits attached to Taylor's Motion to Dismiss (the "Taylor Exhibits") are not the same videos that are referenced (and criticized) in footnote 9 of Plaintiff's Second Amended Complaint. *See* Motion (Dkt. No. 66) at 5-7. Plaintiff's Motion further asserts, supported by expert testimony, that the Taylor Exhibits were newly-created using a "screen-grab" tool by Taylor or his counsel. *See id.* Taylor's Response brief does not contest these points.

Plaintiff's Motion asserts that Taylor's pending Motion to Dismiss urges the Court to draw forensic inferences using both the audio and video portions of the Taylor Exhibits. *See id.* at 7-8. Again, Taylor's Response brief does not contest this point.

Plaintiff's Motion asserts that Taylor provided no evidence to authenticate the Taylor Exhibits in any way. *See id.* at 12. Plaintiff's Motion further asserts that Taylor failed to present evidence that would verify the integrity of the audio / video sync for the Taylor Exhibits and/or the videos hosted on the City of Austin website. *See id.* at 9-10. Plaintiff's Motion, supported by expert testimony, explained the ways in which the audio / video sync of any video can become corrupted, and how Taylor's use of a screen-grab tool to create the Taylor Exhibits is especially prone to introducing sync errors. *See id.* at 8-10. Again, Taylor's Response brief does not contest these points.

Plaintiff's Motion, supported by expert testimony, asserts that the Court cannot use the Taylor Exhibits and/or the videos hosted on the City of Austin website for a reliable forensic video examination of the shooting of Mike Ramos, and that the Court cannot use these videos to draw the inferences urged by Taylor in his Motion to Dismiss because the audio / video sync has not been verified. *See id.* at 9-10. Plaintiff's Motion, supported by expert testimony, further explains the technical ways in which an expert would verify the integrity of the audio / video sync and conduct a reliable forensic video examination. *See id.* Again, Taylor's Response brief provides no response to these points.

Plaintiff's Motion asserts specific evidentiary objections to the Taylor Exhibits. *See id.* at 12-13 (asserting evidentiary objections under Evidence Rules 901, 106, 702, and 802). Taylor's Response brief provides no response.

Plaintiff's Motion provides legal authority demonstrating that the Court is compelled to grant either the primary or alternative relief requested in Plaintiff's Motion. More specifically, under Rule 12 the Court *must* either exclude the Taylor Exhibits because they fall outside the pleadings, or else the Court must treat Taylor's Motion to Dismiss as a Rule 56 motion for

summary judgment. *See id.* at 11. If the Court converts Taylor's motion to a Rule 56 motion, it would be an abuse of discretion under the facts of this case to deny Plaintiff's request for Rule 56(d) relief. *See id.* at 15. Taylor's Response brief does not contest any of these points.

As can be seen, Taylor's Response brief tacitly admits each and every substantive point that forms the basis of Plaintiff's Motion (Dkt. No. 66).

B. Taylor's Attempt to Rewrite his own Motion to Dismiss is Improper.

On page 3 of his Response brief, Taylor expressly urges the Court to dismiss Plaintiff's claims on the basis of a rewritten Motion to Dismiss that perhaps he now wishes he had filed. Taylor states that "If this Court does have concerns with relying upon the video excerpts at issue [the Taylor Exhibits] . . . there are other avenues that would allow this Court to grant Officer Taylor's Motion without needing to rely on the objected-to video excerpts." Response (Dkt. No. 67) at 3. "If formal reliance on only the original Complaint-incorporated videos is desired, this Court could still utilize the video excerpts as demonstratives for easier viewing and an easier time locating the important moments in the original videos." *Id.* But Taylor's actual Motion to Dismiss made all of its factual arguments by citation to the newly-created Taylor Exhibits and nothing more. *See* Taylor Motion to Dismiss (Dkt. No. 49) at 9-12. Taylor's attempt to rewrite his motion to dismiss is improper for several reasons.

First, Taylor ignores his own burden of proof, as the proponent of his motion, to establish that Plaintiff's claims should be dismissed. "In considering a motion to dismiss based on Federal Rule of Civil Procedure 12(b)(6), the party moving for dismissal bears the burden of showing that the plaintiff has failed to state a legal claim." *Mandell v. Cent. Refrigerated Serv.*, 2010 U.S. Dist. LEXIS 154520 at *8-9 (W.D. Tex. Jan. 14 2010) (internal quotes omitted) (citing 1 Steven S. Gensler, Federal Rules of Civil Procedure: Rules and Commentary 199 (2009)). *See also Zamora-Quezada v. Healthtexas Med. Group*, 34 F.Supp. 2d 433, 442 (W.D. Tex. 1998) ("[A] defendant

carries a heavy burden when seeking to prove a case should be dismissed for failure to state a claim."). Taylor cannot meet his burden of proof on his own motion by rewriting it after-the-fact.

Second, Taylor's suggestion is an express invitation for the Court, *sua sponte*, to go in search of its own reasons to dismiss Plaintiff's claims, on grounds not stated in Taylor's actual motion to dismiss. A district court may only "dismiss a claim on its own motion as long as the procedure employed is fair. . . . More specifically, fairness in this context requires both notice of the court's intention and an opportunity to respond before dismissing *sua sponte* with prejudice." *Carver v. Atwood*, 18 F.4th 494, 498 (5th Cir. 2021) (internal citations and quotes omitted). *See also Davoodi v. Austin Indep. Sch. Dist.*, 755 F.3d 307, 310 (5th Cir. 2014); *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006). Here, Taylor's invitation for the Court to go in search of the Court's own *sua sponte* grounds for dismissal does not satisfy the procedural requirements of giving Plaintiff notice of the potential grounds for dismissal and an opportunity to respond. Plaintiff filed a response to the grounds stated in Taylor's actual motion to dismiss, and those are the only grounds the Court is permitted to consider at this time.

Third, Plaintiff's Motion to Strike provides reasons, supported by expert testimony, for why the videos hosted on YouTube and imbedded on the City of Austin website are themselves not reliable for forensic video analysis because the integrity of the audio / video sync has not been verified. *See* Motion to Strike (Dkt. 66) at 9 ("The web-hosted videos on YouTube themselves are not reliable because they are, at best, a third generation copy of the original video recordings. *See* Leiloglou Declaration at ¶6."). Taylor's Response does not rebut this critical point.

Fourth, Plaintiff's Second Amended Complaint did not incorporate the web-hosted videos by reference, as Taylor repeatedly suggests. Instead, the videos were referenced in the complaint, and also criticized as being edited, inaccurate, and incomplete. This point was thoroughly briefed

in the parties' respective filings on Taylor's motion to dismiss and Plaintiff will not repeat the arguments here.

C. Plaintiff's Motion is Timely.

In his Response brief, Taylor argues that Plaintiff's Motion to Strike and Alternative Motion for Rule 56(d) relief was not timely filed, and that Plaintiff's Motion is an improper sur-reply on Taylor's own Motion to Dismiss. *See* Response (Dkt. No. 67) at 4-7. Taylor's arguments are incorrect.

When a district court chooses to exercise its discretion to accept matters outside the pleadings and convert a Rule 12(b)(6) motion to dismiss as a Rule 56 motion for summary judgment, the Fifth Circuit mandates that the district court must comply strictly with Rule 56's procedural requirements. *See Snider v. L-3 Communs. Vertex Aero, L.L.C.*, 946 F.3d 660, 667 (5th Cir. 2019) (district court "must comply strictly" with Rule 56 on a converted motion to dismiss); *Isquith ex rel. Isquith v. Middle S. Utils.*, 847 F.2d 186, 195 (5th Cir. 1988) ("[W]henever a motion to dismiss is converted into a motion for summary judgment, the non-movant is entitled to the procedural safeguards of Rule 56." (internal quotes omitted). *See also Clark v. Tarrant County*, 798 F.2d 736, 745 (5th Cir. 1986); *In re Hailey*, 621 F.2d 169, 171-72 (5th Cir. 1980); *Capital Films Corp. v. Charles Fries Productions, Inc.*, 628 F.2d 387, 391-92 (5th Cir. 1980); *Underwood v. Hunter*, 604 F.2d 367, 369 (5th Cir. 1979).

Rule 56 requires the district court give a party "notice and a reasonable time to respond" before granting a motion for summary judgment. *See* Fed. R. Civ. P. 56(f). In the context of a converted Rule 12(b)(6) motion to dismiss, the Fifth Circuit has held: "Interpreting this requirement, we have said that parties must have ten days to submit additional evidence *once they are put on fair notice that a court could properly treat a Rule 12(b)(6) motion as one for summary judgment*." *Snider*, 946 F.3d at 667 (emphasis added, internal quotes omitted). Parties are not put

on "fair notice" that a 12(b)(6) motion could be converted until "they know a district court *has accepted matters outside the pleadings* for consideration on a Rule 12(b)(6) motion." *Id*.

In this case, Plaintiff has not received notice that the Court will or could convert Taylor's Rule 12(b)(6) motion to dismiss to a Rule 56 motion for summary judgment. Taylor has done no more than file his motion to dismiss, without alerting the Court or Plaintiff that the Exhibits attached to his motion are not even the same videos that are referenced (and criticized) in Plaintiff's Second Amended Complaint. The Court has provided no notice that it will or may exercise its discretion to accept the extrinsic Taylor Exhibits and convert Taylor's motion to a summary judgment motion. Thus, under *Snider*, Plaintiff is still within her rights to submit evidence opposing Taylor's motion if it is converted to a summary judgment motion, making evidentiary objections as allowed by Rule 56, and requesting relief under Rule 56(d). Indeed, the Fifth Circuit has held that even after a party receives notice that a 12(b)(6) motion may be converted to a Rule 56 motion, the party may continue to exercise its procedural rights under Rule 56 until the Court rules on the motion. *See, e.g., Clark*, 978 F.2d at 745-46 (noting that a party failed to exercise its Rule 56 procedural rights for more than 16 months after the district court *held a hearing* on a converted 12(b)(6) motion to dismiss).

Plaintiff's Motion to Strike and Alternative Motion for Relief Under Rule 56(d) is not untimely. The motion is simply an exercise of Plaintiff's Rule 56 procedural rights, within the time frame permitted by the rules of procedure and Fifth Circuit precedent.

III. Conclusion

For the reasons stated in the motion and this reply, Plaintiff's Motion to Strike or Alternative Motion for Relief Under Rule 56(d) (Dkt. No. 66) should be granted.

Dated: June 29, 2022

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed via the court's CM/ECF system on June 29, 2022 which will serve all counsel of record.

/s/ Donald Puckett
Donald Puckett

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, *on behalf of herself and the Estate of Mike Ramos*, Plaintiff, v. CHRISTOPHER TAYLOR and THE CITY OF AUSTIN, Defendants.	§ § § § § § § § § § §	1:20-CV-1256-RP

ORDER

Before the Court is a motion to dismiss filed by Defendant City of Austin ("City of Austin" or "the City"), (Dkt. 47), a motion to dismiss filed by Defendant Christopher Taylor ("Taylor"), (Dkt. 49), and a motion to strike filed by Plaintiff Brenda Ramos ("Plaintiff"), (Dkt. 66). Having considered the parties' briefs, the record, and the relevant law, the Court will deny Taylor's motion to dismiss, moot Plaintiff's motion to strike, and grant the City's motion in part and deny the motion in part.

I. BACKGROUND

This case arises out of the April 24, 2020, police shooting of Mike Ramos ("Ramos"), a Black and Hispanic resident of Austin. His mother, Brenda Ramos, brought suit against the City of Austin and Austin Police Department ("APD") Officer Christopher Taylor, (2d. Am. Compl., Dkt. 45), and alleges the following facts:

On April 24, 2022, APD received a muffled, partially unintelligible 911 call reporting two Hispanic people in a car at the Rosemont Apartments at 2601 South Pleasant Valley Road, Austin, Texas. (*Id.* at 2). The operator struggled to understand the caller, whose audio was garbled and sounded as though she was pulling away the phone (*Id.* at 3). The caller stated that the man in the

car was armed, but after repeated questions from the police, the caller clarified that the man in the car was simply holding a gun, not pointing it at anyone. (*Id.*).

Plaintiff alleges that APD should have recognized several factors that made the call suspect. The story changed, there was no threat of imminent harm to anyone, and the description of the people in the vehicles did not match what Ramos was actually wearing when officers arrived. (*Id.* at 4). Plaintiff claims it was a swatting incident—where a caller deliberately reports a fictitious emergency so that police respond and frighten the victims. (*Id.* at 3). Despite the allegedly suspect nature of the call, APD mobilized seven officers, including Defendant Christopher Taylor, to the scene, along with a police helicopter and dog. (*Id.* at 4). The police arrived on the scene and several officers, including Taylor, were armed with semi-automatic rifles. (*Id.*). They blocked the entrance to the parking lots and enclosed the space around Ramos's Toyota Prius. (*Id.*). They then confirmed that Ramos did not have a weapon in his hand or on his person. (*Id.*).

According to the complaint, the officers then got out of their vehicles and aimed their rifles at Ramos and his companion in the Prius. (*Id.* at 5). Taylor was in the center of the cars, aiming his rifle at Ramos. (*Id.*). Officer Pieper, who was still in field training, had previously been told to stay in the car. (*Id.* at 10). However, at the scene, he got out of the vehicle and aimed a firearm at Taylor loaded with "less lethal" rounds. (*Id.*). The officers commanded Ramos to step out of the car. Ramos complied immediately. (*Id.* at 5). He got out of the car with his hands up. (*Id.* at 6). At that point, it was clear that he did not match the description of that the caller had given as he was wearing a different colored shirt and did not have a gun. (*Id.*). Ramos turned around at the direction of the police to show them that he did not have a handgun. (*Id.*).

At that point, according to the complaint, the situation escalated. The police began shouting conflicting commands at Ramos, all while pointing their rifles at him. (*Id.* at 7). The police did not explain why Ramos had been surrounded. (*Id.*). They did not explain why they pointed semi-

automatic rifles at him. (*Id.*). Ramos repeatedly asked with the police officers to explain what was going on, stating, "What's going on? What's going on?" (*Id.* at 8). As stated in the complaint, he plead with them, "Put the guns down, dawg. What the fuck is going on? Why? What the fuck? You're scaring the fuck out of me?" (*Id.*). In response, Officer Cantu-Harkless said, "I can't explain right now Mike." (*Id.* at 9).

The officers once again shouted allegedly conflicting commands. One told him to keep his hands up, another to walk forward, another to turn around in a circle, and another to get on his knees. (*Id.* at 10). Ramos stayed with his hands up, and Taylor began to order the trainee Pieper to "move up" and "impact up." (*Id.* at 11). Pieper shouted, "comply with us!" (*Id.*).

Ramos pleaded with them again. "Impact me for what? Put the gun down dawg. Man, what the fuck dawg?" (*Id.*). Taylor and other officers ordered Pieper to shoot Ramos with a less lethal projectile. (*Id.*). Pieper shot Ramos with his hands in the air above his head. (*Id.*). The complaint notes that bystanders began to shout, wondering why the police shot him. (*Id.* at 12). In reaction, Ramos entered his car, as his companion left the passenger side. (*Id.* at 15). Ramos began to drive away. He drove towards the dead end blocked by dumpsters, away from Taylor and the officers (*Id.*).

According to the complaint, Taylor opened fire as the car drove away. (*Id.*) Neither Taylor nor any other officer were in front of the Prius nor in the direction it was facing. (*Id.* at 16). Taylor fired from behind his police cruiser, standing at the passenger side door. (*Id.*). Bystanders began to yell, "Why you shootin him?" and "Why you murdering this man?" (*Id.*). Only Taylor, and no other officers, had fired their lethal weapons. (*Id.* at 18). He fired three shots at Ramos, who died of a gunshot to the back of his head. (*Id.* at 17).

Plaintiff filed her second amended complaint on March 15, 2022. She brings claims under Section 1983 for violating Ramos's Fourth Amendment rights, based on both the allegedly unwarranted and unreasonable killing of Ramos, as well as the discriminatory practices of the APD

more generally. In her complaint, she alleges that APD has systemically targeted Black and Hispanic neighborhoods. (*Id.* at 20). The complaint cites a 2016 study that APD officers use more violence in Black and Hispanic neighborhoods and are more likely to use severe force against Black people. (*Id.*). APD officers were also found to be more likely to shoot Black suspects rather than using hand-to-hand training. The complaint also cites a report from an Austin oversight office which highlights the disproportionate policing practices of APD. (*Id.* at 21–22). According to Plaintiff, these practices show a consistently racist and discriminatory pattern of behavior from APD officers.

In addition to APD's allegedly disproportionate policing of communities of color, Plaintiff claims that APD trained its officers in a "paramilitary" style, emphasizing conflict over de-escalation. (*Id.* at 19). She states that the City itself shut down its training academy after Ramos's shooting in order to transition from a "military-styled Academy" into one with a stronger emphasis on de-escalation and communication skills. (*Id.* at 19–20). Finally, Plaintiff alleges that the City failed to adequately discipline its officers, especially Taylor, for excessive use of violence. Plaintiff contends that Taylor has been involved in unwarranted shootings of civilians before and has not been punished by APD for either incident. (*Id.* at 18–19). Plaintiff argues that the City has failed to investigate violence and made a deliberate choice not to discipline officers from using excessive force.

Defendants City of Austin and Christopher Taylor filed separate motions to dismiss. (Dkts. 47, 49). The City alleges that Plaintiff has failed to plead a policy or practice of violence by APD personnel against Black and Hispanic residents. (City's Mot. Dismiss, Dkt. 47, at 2–5). The City also alleges that Plaintiff has failed to plead specific, non-conclusory facts that would support a failure to train or supervise or implement inadequate disciplinary policies. (*Id.* at 5–11).

Taylor's Motion to Dismiss, filed on April 12, 2022, argues that he is entitled to qualified immunity, and that Plaintiff has not plead facts which show Taylor's actions were clearly

unreasonable. (Taylor's Mot. Dismiss, Dkt. 49, at 7). He argues that both the temporal and physical proximity to Ramos placed him in reasonable fear of being hit by the Prius. (*Id.* at 7–11).

In support of his argument, Taylor relies on three video exhibits. The videos are a screen recording of YouTube videos provided by the City that show dashcam and bodycam videos of the events leading up to and including Ramos's death. (*Id.* at 5–6). Ramos filed a motion to strike these video exhibits on June 8, 2022. (Mot. Strike, Dkt. 66). Taylor responded by arguing that the motion to strike should be denied as untimely. (Resp., Dkt. 67).

II. LEGAL STANDARD

Pursuant to Rule 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a 12(b)(6) motion, a "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

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." *Id.* "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* A court ruling on a 12(b)(6) motion may rely on the

complaint, its proper attachments, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Dorsey v. Portfolio Equities, Inc.,* 540 F.3d 333, 338 (5th Cir. 2008) (citations and internal quotation marks omitted). A court may also consider documents that a defendant attaches to a motion to dismiss "if they are referred to in the plaintiff's complaint and are central to her claim." *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). But because the court reviews only the well-pleaded facts in the complaint, it may not consider new factual allegations made outside the complaint. *Dorsey,* 540 F.3d at 338. "[A] motion to dismiss under 12(b)(6) 'is viewed with disfavor and is rarely granted.'" *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (quoting *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009)).

III. DISCUSSION

As a preliminary matter, the Court will discuss whether the videos offered by Taylor are admissible at this stage of the litigation. The Court will then turn to Taylor's motion to dismiss, before addressing the City's motion.

A. Video Exhibits

Defendant Taylor provides three videos as attachments to his motion to dismiss. Collectively, these videos include helicopter footage of the scene, dashcam video of the shooting, and a "Critical Incident Briefing" provided by the City of Austin that provides police commentary on the footage of the shooting. (Exhs., Dkt. 49). Taylor argues that these videos are incorporated by reference in Plaintiff's complaint, and are thus admissible at the motion to dismiss stage. (Mot. Dismiss, Dkt. 49, at 5–6).

The general rule is that courts should consider a motion to dismiss based on the four-corners of the plaintiff's pleadings, not the evidence that Defendants may seek to introduce in response. *See Villarreal v. Wells Fargo Bank, N.A.,* 814 F.3d 763, 766 (5th Cir. 2016) ("A district court

is limited to considering the contents of the pleadings and the attachments thereto when deciding a motion to dismiss under Rule 12(b)(6)."); *see also Indest v. Freeman Decorating*, Inc., 164 F.3d 258, 261 (5th Cir. 1999) ("We may not look beyond the pleadings."). However, the Court may consider "[d]ocuments that a defendant attaches to a motion to dismiss . . . if they are referred to in the plaintiff's complaint and are central to her claim." *Villarreal*, 814 F.3d at 766 (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir.2000)). This Court has held that "a court may consider video evidence attached as an exhibit to the complaint." *Scott v. White*, No. 1:16-CV-1287-RP, 2018 WL 2014093 at *1 (W.D. Tex. Apr. 30, 2018) (citing *Hartman v. Walker*, 685 F. App'x 366, 368 (5th Cir. 2017)).

Defendant's video exhibits are not attached to Plaintiff's complaint. The helicopter video is not referenced in Plaintiff's complaint, much less attached. The dashcam footage may overlap slightly with certain photos that are included in the complaint, but the video itself is not attached (*See* 2d. Am. Compl., Dkt. 45, at 13). Defendant's third video, which is the APD Community Briefing, is referenced in a footnote that hyperlinks to a site which has the YouTube video embedded. (*Id.* at 17 n.9). A hyperlink to a webpage does not qualify as an attached document, so there is no indication that Taylor's videos are attached to the complaint. *See Cantu v. Austin Police Dep't*, No. 1:21-CV-00084-LY-SH, 2021 WL 5599648 at *4 (W.D. Tex. filed Nov. 30, 2021), *report and recommendation adopted*, No. 1:21-CV-84-LY, 2022 WL 501719 (W.D. Tex. filed Jan. 24, 2022) ("Merely providing a web address or hyperlink is insufficient to submit documents to the Court or make them of record.").

Nor do the attached videos meet the standard set out in *Villareal*. Plaintiff *does* reference the videos in her footnote, but this is for the express purpose of criticizing the accuracy of the video. (*Id.*). Plaintiff notes that the "videos that are currently available publicly appear to have been edited by APD" and that "the timestamps are inconsistent, some by more than 3 seconds and one by more

than 5 minutes." (*Id.*). In as much as this is a "reference" to Defendant's videos, it is only to criticize the videos' accuracy. There mere fact that Defendant criticized a potential piece of evidence's reliability does not automatically make that evidence admissible.

Nor are Defendant's videos central to Plaintiff's claim. In general, in Fifth Circuit cases where the court considers evidence at the motion to dismiss stage, the use of such evidence is uncontested. Often, the evidence is "central" to the claim in that it is a written instrument at the heart of a dispute, as permitted by Rule 10(c), such as a contract or lien. *See* Fed. R. Civ. P 10(c). In *Collins*, this included financial statements core to the plaintiff's claim, which the plaintiff did not object to. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). In *Villareal*, the evidence at question was a notice of foreclosure that was expressly referenced in the pleadings and central to the plaintiff's claims. *Villarreal v. Wells Fargo Bank, N.A.*, No. 7:14-CV-584, 2014 WL 12600167 at *4 n.7 (S.D. Tex. Sept. 15, 2014), *aff'd*, 814 F.3d 763 (5th Cir. 2016). Taylor's videos are categorically distinct from these written instruments, as they are not central to the complaint itself, but merely depict evidence of the incident in question.

In at least two other cases, district courts within the Fifth Circuit have declined to consider videos of police violence at the motion to dismiss stage. In one case, the Eastern District of Texas declined to consider evidence such as a 911 call and body camera footage at the motion to dismiss stage because the references to the videos were insufficient. *Polnac v. City of Sulphur Springs*, 555 F. Supp. 3d 309, 325 (E.D. Tex. 2021). Moreover, the court noted that it would be inappropriate to take judicial notice of the facts within the call. *Id.* Likewise, this Court has declined to take judicial notice of a police video, noting that it "clearly exceeds the purview of judicial notice." *Ambler v. Williamson Cnty., Texas*, No. 1-20-CV-1068-LY, 2021 WL 769667 (W.D. Tex. Feb. 25, 2021) (Order, Dkt. 25) (Hightower, J.). Most importantly, *Ambler* noted that the mere fact that the video captured events at issue in the complaint does not render it "referenced" as a matter of evidence. (*Id.* at 3).

District courts outside the Fifth Circuit have also declined to consider videos of police conduct at the motion to dismiss stage. *See Turner v. Byer*, No. 2:17-CV-1869-EFB P, 2020 WL 5518401, at *1 (E.D. Cal. Sept. 14, 2020) ("As plaintiff points out, the video is not part of the complaint and thus is extrinsic material not properly considered in determining whether the allegations of the complaint are sufficient to state a claim for relief."), *R. & R. adopted*, 2020 WL 6582267 (E.D. Cal. Nov. 10, 2020); *Smith v. City of Greensboro*, No. 1:19CV386, 2020 WL 1452114, at *3 (M.D.N.C. Mar. 25, 2020) (finding that a police camera video attached to defendant's motion to dismiss was not central to plaintiff's complaint where complaint made "no express mention of the video"). As one district court noted, "Simply because a video that captured the events complained of in the complaint exists does not transform that video into a 'document' upon which the complaint is based." *Slippi-Mensah v. Mills*, No. 1:15-CV-07750-NLH-JS, 2016 WL 4820617, at *3 (D.N.J. Sept. 14, 2016).

Taylor's videos are nearly identical to those that this Court struck in *Ambler* in that they are only one perspective of the shooting. As this Court noted in *Ambler*, "the Video captures only part of the underlying incident." *Ambler*, 2021 WL 769667, at *4. Indeed, in this instance, at least one bystander also captured video of the event, whose video Taylor does not seek to include. (2d. Am. Compl., Dkt. 45, at 14). Given that multiple perspectives exist of this same incident, the Court sees no reason to deviate from *Ambler*'s holding declining to consider video evidence at the motion to dismiss stage.

Instead, Defendants rely on another case from this Court involving police violence—*Scott v. White*, No. 1:16-CV-1287-RP, 2018 WL 2014093 at *1 (W.D. Tex. Apr. 30, 2018) (Order, Dkt. 60, at 11). However, in that case, the Plaintiff attached dashcam footage of the incident to his complaint. (*Id*). Indeed, the video was marked as "Exhibit A." *Scott v. White*, No. 1:16-CV-1287-RP (3d. Am. Compl., Dkt. 64, at 5). Notably, in *Scott*, the plaintiff made no attempt to criticize the video or

suggest that they were inaccurate. Far from criticizing the videos, the plaintiff relied on them repeatedly in his complaint. (*Id.*). Thus, *Scott* can be readily differentiated from the instant case, both because this case presents a genuine dispute as to the accuracy of the evidence, as well as the fact that the Plaintiff has not voluntarily relied on the video evidence. The fact that a video may be central to Taylor's defense does not mean that it is central to the Plaintiff's claims. *Ambler*, 2021 WL 769667, at *4.

Finally, even if the videos were sufficiently referenced by Plaintiff, they would nonetheless be inadmissible for a Rule 12 motion. Taylor does not cite any instances in which a court has considered extrinsic evidence that the plaintiff plausibly argues has been edited. Indeed, Taylor cites several cases which stand for the opposite proposition—that courts deciding a motion to dismiss should only consider extrinsic evidence when its authenticity is uncontested. (Taylor's Mot. Dismiss, Dkt. 49, at 5 n.18 (citing *Meyers v. Textron, Inc.*, 540 F. App'x 408, 409 (5th Cir. 2013) (per curiam) ("court[s] may take into account documents . . . whose authenticity is unquestioned."))). Likewise, Taylor cites another case for the proposition that a court should "not adopt a plaintiff's characterization of the facts where *unaltered* video evidence contradicts that account." (*Id.* at 6 (citing *Thompson v. Mercer*, 762 F.3d 433, 435 (5th Cir. 2014) (emphasis added)). As these cases make clear, video evidence at a motion to dismiss stage must have unquestioned authenticity and be "unaltered." Here, neither is the case. The videos attached by Taylor are not the authentic, original video files. (Exhs., Dkt. 49). Instead, they are screen-recordings of the YouTube videos themselves. Because Taylor's defense deal with the exact timing of when the bullets were fired and the minute details of the scene, such as whether Ramos may have been blinded by the sunlight, it is important to authenticate any video exhibits prior to considering them. Moreover, Plaintiff has plausibly alleged, at least at the motion to dismiss stage, that the City altered the videos which Taylor includes. As Plaintiff points out, the various videos' timestamps are inconsistent by several seconds. (2d. Am.

Compl., Dkt. 45, at 17 n.9). Only certain videos are available, and the footage from three other officers has not been provided. (*Id.*). Plaintiff has plausibly alleged that these videos have been altered, and, at the very least, do not contain all APD perspectives of the event. (*Id.*). In light of this allegation, it would be premature to introduce Taylor's exhibits into evidence prior to discovery that will presumably reveal the full, unaltered video evidence. Accordingly, the Court declines to consider Taylor's video exhibits at this stage of the pleading.[1]

B. Taylor's Motion to Dismiss

Having found that Taylor's video exhibits are inadmissible, the Court turns to Taylor's motion to dismiss itself. In his defense, Taylor asserts that he is entitled to qualified immunity, and that Plaintiff's complaint does not meet the high burden needed to show a clearly unreasonable use of excessive force. (Taylor's Mot. Dismiss, Dkt. 49). He further contends that no clearly established law supports liability for a "blink of an eye" decision, relying especially on a recent Fifth Circuit case involving police shooting a moving vehicle (*Id.* at 13 (citing *Irwin v. Santiago*, 21-10020, 2021 WL 4932988 (5th Cir. Oct. 21, 2021) (unpublished))).

At this early stage of the litigation, the Court does not need to delve into the contested facts of Taylor's actions in the moments before Ramos's death. Instead, the relevant inquiry remains whether the complaint states a valid, plausible claim when viewed in the light most favorable to the Plaintiff. *Iqbal*, 556 U.S. at 678–79 (2009). At the motion to dismiss stage, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness'." *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) (emphasis in original). Moreover, "[i]n showing that the defendant's actions violated clearly established law, the plaintiff need not rebut every conceivable

[1] Plaintiff contested the use of the video exhibits in her response to Taylor's motion to dismiss. (P's Resp., Dkt. 56), and later filed a motion to strike the exhibits (Mot. Strike, Dkt. 66). These two filings contain largely the same arguments, so the Court need not decide whether the motion to strike was timely filed, since, as a preliminary matter, the video exhibits do not qualify as evidence properly before the Court at this stage.

reason that the defendant would be entitled to qualified immunity, including those not raised by the defendant." *Cotropia v. Chapman*, 721 F. App'x 354, 360 (5th Cir. 2018) (per curiam).

"To prove an excessive-force claim, a plaintiff must show (1) an injury, (2) which resulted directly and only from the use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *See Roque v. Harvel*, 993 F.3d 325, 333 (5th Cir. 2021) (cleaned up); *Hathaway v. Bazany*, 507 F.3d 312, 321 (5th Cir. 2007). As the Fifth Circuit has noted, however, qualified immunity claims often involve intensive inquiries into the facts of the case. *Id.* ("Excessive-force claims are necessarily fact-intensive . . . .") (internal citations omitted). Taylor repeatedly urges the Court to examine the detailed facts of what happened during the incident in question, (Taylor's Mot. Dismiss, Dkt. 49 at 4–15), but this is premature. The mere fact that a plaintiff must plead facts which can overcome a qualified immunity defense does not automatically transform a motion to dismiss into a motion for summary judgment. The question remains at this stage whether Plaintiff has pled facts which plausibly suggest Taylor's force was excessive under the qualified immunity standard. Plaintiff has met her burden in this regard.

Supreme Court precedent demonstrates that an officer violates the Fourth Amendment when he shoots an unarmed person who poses no immediate threat to others. "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Tennessee v. Garner*, 471 U.S. 1, 2 (1985). More specifically, the Fifth Circuit has held that "it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle v. Bexar Cnty., Texas*, 560 F.3d 404, 408 (5th Cir. 2009).

Plaintiff's complaint repeatedly and plausibly alleges that Ramos posed no immediate danger to others. First, Plaintiff's complaint makes clear that Ramos was unarmed, and more crucially, that this was made aware to the officers at the scene. (2d. Am. Compl., Dkt. 45, at 6). Plaintiff alleges

that Ramos held his hands up for several minutes listening to conflicting directions from the police and pleaded with them to put their own rifles down because he was unarmed. (*Id.* at 6, 12). The passenger next to Ramos had already left the vehicle. (*Id.* at 13). Ramos made no move to reach for a weapon in the car. (*Id.* at 15). Plaintiff also alleges that the Prius "turned away from Taylor and all officers and headed slowly in the opposite direction" and "inched away toward" a dead end. (*Id.*). Plaintiff alleges that Taylor was not in front of the Prius when he fired his shots. (*Id.*). All of these alleged facts suggest that Ramos could not have reasonably posed a threat to Taylor or other officers.

The complaint also states facts that suggest Taylor could not have reasonably believed a Prius, moving slowly from a few yards away, would have been able to cause any injury to officers standing behind "a three-ton vehicle with a grill outfitted with bull bars." (*Id.* at 16). To support this claim, Plaintiff includes a photo of a bystander's video that shows the Prius clearly angled away from the police cars. (*Id.*). Based on the four corners of this complaint, Plaintiff has plausibly alleged that Taylor violated Ramos's constitutional rights and acted with unreasonable and excessive force.

Perhaps most importantly, Taylor's claim that he acted reasonably is belied by Plaintiff's allegation that Taylor was the only officer to fire his weapon at the car. (2d. Am. Compl., Dkt. 45, at 15). Six other officers at the scene had rifles pointed at Ramos, but only Taylor fired live shots. Drawing an inference in favor of the Plaintiff, it is difficult to see how Taylor acted reasonably—especially viewing the facts in the light most favorable to Plaintiff—when six other officers decided not to shoot. Because it is plausible that the excessiveness of the force was unreasonable, Plaintiff has met her burden at the pleading stage. *Roque*, 993 F.3d at 333.

Taylor urges the Court instead to dismiss the complaint based on a test adopted in *Hathaway v. Bazany*, 507 F.3d 312, 321 (5th Cir. 2007). This inquiry examines (1) the time an officer has to respond to a moving vehicle and (2) the physical proximity of the officer to the moving vehicle. *Id.*;

see also Roque, 993 F.3d at 333 (citing *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005)). Both *Hathway* and *Roque* were decided at the summary judgment stage, so their relevance here is limited. In addition, *Hathaway* materially differs from the instant case because the police officer in that was case was rammed by a car on an open street, whereas Ramos was stuck in a parking lot. (*Id.* at 314–6). Nonetheless, even assuming *Hathaway* does apply, Plaintiff's complaint sufficiently alleges that neither the timing nor the proximity rendered Taylor's actions unreasonable. The complaint describes Ramos's driving as "slow" and "inch[ing]", while his car was turned away from the officers. (2d. Am. Compl., Dkt. 45, at 15) ("The Prius turned away from Taylor and all officers and headed slowly in the opposite direction."). At this stage, where the Court accepts Plaintiff's well-plead facts as true, the complaint suggests that Taylor had time to realize Ramos posed no threat. In addition, while only seconds elapsed between when Ramos started his car and when Taylor fired the shots, these seconds were preceded by several minutes of Ramos standing with his hands up, begging the officers to put their weapons down. (*Id.* at 3–10). Taylor also directed Pieper to fire a less lethal round at Taylor. (*Id.* at 13). This itself was plausibly an excessive use of force as alleged by Plaintiff. Ramos had stood with his hands up for several minutes pleading with several officers to lower their semi-automatic rifles pointed at him, stating repeatedly that he did not have a gun. (*Id.* at 11–13). It is a reasonable inference that order an officer to shoot him with a less lethal round under these circumstances was an excessive and unreasonable use of force. Based on the facts alleged in Plaintiff's complaint, Taylor had sufficient time to realize that Ramos posed no violent threat.

Likewise, Plaintiff's complaint alleges that there was enough distance from Ramos to Taylor that he could not have reasonably feared being hit by the car when he shot. As the complaint states, "Talyor was the closest of any officer and he was a substantial distance from the car. The Prius is driving away from the officers[.]" (*Id.* at 16). Additionally, the proximity is mitigated by the fact that Taylor and every other officer was standing behind police vehicles specially equipped to handle

impacts from cars. (*Id.*). Whether Taylor or any other officer could have reasonably feared the impact from a compact car driving from start while they stood behind specially equipped police SUVs is a question to be decided by a jury, or potentially at summary judgment. For now, Plaintiff has plausibly alleged that Taylor could not have reasonably feared for his life under these circumstances.

In his motion, Taylor relies heavily on cases suggesting that officers are immune from split-second decisions. (Taylor's Mot. Dismiss, Dkt. 49, at 12–14). Every case cited by Taylor, however, deals with a motion for summary judgment, not a motion to dismiss. *See Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) (affirming grant of summary judgment); *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572 (5th Cir. 2009) (reversing denial of summary judgment); *Joseph on behalf of Est. of Joseph v. Bartlett*, 981 F.3d 319 (5th Cir. 2020) (affirming summary judgment in part*); Irwin v. Santiago*, No. 21-10020, 2021 WL 4932988 (5th Cir. Oct. 21, 2021) (unpublished) (affirming grant of summary judgment). There is a reason that these cases are dealt with at summary judgment, and not in a 12(b)(6) motion—they hinge on a question of fact that is inappropriate at the pleading stage. The reasonableness of a "split-second" decision is a question that requires an investigation into the facts of the case and is more suited to disposition after the parties have conducted discovery. It may very well be that the evidence produced shows no genuine dispute that Taylor could have feared for his life, but such a question must be reserved for when the Court has full evidence of the incident before it.

At this early stage, these cases do not show that Plaintiff failed to plead an unreasonable and excessive use of force. The Fifth Circuit in *Irwin* did hold that "the projected path of Irwin's vehicle was in the officer's direction, at least generally," and that the officers were not unreasonable in firing at the vehicle. *Irwin v. Santiago*, No. 21-10020, 2021 WL 4932988 (5th Cir. Oct. 21, 2021) (unpublished). Plaintiff's complaint alleges a very different scenario. Unlike in *Irwin*, where a car

"narrowly avoided one of the two officers," the instant case presents a scenario where the officers were protected by their own vehicles and standing beside them such that it would have been physically impossible to be directly hit by Ramos's Prius. (2d. Am. Compl., Dkt. 45, at 16; *Irwin*, 2021 WL 4932988 at *1). Nor does *Irwin* overturn *Lytle*, which held that it was unlawful to shoot at a car that was, at the moment of the shooting, driving away from the officer. *Irwin*, 2021 WL 4932988 at *3 (citing *Lytle v. Bexar County*, Texas, 560 F.3d 404, 409 (5th Cir. 2009)). Plaintiff has pled a set of facts that are distinguishable from *Irwin* and suggest Taylor violated established law. She has thus pled a set of facts sufficient to survive a motion to dismiss.

C. The City's Motion to Dismiss

Finally, the Court turns to the City's motion to dismiss, (Dkt. 47), which argues that Plaintiff's claims are insufficient to establish a claim under *Monell*. (City's Mot. Dismiss, Dkt. 47, at 3 (citing *Monell v. Dep't of Social Service of City of New York*, 436 U.S. 658 (1978)). In order to survive a motion to dismiss under *Monell*, a plaintiff's pleadings "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ratliff v. Aransas County*, 948 F.3d 281, 285 (5th Cir. 2020) (quoting *Iqbal*, 556 U.S. at 678). However, the fact that a defendant has invoked *Monell* does not raise the plaintiff's pleading requirements above the *Twombly* and *Iqbal* standard. *See id.*; *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). The proper inquiry is whether a plaintiff pleads "facts that plausibly establish: a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Ratliff*, 849 F.3d at 285 (citing *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)).

In total, Plaintiff alleges seven different practices that violated Ramos's civil rights:

a. Disproportionate use of excessive force against people of color,
b. Condoning such disproportionate use of excessive force against people of color
c. Choosing not to adequately train officers regarding civil rights protected by the United States Constitution,

d. Choosing not to adequately supervise officers regarding the use of force against people of color,
e. Choosing not to intervene to stop excessive force and civil rights violations by its officers,
f. Choosing not to investigate excessive violence and civil rights violations by its officers, and
g. Making the deliberate choice not to discipline officers for— and deter officers from—using excessive force and violating civil rights.

(2d. Am. Compl., Dkt. 45, at 29).

At their core, these alleged practices constitute three distinct violations: (1) a policy and custom of discriminatory policing, (2) a failure to train officers not to violate the civil rights of residents, and (3) the failure to discipline officers for misconduct. The Court will address each claim in turn.

1. The Institutional Racism Claim

The City argues that Plaintiff's evidence of institutional racism is too attenuated from the actual harm suffered by Ramos and his family. (City's Mot. Dismiss, Dkt. 47, at 3–4). "[T]o plead a practice so persistent and widespread as to practically have the force of law, [the plaintiff] must do more than describe the incident that gave rise to his injury." *Ratliff*, 849 F.3d at 285 (quoting *Pena v. Rio Grande City*, 879 F.3d 613, 622 (5th Cir. 2018)). A plaintiff may show a "persistent, widespread practice of City officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Piotrowski*, 237 F.3d at 579 (quoting *Webster v. City of Houston*, 735 F.2d 838, (5th Cir. 1984) (en banc)). However, "[a]ctions of officers or employees of a municipality do not render the municipality liable under section 1983 unless they execute official policy as above defined." *Id.* "[A] facially innocuous policy will support liability if it was promulgated with deliberate indifference to the 'known or obvious consequences' that constitutional violations would result." *Id.* (quoting *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997)). "Deliberate indifference of this sort is a stringent test, and a showing of simple or even heightened negligence will not suffice to prove municipal culpability." *Id.*

In her complaint, Plaintiff does not allege that the City explicitly adopted a policy of discriminating against Black or Hispanic citizens in policing. Instead, Plaintiff's allegations focus on findings from reports—including one from the Austin City Council—which show that APD consistently engaged in increased violence against Black people and other people of color. (2d. Am. Compl., Dkt. 45, at 20). The complaint also alleges that APD officers were more likely to shoot Black individuals. (*Id.*). Likewise, the complaint alleges that APD officers were more likely to arrest people of color and give more warnings to people of color. (*Id.* at 20–22). She cites a statement from the Austin City Council which says, "The elected members of City Council have no confidence that current Austin Police Department leadership intends to implement the policy and culture changes required to end the disproportionate impact of police violence on Black Americans, Latinx Americans, other nonwhite ethnic communities." (*Id.* at 23). Finally, the complaint points to a report which stated that an assistant APD chief frequently used racial slurs, but also noted that anyone reporting such slurs "must be prepared in the present climate and culture to face almost certain retaliation" from APD. (*Id.*).

However, the relevant inquiry under *Monell* is not whether the City's policies had a disproportionate impact upon people of color, but whether this policy was promulgated with deliberate indifference to the "known or obvious consequences" that constitutional violations would result. *Bryan County*, 520 U.S. at 403. Plaintiff's complaint does not qualify under this "stringent test." *Id.* Plaintiff fails to allege a pattern or custom from APD with the known and obvious consequence of discriminating against people of color. Plaintiff's allegations suggest that the City's policies had discriminatory effects, but not that these effects were known or obvious. Plaintiff cites studies showing that APD was more likely to use deadly force against people of color, but not that this was a known result of the City's policies.

Nor does Plaintiff's complaint show a "moving force causation" between this discrimination and the shooting of Mike Ramos. A plaintiff must allege that an official policy or custom "was a cause in fact of the deprivation of rights inflicted." *Spiller v. City of Texas City, Police Dept.*, 130 F.3d 162, 167 (5th Cir. 1997) (quoting *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994)). Plaintiff does allege that Austin police were "more likely to shoot rather than use their hand-to-hand training or deploy pepper spray when the person subjected to force was Black." (2d. Am. Compl., Dkt. 45, at 20). Nonetheless, Plaintiff fails to show that this disproportionate use of deadly force against Black residents was a "cause-in-fact" of the shooting of Taylor. Under Fifth Circuit precedent, the Court finds that the fact that APD's police force disproportionate targets people of color is insufficient, absent more evidence, to support a finding that its customs and practices were a cause-in-fact of Ramos's shooting.

2. Failure to Train

Plaintiff also alleges that the City failed to train officers properly and to adequately supervise them. (2d. Am. Compl., Dkt. 45, at 29). "To prevail on a failure-to-train theory, [a plaintiff] must plead facts plausibly establishing "(1) that the municipality's training procedures were inadequate, (2) that the municipality was deliberately indifferent in adopting its training policy, and (3) that the inadequate training policy directly caused the violations in question." *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 170 (5th Cir. 2010). However, courts should treat failure to train claims with a high degree of caution. "A municipality's culpability for a deprivation of right is at its most tenuous where the claim turns upon a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). A plaintiff must demonstrate "at least a pattern of similar incidents" to establish municipal liability. *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir. 1998) (internal citations omitted).

Here, Plaintiff's complaint alleges two training failures. The first is that the City failed to "adequately train officers regarding civil rights protected by the United States Constitution [and

chose] not to adequately supervise officers regarding the use of force against people of color." This allegation, however, lacks factual support. By itself, the claim is a conclusory statement which the Court must strike. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The claim lacks sufficient facts to suggest plausibly allege the City was "deliberately indifferent" in its training policy. Plaintiff relies on the City Council's report criticizing APD for using a "paramilitary approach to policing." (2d. Am. Compl., Dkt. 45, at 19). She further relies on studies highlighting the disproportionate violence used against Black residents to show that APD failed to train its officers. (*Id.* at 18–24). However, the fact that the City criticized APD for this training approach *after* the Ramos shooting does not show that it was deliberately indifferent to the inadequacy of its training. Moreover, the studies which show the disproportionate impact do not suggest that the City knew its training was inadequate.

Second, Plaintiff appears to allege that "APD policy or practice allowed Pieper to be in field training, even though he had only completed minimal training." (*Id.* at 10 n.6). She further states that APD policy requires officers to go through four months of "academy" before entering field training. Officer Pieper, when he fired a less-lethal round at Ramos, was allegedly only in this third month with the APD. (*Id.*). However, Plaintiff does not actually state any facts. There is no indication that this incident was a pattern with APD or that the City knew of it happening. Accordingly, the Court will dismiss Plaintiff's claim for failure to train.

3. Inadequate Disciplinary Policies

Finally, Plaintiff alleges that APD implemented inadequate disciplinary policies with its officers. In order to plead a failure to discipline, a plaintiff must show: (1) the municipality failed to discipline its employees; (2) that failure to discipline amounted to deliberate indifference; and (3) the failure to discipline directly caused the constitutional violations in question. *See Deville v. Marcantel*, 567 F.3d 156, 171 (5th Cir. 2009). When a municipality approves a subordinate's conduct and the

basis for it, liability for that conduct is chargeable against the municipality because it has "retained the authority to measure the official's conduct for conformance with their policies." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion); *Groden v. City of Dallas*, 826 F.3d 280, 284 (5th Cir. 2016); *see also Balle v. Nueces Cty., Tex.*, 690 F. App'x 847, 852 (5th Cir. 2017).

Here, a core part of Plaintiff's claim rests upon a 2019 incident involving two of the same officers who responded to the Ramos call—Officers Taylor and Kyrcia. According to Plaintiff's complaint, on July 31, 2019, four APD officers responded to a welfare check call in an Austin high-rise. (2d. Am. Compl., Dkt. 45, at 18–19). When they got to the scene, Taylor and Krycia encountered Dr. Mauris DeSilva, a neuroscientist who was having a mental health episode. Despite having knowledge of Dr. DeSilva's mental health history, Taylor and Krycia both shot and killed Dr. DeSilva. (*Id.*). After the shooting, APD allowed Taylor and Krycia to return to duty. (*Id.* at 19). On August 27, 2021, a grand jury indicted Taylor and Krycia for the shooting. (*Id.*).

Plaintiff argues that the City had inadequate disciplinary policies based on APD's failure to punish officers whose conduct was sufficient to receive a grand jury indictment. Plaintiff further alleges that APD ratified this conduct because it consistently failed to discipline Taylor for his excessive uses of force and constitutional violations. (*Id.* at 29–30). Plaintiff states that the City compounded the failure to discipline because it did not punish Taylor for shooting Ramos. Although APD played Taylor on administrative leave after the Ramos shooting, APD never subjected him to any other discipline, according to the complaint. (*Id.* at 18).

Plaintiff's claim that the City should have disciplined Taylor and Krycia for this incident is sufficient to survive the motion to dismiss. *Deville*'s three-pronged test applies here, asking whether (1) the municipality failed to discipline its employees; (2) that failure to discipline amounted to deliberate indifference; and (3) the failure to discipline directly caused the constitutional violations in question. *Deville*, 567 F.3d at 171. Here, Plaintiff's allegations meet the first prong. The City failed to

discipline Taylor at all for his involvement in the shooting of Dr. DeSilva, for which a grand jury indicted him for murder and third-degree felony deadly conduct. (2d. Am. Compl., Dkt. 45, at 19). Likewise, placing an officer on administrative leave generally does not amount to "discipline" under *Monell*. *See McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007) (citing *Green v. Administrators of Tulane Educ. Fund*, 284 F.3d 642 (5th Cir. 2002), *overruled on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)). In light of the fact that APD allegedly failed to discipline officers for conduct that a grant jury found sufficient to warrant an indictment for murder, Plaintiff has adequately alleged that APD maintained a deliberate policy of improperly disciplining officers for excessive force.

Plaintiff has also plausibly alleged that the City knew of the shootings and was deliberately indifferent to them. The shooting of Dr. DeSilva was a high-profile incident that received significant press coverage, as well as statements from APD officials.[2] Given the notoriety of the shooting, as well as the fact that APD briefed the shooting to local media, it is more than plausible that the City knew of the shooting but deliberately chose not to discipline the officers involved. The same is true for the shooting of Ramos himself, which led to major protests in Austin.[3] Plaintiff's complaint alleges two separate incidents where the City knew of a lethal and unwarranted shooting but failed to discipline the officers responsible. It is a reasonable inference at this stage that the City's disciplinary policies—as described by Plaintiff—deliberately failed to sanction conduct that violated § 1983.

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[2] *See, e.g.*, Mark D. Wilson, *Man killed in police shooting in downtown Austin ID'd*, AUSTIN AM. STATESMAN, (Aug. 2, 2019), https://www.statesman.com/story/news/local/2019/08/02/man-killed-in-police-shooting-in-downtown-austin-idd/4550313007; Drew Knight & Britny Eubank, *Police identify man killed in officer-involved shooting in Downtown Austin*, KVUE, (Aug. 2, 2019), https://www.kvue.com/article/news/local/police-responding-to-officer-involved-shooting-in-downtown-austin/269-9ae26db2-0796-46ab-8fe3-46e0922a176d. *See also*, *Roque v. Harvel*, No. 1:17-CV-932-LY-SH, 2019 WL 5265292 (W.D. Tex. Oct. 16, 2019) (noting that newspaper articles are relevant for the purpose of notice of excessive use of force).

[3] *See, e.g.*, Michael Barajas, *Why Protestors in Austin are Chanting 'Justice for Mike Ramos'*, TEXAS OBSERVER (June 5, 2020), https://www.texasobserver.org/mike-ramos-austin-police.

Finally, Plaintiff has plausibly alleged that the failure to discipline directly caused the death of Ramos. In both instances, Taylor shot an unarmed man, and it is reasonable to infer that the City's failure to sanction the shooting of Dr. DeSilva implicitly condoned APD's excessive use of force. *See Rivera v. City of San Antonio* No. SA-06-CA-235-XR, 2006 WL 3340908, at *13 (W.D. Tex. 2006) (citing *Grandstaff v. City of Borger*, 767 F.2d 161, 170 (5th Cir. 1985) ("Where police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force requirement is satisfied."). The excessive use of force—both telling Pieper to shoot Ramos with a less lethal round and Taylor's own gunshots—are alleged to be the direct causes of Ramos's death. Given the City's alleged prior failures to discipline, Plaintiff plausibly suggests that Taylor's excessive use of force was a result of APD's failure to discourage such conduct.

In response, the City alleges that the actions of its officers were not "manifestly indefensible." (City's Mot. Dismiss, Dkt. 47, at 7–9). This assertion is premature. Whether APD's actions were manifestly indefensible is a question for the jury, or perhaps summary judgment, but it is a question of fact that is not properly before the Court at a motion to dismiss. The relevant inquiry is simply whether Plaintiff has met its burden of pleading facts which plausibly show a manifestly indefensible act. *Iqbal*, 556 U.S. at 678–79 (2009). Plaintiff has pled that Taylor's actions have led to two grand jury indictments for murder in state court. Indeed, Plaintiff's complaint sets out facts which plausibly suggest that Taylor has, on two occasions, met the elements of criminal homicide under Texas law. To put it simply, an allegation of an unlawful killing, supported by properly alleged facts, is more than sufficient to plead a manifestly indefensible action. The fact that the City twice failed to discipline Taylor after these deaths plausibly suggests that the City condoned excessive uses of force and had a policy of failing to properly discipline its officers. Accordingly, the City's motion to dismiss is denied as to the inadequate disciplinary policies claim.

IV. CONCLUSION

For these reasons, **IT IS ORDERED** that Defendant Christopher Taylor's motion to dismiss, (Dkt. 49), is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff's motion to strike, (Dkt. 66), is **MOOT**.

IT IS FURTHER ORDERED that the City of Austin's motion to dismiss, (Dkt. 47), is **GRANTED IN PART** as to Plaintiff's first four claims, (2d. Am. Compl., Dkt. 45, at 29), of using or condoning disproportionate use of force against people of color, failure to train, and failure to supervise. The City's motion to dismiss is **DENIED IN PART** as to Plaintiff's final three claims of choosing not to intervene to stop excessive force violations, choosing not to investigate excessive violence, and making the deliberate choice not to discipline officers for excessive force.

SIGNED on December 18, 2022.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Brenda Ramos, On Behalf of Herself and The Estate of Mike Ramos	§	
Plaintiff,	§	**No. 1:20-cv-01256-RP**
v.	§	
The City of Austin and Christopher Taylor	§	JURY DEMANDED
Defendants.	§	

PLAINTIFF'S MOTION TO WITHDRAW
DONALD PUCKETT AS COUNSEL OF RECORD

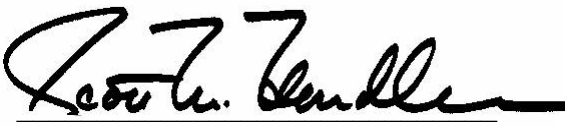
Hendler Flores Law, counsel for Plaintiff Brenda Ramos, respectfully requests that Donald Puckett be permitted to withdraw as counsel of record for Plaintiff in this matter. No other changes are requested at this time regarding the other attorney acting as Plaintiff's counsel of record.

WHEREFORE, Donald Puckett seeks leave of Court to withdraw as counsel of record for Plaintiff and simultaneously requests the clerk of Court remove Mr. Puckett's name from the list of persons authorized to receive electronic notices in this case.

Dated: December 29, 2022

Respectfully submitted,

HENDLER FLORES LAW, PLLC



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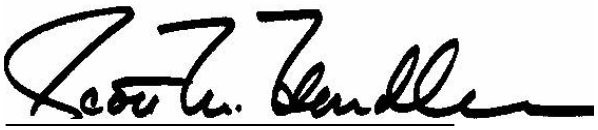
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that Plaintiff's Motion to Withdraw Donald Puckett as Counsel of Record was served on all counsel of record via the Court's CM/ECF system on December 29, 2022.



Scott M. Hendler

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Brenda Ramos, On Behalf of Herself and The Estate of Mike Ramos	§	
Plaintiff,	§	**No. 1:20-cv-01256-RP**
v.	§	
The City of Austin and Christopher Taylor	§	JURY DEMANDED
Defendants.	§	

PROPOSED ORDER

BEFORE THE COURT is Plaintiff's Motion to Withdraw Donald Puckett as Counsel of Record. The Court having read and considered the Motion finds that the Motion should be and is hereby **GRANTED.**

IT IS ORDERED that Donald Puckett be withdrawn as counsel of record for Plaintiff.

IT IS FURTHER ORDERED that the Clerk of Court remove Mr. Puckett's name from the list of persons authorized to receive electronic notices in this case.

SIGNED AND ENTERED this ____ day of _____ 20___.

_____
HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, on behalf of herself and the ESTATE OF MIKE RAMOS,	§	
Plaintiff,	§	
	§	**CIVIL ACTION NO. 1:20-cv-1256-RP**
v.	§	
	§	
CITY OF AUSTIN AND CHRISTOPHER TAYLOR,	§	
Defendants.	§	

DEFENDANT CITY OF AUSTIN'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' SECOND AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant City of Austin files this Answer and Affirmative Defenses to Plaintiffs' Second Amended Complaint (Doc. No. 45). Pursuant to Rules 8 and 12 of the Federal Rules of Civil Procedure, Defendant respectfully shows the Court the following:

ORIGINAL ANSWER

Pursuant to Federal Rule of Civil Procedure 8(b), Defendant responds to each of the specific averments in Plaintiffs' Second Amended Complaint as set forth below. To the extent that Defendant does not address a specific averment made by Plaintiff, Defendant expressly denies that averment. [1]

1. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 1 and therefore denies same.
2. Defendant admits the allegations contained in Paragraph 2.
3. Defendant admits the allegations contained in Paragraph 3.

[1] Paragraph numbers in Defendant's Answer correspond to the paragraphs in Plaintiffs' Second Amended Complaint.

4. Defendant admits the allegations contained in Paragraph 4.

5. Defendant admits the allegations contained in Paragraph 5.

6. Defendant admits the allegations contained in Paragraph 6.

7. Defendant admits the allegations contained in Paragraph 7.

8-101. Defendant denies the allegations contained in Paragraphs 8-101.

102. Defendant admits the allegations contained in Paragraph 102.

103-110. Defendant denies the allegations contained in Paragraphs 101-110 as phrased.

111-143. Defendant denies the allegations contained in Paragraphs 111-143.

144. Paragraph 144 merely contains Plaintiff's demand for jury trial and thus no response is required of this Defendant.

131 (misnumbered) Defendant denies the allegations contained in Paragraph 131 and denies that Plaintiff is entitled to any relief whatsoever of and from this Defendant.

AFFIRMATIVE DEFENSES

1. Defendant City of Austin asserts the affirmative defense of governmental immunity as a municipal corporation entitled to immunity while acting in the performance of its governmental functions, absent express waiver.

2. Defendant City of Austin asserts the affirmative defense of governmental immunity since its employees are entitled to qualified/official immunity for actions taken in the course and scope of their employment, absent express waiver.

3. Defendant reserves the right to assert additional affirmative defenses throughout the development of the case.

DEFENDANT'S PRAYER

Defendant City of Austin prays that all relief requested by Plaintiff be denied, that the Court dismiss this case with prejudice, and that the Court award Defendant costs and attorney's fees, and any additional relief to which it is entitled under law or equity.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN L. RILEY, CHIEF, LITIGATION

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ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this 1st day of May, 2023.

Via CM/ECF:

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/s/ H. Gray Laird III
H. GRAY LAIRD III

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS,	§	
Plaintiff,	§	**CIVIL ACTION NO. 1:20-cv-1256-RP**
v.	§	
CITY OF AUSTIN AND CHRISTOPHER TAYLOR,	§	
Defendants.	§	

DEFENDANT CITY OF AUSTIN'S MOTION TO STAY FURTHER PROCEEDINGS

Defendant the City of Austin (the "City") files this motion to stay further proceedings and corresponding scheduling order deadlines in this matter, including discovery, pretrial exchanges, dispositive motion deadlines, and trial, pending resolution of the criminal proceeding related to this case that remains pending in Travis County criminal district court.

SUMMARY

This civil case has proceeded as far as it reasonably can before an overarching and inevitable question has been reached: How can the City effectively prepare its defenses, at summary judgment or trial, given the pendency of related criminal proceedings? As the Court is well aware, Defendant Christopher Taylor is under indictment in Travis County district court for alleged actions taken in response to the April 24, 2020 incident which is the subject of this lawsuit. The overlapping nature of the criminal case and this federal civil rights case is plain from the federal and state dockets and corresponding pleadings:

Civil Case Name:	Officers under indictment:	Criminal Docket Number:
Brenda Ramos (No. 1:20-CV-01256-RP)	Christopher Taylor	D-1-DC-20-900048
Maurice DeSilva (No. 1:21-CV-00129- RP)	1. Christopher Taylor 2. Karl Krycia	1. D-1-DC-19-900111 2. D-1-DC-21-900071

Copies of the state criminal indictments that correspond to the above chart are attached as Exhibits 1 and 2.

Plaintiff has brought excessive force claims against the officer defendant arising out of the death of Plaintiff's decedent Mike Ramos on April 24, 2020, and has brought related *Monell* claims against the City over claimed policies and practices, among others, concerning use of force.

On March 10, 2021, a Travis County grand jury returned an indictment against Christopher Taylor for murder as a result of the death of Mike Ramos arising from the incident which is the subject of this lawsuit. Ex. 1. The pending Travis County criminal case is currently set for jury trial on October 16, 2023. Ex. 3, criminal docket sheet. There is no dispute, nor can there be, that the subject matter of the pending Travis County criminal case against the officer defendant here overlaps with the subject matter of Plaintiff's civil rights case. Ex. 1

Additionally, a Travis County grand jury returned an indictment against Christopher Taylor for murder as a result of the death of Dr. Mauris DeSilva arising from a July 31, 2019 officer-involved shooting which is the subject of a pending civil action in this court styled *DeSilva v. Taylor, et al.,* No. 1:21-cv-00129-RP, Western District, Texas. Ex. 2 (Taylor indictment re DeSilva). In the *DeSilva* civil case, this Court granted the plaintiff's motion to stay the entire case pending the outcome of the criminal prosecutions against Officer Taylor and the other officer defendant, Officer Krycia. (Order, Dkt. 45, *DeSilva v. Taylor, et al.*, No. 1:21-cv-00129-RP (W.D. Texas October 27, 2022)(Pitman, D.J.) Notably, the Plaintiff's *Monell*

allegations against the City in the instant case include allegations that the City failed to discipline and supervise Officer Taylor following the DeSilva incident which allowed Taylor to return to duty and ultimately use excessive deadly force on Ramos. See Second Amended Complaint, Dkt. 45, ¶¶ 98-102; 124-129)

Keeping in mind the differences between claims against the individual officer and the City,[1] the City has participated in as much discovery and pretrial proceedings as it reasonably can before getting to the point of confronting the inevitable question of how it can prepare and present its defenses in light of the pending criminal cases. The City has produced over 9,000 pages of documents in this case. The bulk of this production consists of Austin Police Department personnel and investigation files, emails from within APD and other City departments, and multimedia files. The potential discovery involving the individual officer—who is a critical fact witness under indictment—will force upon the individual officer the impossible choice of invoking their Fifth Amendment rights in light of the pending criminal cases or defending himself against civil liability by waiving those rights and testifying.

Given the dilemma presented by the parallel proceedings, this Court recently granted the City's motions to stay further proceedings in *Sanders v. City of Austin. See* Order (Dkt. 72), *Sanders v. City of Austin*, No. 1:22-cv-00314-RP (W.D. Tex. May 12, 2023) (Howell, M.J.) and *Volter-Jones v. City of Austin, et al.* See Order (Dkt. 26), *Volter-Jones v. City of Austin, et al.*, No. 1:22-cv-00511-RP (W.D. Tex. June 8, 2023)(Howell, M.J.). Additionally, the Court has entered stays of discovery and/or other proceedings in recent matters arising out of the May

[1] *E.g., Martin v. Dallas County*, 822 F.2d 553, 555-56 (5th Cir. 1987); *Beltran v. City of Austin*, 2022 WL 11455897 (W.D. Tex. 2022); *Ramirez v. Escajeda*, 2022 WL 1744454 (W.D. Tex. 2022); *Rhoten v. Stroman*, 2020 WL 3545661 (W.D. Tex. 2020).

2020 protests, as well as in other cases involving parallel civil and criminal proceedings over officer conduct. *See, e.g.*, Order (Dkt. 39), *Sanders v. City of Austin*, No. 1:22-cv-00314-RP (W.D. Tex. Nov. 15, 2022) (Howell, M.J.) (staying all discovery against officer defendant); *Doe v. City of Austin*, No. 1:22- CV-00299-RP, 2022 WL 4234954, at *8 (W.D. Tex. Sept. 14, 2022) (Hightower, M.J.) (staying all discovery against city and officer defendant); *Kirsch v. City of Austin*, No. A-20-CV-01113- RP, 2022 WL 4280908, at *3 (W.D. Tex. Aug. 5, 2022) (Howell, M.J.) (staying all discovery against officer defendant); *DeSilva v. Taylor*, No. 1:21:cv-00129-RP, 2022 WL 545063, at *4 (W.D. Tex. Feb. 23, 2022) (Hightower, M.J.) (staying all discovery against officer defendants); Text Order dated May 30, 2023 Granting Agreed Motion to Stay Further Proceedings, *Griffith v. City of Austin, et al.*, No. 1:21-cv-01170-DII; Order Staying Case (Dkt. 89), *Ambler v. Williamson Cnty.*, No. 1:20-CV-1068-LY (W.D. Tex. July 27, 2021) (staying entire case).

Given the lack of resolution of the criminal case that factually overlaps this one, as well as the criminal case arising out of the DeSilva incident, it has now become readily apparent that the parties (including the City) will not be able to conduct additional and necessary discovery that is unavailable while the criminal case is pending. It has likewise become apparent that it is not possible to conduct expert discovery without the necessary and currently unavailable testimony of essential fact witnesses. It has become readily apparent that without this unavailable testimony and other evidence, the City will not be able to prepare its defenses for summary judgment, much less for trial. The practical effects of the parallel criminal proceedings preclude the completion of expert disclosures and reports, summary judgment briefing, trial preparation, and presentation of the claims and defenses at trial. These roadblocks to a full and fair defense constitute a due process issue for the City.

The City therefore moves to stay all further proceedings in this case until the resolution of the corresponding parallel criminal proceedings pending against the officer defendant. Once the overlapping criminal matters are resolved, the parties will be able to complete remaining discovery, summary judgment proceedings, and any pretrial preparations.

ARGUMENT

The City requests a stay of further proceedings in this matter pending resolution of the parallel criminal proceeding. The City did not file this motion immediately upon the case having been filed. This allowed the parties to make progress in discovery without directly implicating an officer's right to defend himself in parallel criminal cases, or the City's ultimate ability to prepare and present its defenses. The discovery and proceedings have reached the point at which the City cannot prepare and mount a full and fair defense to the civil allegations against it.

I. This Court has the authority to stay discovery.

As this Court knows, federal courts often stay civil proceedings to allow overlapping and parallel criminal proceedings to run their course. As indicated above, this has been the case with this Court having recently imposed a stay with respect to proceedings against not only individual law enforcement officers but also the government entities with which the officers were employed during the time period at issue. *See cases cited supra at pp 3-4.*

This case presents the same issue and also warrants a stay. Federal district courts have "broad discretion to stay proceedings as an incident to [their] power to control [their] own docket[s]." *Clinton v. Jones*, 520 U.S. 681, 707 (1997). The United States Supreme Court has recognized that there are "special circumstances" in which "the interests of justice" support or even require temporary stays. *United States v. Kordel*, 397 U.S. 1, 12 & n.27 (1970); *SEC v. First Fin. Grp. of Tex., Inc.*, 659 F.2d 660, 668 (5th Cir. 1981) (stays may be necessary "to

prevent a party from suffering substantial and irreparable prejudice"). In particular, stays are "common practice" when civil and criminal liability arise from the same incident because "criminal prosecutions often take priority over civil actions." *Wallace v. Kato*, 549 U.S. 384, 394 (2007); *In re Grand Jury Subpoena*, 866 F.3d 231, 234 (5th Cir. 2017); *Kmart Corp v. Aronds*, 123 F.3d 297, 300 (5th Cir. 1997); *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983) ("Certainly, a district court may stay a civil proceeding during the pendency of a parallel criminal proceeding.").

The existence of parallel civil and criminal proceedings poses a unique constitutional danger because every person facing criminal liability has the constitutional right against self-incrimination provided by the Fifth Amendment. *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1087-88 (5th Cir. 1979). At the same time, every person facing civil liability has a due process right to have that matter fully and fairly adjudicated. *Id.* Courts must avoid scenarios that "require a party to surrender one constitutional right in order to assert another." *Id.* at 1088. A civil defendant invoking his Fifth Amendment rights "should suffer no penalty for his silence." *Id.* (citing *Spevack v. Klein*, 385 U.S. 511, 515 (1967)). Temporary stays protect these competing rights by allowing the criminal process to resolve before the civil process. *Id.* at 1089 (reversing district court for refusing to stay case "for approximately three years" while criminal process was resolved).

Here, Plaintiff's theories of municipal liability depend on a requested finding that the officer violated the constitutional rights of Mike Ramos. Second Am. Complaint (Dkt. 45) at 24-25 ("Taylor violated Mike Ramos's Fourth Amendment rights when he shot and killed Mike Ramos without justification...Taylor's unlawful and unconstitutional use of deadly force violated Mike's civil rights, is the direct cause of his death, and caused Ms. Ramos's harm and

damages." As pled and discovered to date, it is clear that the alleged actions of Officer Taylor are the source of the claimed harm at issue in this case and the Desilva case. Testimony from Taylor is not currently available in this case, and testimony from Officer Krycia, who was also indicted for the DeSilva incident and a witness officer to the Ramos incident, is just as unreachable. The witness officers' right against self-incrimination is therefore just as likely to prevent usable testimony. Without that essential testimony, from both defendants and witnesses, the City is precluded from essential factual information that would demonstrate that "a person has suffered no constitutional injury at the hands of the individual police officer." *City of Los Angeles v. Heller*, 106 S. Ct. 1571, 1573 (1986). As the Supreme Court has stated:

> But this was an action for damages, and neither *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm.

Id.

In the circumstances of these cases, the City is precluded—by virtue of the lack of access to an indicted officer's testimony—from completing discovery that would allow it to marshal its defenses. Thus, a stay as to the City on Plaintiff's *Monell* claims is appropriate. *See Doe*, 2022 WL 4234954 at * 7; *see also, e.g., Anderson v. City of Chicago*, 2016 WL 7240765 (N.D. Ill. 2016) ("Even if the City had a policy or practice of permitting its officers' to coerce false confessions through force, the harm caused by the policy could only manifest itself through the officers' actions."); *Williams v. City of Chicago*, 315 F. Supp. 3d 1060, 1080 (N.D. Ill. 2018) ("Even if the City had a policy or practice of permitting its officers to coerce false testimony or to create false investigative reports, the harm caused by the practice could only manifest itself through the officers' actions.")

When tasked with determining the propriety of a stay in light of parallel civil and criminal proceedings, courts generally consider six factors:

> "(1) the extent to which the issues in the criminal case overlap with those presented in the civil case;
>
> (2) the status of the criminal case, including whether the defendants have been indicted;
>
> (3) the private interests of the plaintiffs in proceeding expeditiously, weighed against the prejudice to the plaintiffs caused by the delay;
>
> (4) the private interests of and burden on the defendants;
>
> (5) the interests of the courts; and
>
> (6) the public interest."

Bean v. Alcorta, 220 F.3d 772, 775 (W.D. Tex. 2016); *Doe*, 2022 WL 4234954, at *4.

II. The Court should stay further proceedings here.

Each of the six factors identified above supports a stay of further proceedings here. As in *Doe*, *Sanders*, *Kirsch*, *DeSilva*, and other cases in which stays have been granted, the individual law enforcement officer named as a defendant here is facing criminal prosecution regarding the same conduct at issue in the civil case. *See Doe*, 2022 WL 4234954, at *5; *Kirsch*, 2022 WL 4280908, at *2; *DeSilva*, 2022 WL 545063, at *3. When previously faced with that overlap between civil and criminal issues, this Court has chosen to stay the civil cases, for both the officers and the City, based largely on that overlap and the resulting danger of civil discovery forcing the officers to incriminate themselves. *See Sanders v. City of Austin. See* Order (Dkt. 72), *Sanders v. City of Austin*, No. 1:22-cv-00314-RP (W.D. Tex. May 12, 2023) (Howell, M.J.), *Doe*, 2022 WL 4234954, at *6-7; *see also Ambler*, No. 1:20-CV-1068-LY (W.D. Tex. July 27, 2021) (staying entire case in light of officers' indictment for crimes arising from facts similar to

the civil case). The Court should exercise its discretion in favor of a stay in this case as well.

A. There is complete overlap between the civil and criminal cases.

There is no dispute that there is complete overlap between the Plaintiff's allegations in this civil case and the allegations that undergird the indictment against the APD officer named as a co- defendant with the City. The civil allegations in the Second Amended Complaint and the criminal allegations contained in the indictment arise from the same set of facts and essentially mirror each other. "The question is simple: do the facts overlap? Here, they undeniably do." *See* Order (Dkt. 39), at 4, *Sanders v. City of Austin*, No. 1:22-cv-00314-RP (W.D. Tex. Nov. 15, 2022) (Howell, M.J.).

This complete overlap of subject matter supports a stay because "[w]here there is significant overlap, self-incrimination is more likely" and Fifth Amendment concerns are at their greatest. *Bean*, 220 F. Supp. 3d at 776 ("significant and perhaps even complete overlap" between criminal and civil proceedings "weighs strongly in favor of staying the case"); *Meyers*, 2016 WL 393552, at *6 (factor favored stay where civil and criminal lawsuits arose "from the same facts"); *Shaw*, 2007 WL 1465850, at *2 (civil and criminal allegations "aris[ing] from the same set of operative facts . . . weighs heavily in favor of granting a stay"). For this reason, courts often describe this factor as the "most important" consideration for issuing a stay. *E.g.*, *Doe*, 2022 WL 4234954, at *5; *DeSilva*, 2022 WL 545063, at *3 ("Because there is significant overlap between the issue presented in this case and Defendants' criminal proceedings . . . . [t]he first and most important factor weighs strongly in favor of staying the case."); *Frierson v. City of Terrell*, No. 3:02CV2340-H, 2003 WL 21355969, at *3 (N.D. Tex. June 6, 2003) (staying case); *Librado v. M.S. Carriers, Inc.*, No. 3:02-CV-2095D, 2002 WL 31495988, at *2 (N.D. Tex. Nov. 5, 2002)

(staying case).

It is no answer to this analysis to say that the City itself is not facing criminal charges. This Court rejected that argument in *Doe*. "Although the City is not a party to the criminal proceedings, the Court finds that Dodds' oppression charge substantially overlaps with Doe's *Monell* claims against the City." *Doe*, 2022 WL 4234954, at *5. The same is true here. The *Monell* claims against the City allege that various City policies resulted in an officer engaging in the exact conduct that undergirds the individual excessive force claims and the basis of the criminal charges. *See, e.g.*, First Am. Compl. (Dkt. 4) ¶¶ 36-39. And as in *Doe*, "the first and most important factor weighs strongly in favor of staying this case." *Doe*, 2022 WL 4234954, at *5.

B. The officer defendant has been indicted and still faces criminal liability.

As noted above, the individual officer defendant in this case has been indicted for murder. Ex. 1 "A stay of a civil case is more appropriate where a party to the civil case has already been indicted for the same conduct." *Bean*, 220 F. Supp. 3d at 776 (staying case when defendant's criminal conviction was pending on appeal); *Doe*, 2022 WL 4234954, at *5 (staying case when indictment issued while motion to stay was pending); *Kirsch*, 2022 WL 4280908, at *2 (staying case when defendant was indicted); *DeSilva*, 2022 WL 545063, at *3 (same); *Meyers*, 2016 WL 393552, at *6 (same); *Shaw*, 2007 WL 1465850, at *2 (staying case when plaintiffs were indicted).

C. Plaintiff will suffer no prejudice beyond mere delay.

Stays by their very nature delay proceedings. A claim that stays cause delay or result in witness memories fading over time is not enough to affect the analysis. As this Court has recognized, that "is true in any case in which a stay is granted." *Kirsch*, 2022 WL 4280908, at

*2; *see also* Order (Dkt. 39), at 5, *Sanders v. City of Austin*, No. 1:22-cv-00314-RP (W.D. Tex. Nov. 15, 2022)(Howell, M.J.)(rejecting arguments about "a COVID-19 induced backlog of criminal cases" in Travis County).

Instead, to avoid a stay, courts require plaintiffs to, *inter alia*, demonstrate "more prejudice than simply a delay" in resolving their pending claims. *DeSilva*, 2022 WL 545063, at *3; *Doe*, 2022 WL 4234954, at *5-6; *Bean*, 220 F. Supp. 3d at 776; *Meyers*, 2016 WL 393552, at *6. To meet this burden, a plaintiff could identify some specific "discovery that is available now but would be unavailable later should a stay be granted," or identify specific "witnesses [who] will be unable to testify" after a stay is lifted. *DeSilva*, 2022 WL 545063, at *3.

Plaintiff cannot establish such prejudice here. Moreover, any discovery concerns are mitigated by the discovery the parties have already conducted in the case. This includes extensive production of the available documentary and multimedia records of the incident and later investigation, the evidentiary value of which will not decay over time. To the contrary, the massive amount of reporting and video and audio evidence of the conduct at issue in this and similar cases means the parties are less likely to need to rely exclusively on witnesses' memories than in other types of cases in which stays might be more prejudicial.

D. Proceeding with the civil case further would be highly prejudicial and potentially wasteful.

One of the fundamental goals of stays in this context is avoiding the natural prejudice that arises from forcing parties to defend litigation while also asserting their Fifth Amendment rights. The Fifth Amendment "privileges [a person] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976). A person cannot be compelled "to answer deposition questions, over a valid assertion of his Fifth

Amendment right." *Pillsbury Co. v. Conboy*, 459 U.S. 248, 256–57 (1983).

If this case continues, including through officer depositions and on to disclosures of experts, filing of dispositive motions, and trial, these Fifth Amendment concerns will continue to be directly implicated. Officer Taylor and Officer Krycia will face "a conflict between asserting his Fifth Amendment rights and fulfilling his legal obligations as a witness" and defendant in this civil case. *DeSilva*, 2022 WL 545063, at *4. The officers have an interest in preventing their defenses in these civil cases from providing evidence that the TCDAO may use in its prosecutions, and from prematurely disclosing to the TCDAO their defenses in the criminal cases. *Id.* ("Defendants have an interest in staying the civil trial to avoid exposing their criminal defense strategies to the prosecution."). While these concerns are present—as they continue to play out indisputably with officers refusing to testify—the prejudice to the City in preparing its defenses continues.

This factor favors a stay. *Id.*; *Doe*, 2022 WL 4234954, at *6; *Kirsch*, 2022 WL 4280908, at *3; *Bean*, 220 F. Supp. 3d at 777; *Meyers*, 2016 WL 393552, at *7 & n.3 (noting the potential for plaintiffs to use civil discovery to prejudice criminal defendants); *Librado*, 2002 WL 31495988, at *3.

E. A stay supports the Court's interests.

A stay also favors judicial economy and this Court's management of its docket. *Bean*, 220 F. Supp. 3d at 777; *Meyers*, 2016 WL 393552, at *7; *Librado*, 2002 WL 31495988, at *3. If the civil cases continue, Officer Taylor and Officer Krycia will be placed in a position to assert their Fifth Amendment rights. If the prospect of criminal liability has been eliminated before trial, they would likely then be in a position of withdrawing the privilege and testifying in their own defense and on behalf of the City in support of its defenses. *Davis-Lynch, Inc. v. Moreno*,

667 F.3d 539, 547-48 (5th Cir. 2012) (discussing circumstances in which "a party may withdraw its assertion of the Fifth Amendment privilege, even at a late stage in the litigation"). That withdrawal may raise new concerns of prejudice and delay, the prospect of additional depositions, extensions of expert discovery or *Daubert* deadlines, and more. *See id.* This Court can avoid any need to raise or resolve those legal questions by temporarily staying the proceedings. *See DeSilva*, 2022 WL 545063, at *4 (noting the possibility that resolution of the criminal case may also resolve or eliminate issues in the civil trial). Additionally, resolution of the criminal proceedings may help resolve the civil cases as well, in whole or in part, through encouraging settlement or through potential estoppel- or preclusion-type rulings. *Kirsch*, 2022 WL 4280908, at *3.

F. A stay supports the public's interests.

The public "has an interest in protecting the constitutional rights of criminal defendants" as well as in seeing both civil and criminal cases resolved promptly. *Bean*, 220 F. Supp. 3d at 778. The public interest factor weighs *against* a stay "only where, unlike here, a civil case is pending and no criminal investigation has begun." *DeSilva*, 2022 WL 545063, at *4; *Meyers*, 2016 WL 393552, at *7. Here, the public's interests are best served by temporarily staying civil discovery until the criminal process concludes so officers' constitutional rights can be protected, along with the City's rights to defend itself against claims for damages with all available evidence, including evidence from the officers. *DeSilva*, 2022 WL 545063, at *4; *Bean*, 220 F. Supp. 3d at 778; *Meyers*, 2016 WL 393552, at *7; *Shaw*, 2007 WL 1465850, at *2; *Librado*, 2002 WL 31495988.

The public has an interest in seeing these accusations against the City, against Officer Taylor, and against other non-defendant officers resolved based on all the evidence, not based on

any rush to prosecute. The public also has an interest in avoiding a situation in which the City's rights to defend itself are limited by the pendency of the criminal cases. This interest can and should be protected by allowing the remaining criminal process to play out first.

III. The Court should stay these proceedings so the defendants can fully defend themselves, including through developing and presenting defenses.

The City, just like any other defendant, has a right to defend itself. A cornerstone of its defense will be whether the officer involved in the above-captioned civil rights case (or any other officers implicated in conduct Plaintiff claims affected him) committed a constitutional injury. If they did not, the related *Monell* claims against the City may fail. *See Lucky Tunes #3, L.L.C. v. Smith*, 812 Fed. Appx. 176, 183 (5th Cir. 2020) (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)). With the lack of access to the officer testimony and essential physical evidence, the City's defense will be hopelessly hamstrung.

A municipality cannot be found liable on a *Monell* claim if the plaintiff cannot show that the municipality's employees, here the officers, violated the Constitution. *Heller*, 475 U.S. at 796; *Malbrough v. Stelly*, 814 Fed. Appx. 798, n. 15 (5th Cir. 2020). The claims against the officer is thus linked by a common core of evidence to the claims against the City. *Doe*, 2022 WL 4232954, at *7. As the Court knows, the defense of qualified immunity "provides government officials with immunity from suit so long as they do not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Hutcheson v. Dallas Cnty., Tex.*, 994 F.3d 477, 480 (5th Cir. 2021) (internal quotations omitted). In this matter, the officer also has a right to pursue a qualified immunity defense, which will protect him against liability unless Plaintiff can prove both (1) that the officer involved violated his constitutional rights, and (2) that the officer's actions were objectively unreasonable in light of clearly established law at the time. *Id.* This analysis includes what actions the officer took on the day in

question—a matter on which the officer has unique personal knowledge, but to which he cannot testify without abrogating his rights against self-incrimination given the ongoing criminal case.

Defending against a *Monell* claim that is based on claims of inadequate policies regarding the use of force and protest response, while the officer at issue is under criminal indictment awaiting trial, puts the City in an untenable position. The evidence the City needs to defend itself is evidence and testimony from the officers who, under advice of their counsel, have invoked and will continue to invoke their rights against self-incrimination. As this Court has noted before, when self-incrimination is at issue, neither the Plaintiff nor the City will be able to obtain the necessary discovery to prove, or disprove, their claims or defenses. *Doe*, 2022 WL 4232954, at *7. The only equitable solution at this point is a stay.

Other courts, presented with similar situations and facts, have chosen to stay *Monell* claims. *See, e.g.*, *Trent v. Wade*, 3:12-cv-01244-P, 2013 WL 12176988, at *3 (N.D. Tex. 2013). A stay under these circumstances would be based in equity and due process. If the underlying issue of whether a constitutional violation occurred or not cannot be determined because of the threat of self-incrimination faced by essential witnesses, the correct response is not to force the issue and make either side litigate with half the facts. The correct response is a stay. *Doe*, 2022 WL 4232954, at *7.

CONCLUSION

For all these reasons, Defendant City of Austin respectfully requests the Court grant this motion, stay all further proceedings in each of these matters until after the resolution of the pending parallel criminal proceeding, and award the City all other relief to which it may show itself to be entitled in connection with this motion.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN L. RILEY, LITIGATION DIVISION CHIEF

/s/ H. Gray Laird III
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ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

CERTIFICATE OF CONFERENCE

I hereby certify that I have conferred with counsel for Plaintiff and he is opposed to the relief sought in this motion. We have also conferred with counsel for co-defendant Christopher Taylor and understand that the co-defendant is unopposed to the relief requested in this motion.

/s/ *H. Gray Laird III*
H. GRAY LAIRD III

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2023, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system.

/s/ *H. Gray Laird III*
H. GRAY LAIRD III

Exhibit 1

D.A. #D1DC20900048 MNI # 7968275 TRN: DPS: 09990030 Court: 167th

The State of Texas v. CHRISTOPHER TAYLOR

INDICTMENT

MURDER - PC 19.02(c) - F1

Bond $

In The 147th Judicial District Court (Special) of Travis County, Texas

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY, for the County of Travis, State of Texas, duly selected, empaneled, sworn, charged, and organized as such at the July Term, 2020, of the 147th Judicial District Court (Special) for said County, upon its oath presents in and to said Court at said term, that CHRISTOPHER TAYLOR, on or about the 24th day of April, 2020, and before the presentment of this Indictment, in the County of Travis, and State of Texas, did then and there intentionally and knowingly cause the death of MICHAEL RAMOS, an individual, by shooting the said MICHAEL RAMOS with a firearm,

against the peace and dignity of the State,

DocuSigned by:

DocuSigned by:
Gaurav Patel
7011998D818B44C...
Foreperson of the Grand Jury

Filed in the District Court
Of Travis County, Texas
Velva L. Price, District Clerk

DS
LE

3/10/2021 | 10:17 AM CST

Exhibit 2

D.A. #D1DC19900111 MNI # 7968275 TRN: DPS: 09990030, 52130005 Court: 167th

The State of Texas v. CHRISTOPHER TAYLOR

INDICTMENT

COUNT ONE: MURDER - PC 19.02(c) - F1

COUNT TWO: DEADLY CONDUCT DISCHARGE FIREARM – PC 22.05(b) – F3

Bond $

In The 331st Judicial District Court of Travis County, Texas

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY, for the County of Travis, State of Texas, duly selected, empaneled, sworn, charged, and organized as such at the July Term, 2021, of the 331st Judicial District Court (Special) for said County, upon its oath presents in and to said Court at said term, and before the presentment of this Indictment:

PARAGRAPH A

On or about the 31st day of July, 2019, CHRISTOPHER TAYLOR, in the County of Travis, and State of Texas, did then and there intentionally and knowingly cause the death of MAURIS DESILVA, an individual, by shooting MAURIS DESILVA with a firearm;

PARAGRAPH B

On or about the 31st day of July, 2019, CHRISTOPHER TAYLOR, in the County of Travis, and State of Texas, did then and there, intending to cause serious bodily injury to MAURIS DESILVA, commit an act clearly dangerous to human life, to-wit: by shooting MAURIS DESILVA with a firearm, thereby causing the death of MAURIS DESILVA, an individual;

COUNT TWO: DEADLY CONDUCT DISCHARGE FIREARM – PC 22.05(b) – F3

The Grand Jury further presents that CHRISTOPHER TAYLOR, on or about the 31st day of July, 2019, and before the presentment of this Indictment, in the County of Travis, and State of Texas, did then and there knowingly discharge a firearm at and in the direction of one or more individuals, namely: MAURIS DESILVA,

against the peace and dignity of the State,

DocuSigned by:

Filed in the District Court
Of Travis County, Texas
Velva L. Price, District Clerk

8/26/2021 | 10:39 AM CDT

DS
LE

DocuSigned by:
Angelica Lopez
7011998D818B44C...
Foreperson of the Grand Jury

D.A. #D1DC21900071 MNI # 7968275 TRN: DPS: 09990030, 52130005 Court: 167th

The State of Texas v. KARL KRYCIA

INDICTMENT

COUNT ONE: MURDER - PC 19.02(c) - F1

COUNT TWO: DEADLY CONDUCT DISCHARGE FIREARM – PC 22.05(b) – F3

Bond $

In The 331st Judicial District Court of Travis County, Texas

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY, for the County of Travis, State of Texas, duly selected, empaneled, sworn, charged, and organized as such at the July Term, 2021, of the 331st Judicial District Court (Special) for said County, upon its oath presents in and to said Court at said term, and before the presentment of this Indictment:

PARAGRAPH A

On or about the 31st day of July, 2019, KARL KRYCIA, in the County of Travis, and State of Texas, did then and there intentionally and knowingly cause the death of MAURIS DESILVA, an individual, by shooting MAURIS DESILVA with a firearm;

PARAGRAPH B

On or about the 31st day of July, 2019, KARL KRYCIA, in the County of Travis, and State of Texas, did then and there, intending to cause serious bodily injury to MAURIS DESILVA, commit an act clearly dangerous to human life, to-wit: by shooting MAURIS DESILVA with a firearm, thereby causing the death of MAURIS DESILVA, an individual;

COUNT TWO: DEADLY CONDUCT DISCHARGE FIREARM – PC 22.05(b) – F3

The Grand Jury further presents that KARL KRYCIA, on or about the 31st day of July, 2019, and before the presentment of this Indictment, in the County of Travis, and State of Texas, did then and there knowingly discharge a firearm at and in the direction of one or more individuals, namely: MAURIS DESILVA,

against the peace and dignity of the State,

DocuSigned by:

Filed in the District Court
Of Travis County, Texas
Velva L. Price, District Clerk

DocuSigned by:
Angelica Lopez
7011998D818B44C...
Foreperson of the Grand Jury

8/26/2021 | 10:39 AM CDT

DS
LE

Exhibit 3

167th District Court

Case Summary

Case No. D-1-DC-20-900048

STATE OF TEXAS VS TAYLOR, CHRISTOPHER	§	Location: **167th District Court**
	§	Judicial Officer: **167TH, DISTRICT COURT**
	§	Filed on: **03/10/2021**

Case Information

Offense	Degree	Offense Date	Filed Date		
1. MURDER	F1	04/24/2020	03/10/2021	Case Type:	FELONY
				Case Status:	**03/12/2021 Indictment**

Arrest
Date: 03/11/2021
Control #: 21-03781
Agency: TCSO - Travis County Sheriff

Bonds

PERSONAL RECOGNIZANCE BOND #137319
03/11/2021 Posted
03/11/2021 Posted
Counts: 1

Party Information

State **STATE OF TEXAS**

Defendant **TAYLOR, CHRISTOPHER**
ERVIN, KENNETH WAYNE
Retained
O'Connell, Douglas K.
Retained

Case Events

03/10/2021 NO COMPLAINT
Event Code: 6509
Party: Defendant TAYLOR, CHRISTOPHER

03/10/2021
INDICTMENT 147TH GRAND JURY
Event Code: 6501
Party: Defendant TAYLOR, CHRISTOPHER

03/10/2021
SIGNED ORDER
SIGNED ORDER FOR ISSUANCE OF CAPIAS Event Code: 8069
Party: Defendant TAYLOR, CHRISTOPHER

03/10/2021
CAPIAS/WARRANT
BOND AMOUNT SET AT $100,000.00 Event Code: 7507
Party: Defendant TAYLOR, CHRISTOPHER

03/11/2021 CAL:ON CCA COURT DOCKET
Event Code: 6101
Party: Defendant TAYLOR, CHRISTOPHER

167th District Court

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03/11/2021
PERSONAL BOND
Event Code: 7000 Adjmt Amount: 100000.00
Party: Defendant TAYLOR, CHRISTOPHER

03/11/2021
WARRANT RETURNED EXECUTED
Event Code: 7503
Party: Defendant TAYLOR, CHRISTOPHER

04/01/2021 CAL:FIRST APPEAR; FIRST SET
Calendar Posting on 03/11/2021 Event Code: 6244

04/09/2021 CAL:BOND HEARING
Calendar Posting on 03-18-2021 Event Code: 6132

04/12/2021
APPLICATION FOR SUBPOENA
A SUBPOENA WAS ISSUED FOR THE FOLLOWING WITNESSES: CUSTODIAN OF RECORDS: C/O PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW ENFORCEMENT Event Code: 7532
Party: State STATE OF TEXAS

04/14/2021
EXECUTED SUBPOENA
A SUBPOENA WAS EXECUTED FOR THE FOLLOWING WITNESSES: CUSTODIAN OF RECORDS: PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW ENFORCEMENT Event Code: 7517
Party: State STATE OF TEXAS

05/25/2021 CAL:PRETRIAL SETTING
Calendar Posting on 04-09-2021 Event Code: 6010

06/21/2021 CAL:PRE JURY SETTINGS
Calendar Posting on 05-25-2021 Event Code: 6156

09/07/2021 CAL:JURY TRIAL SETTING
Calendar Posting on 06-21-2021 Event Code: 6018

09/21/2021
MTN:MOTION
MOTION FOR INDEPENDENT FIREARM TESTING Event Code: 6731
Party: Defendant TAYLOR, CHRISTOPHER

10/11/2021 CAL:JURY TRIAL SETTING
Calendar Posting on 09-07-2021 Event Code: 6018

01/20/2022
WAIVER OF ARRAIGNMENT

02/17/2022
APPLICATION FOR SUBPOENA
CUSTODIAN OF RECORDS FOR: AUSTIN POLICE DEPARTMENT (AUSTIN POLICE ACADEMY)

11/18/2022
MTN:FOR CONTINUANCE

11/22/2022
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR C/O PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW ENFORCEMENT REGARDING BENJAMIN HART

11/22/2022
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR C/O PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW ENFORCEMENT REGARDING KATRINA RATCLIFF

11/22/2022
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR C/O PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW

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ENFORCEMENT REGARDING VALERIE TAVAREZ

11/22/2022
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR C/O PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW ENFORCEMENT REGARDING MITCHELL PIEPER

11/22/2022
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR C/O PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW ENFORCEMENT REGARDING KARL KRYCIA

11/22/2022
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR C/O PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW ENFORCEMENT REGARDING JAMES MORGAN

11/22/2022
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR C/O PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW ENFORCEMENT REGARDING DARRELL CANTU-HARKLESS

11/22/2022
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR AUSTIN POLICE DEPARTMENT

11/30/2022
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR C/O PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW ENFORCEMENT REGARDING BENJAMIN HART

11/30/2022
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR C/O PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW ENFORCEMENT REGARDING DARRELL CANTU-HARKLESS

11/30/2022
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR C/O PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW ENFORCEMENT REGARDING JAMES MORGAN

11/30/2022
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR C/O PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW ENFORCEMENT REGARDING KARL KRYCIA

11/30/2022
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR C/O PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW ENFORCEMENT REGARDING KATRINA RATCLIFF

11/30/2022
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR C/O PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW ENFORCEMENT REGARDING MITCHELL PIEPER

11/30/2022
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR C/O PUBLIC INFORMATION COORDINATOR TEXAS COMMISSION ON LAW ENFORCEMENT REGARDING VALERIE TAVAREZ

167th District Court

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Case No. D-1-DC-20-900048

12/22/2022
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR AUTIN POLICE DEPARTMENT

01/12/2023
MTN:TO QUASH
PARTIALLY QUASH SUBPOENA

01/17/2023
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR AUSTIN POLICE DEPARTMENT

01/18/2023
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR AUSTIN POLICE DEPARTMENT

01/18/2023
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR AUSITN POLICE DEPARTMENT

01/25/2023
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR AUSTIN-TRAVIS EMS REGARDING MICHAEL RAMOS

01/25/2023
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR AUSTIN-TRAVIS EMS REGARDING MICHAEL RAMOS

01/26/2023
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR AUSTIN POLICE DEPARTMENT ATTN: RENEE MOORE

01/26/2023
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR AUSTIN POLICE DEPARTMENT ATTN: RENEE MOORE

02/24/2023
MTN:MOTION
MOTION FOR JURY QUESTIONNAIRE

03/06/2023
APPLICATION FOR SUBPOENA
STATE:CUSTODIAN OF RECORDS FOR AUSTIN POLICE DEPARTMENT

03/07/2023
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR AUSTIN POLICE DEPARTMENT

03/22/2023
ORD:STANDING DISCOVERY ORDER

04/04/2023
SIGNED ORDER
AGREED ORDER

04/06/2023
APPLICATION FOR SUBPOENA
STATE:CUSTODIAN OF RECORDS FOR AUSTIN POLICE DEPARTMENT

04/07/2023
MTN:IN LIMINE
STATES MOTION IN LIMINE

04/10/2023
OTHER/NOTICE
REQUEST FOR DISCLOSURE

04/10/2023
NTC:NOTICE
NOTICE OF WITNESSES TO TESTIFY

04/10/2023
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS FOR AUSTIN POLICE DEPARTMENT

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04/12/2023 OTHER/NOTICE
State's Request for Conflicts Hearing

04/14/2023 NTC:NOTICE
STATES NOTICE OF WITNESSES

04/25/2023 STATE'S LIST OF WITNESSES

05/01/2023 NTC OF INTENT

05/01/2023 NTC:NOTICE
STATE'S SUPPLEMENTAL LIST OF WITNESSES

05/02/2023 REQUEST FOR NOTICE

05/02/2023 NTC:OF EXPERT WITNESSES
NTC:OF EXPERT WITNESSES

05/02/2023 MTN:IN LIMINE
MTN:IN LIMINE

05/03/2023 APPLICATION FOR SUBPOENA
STATE:S.ASTON, D. CANTU-HARKLESS, M.DECKER, B.HEART, K.KRYCIA, S,MCCORMICK, J.MORGAN

05/03/2023 APPLICATION FOR SUBPOENA
STATE:M.PIEPER, J.SLAYTON, V.TAVAREZ, N.TAYLOR

05/03/2023 APPLICATION FOR SUBPOENA
STATE:D.MIRELES, K.RATCLIFF

05/03/2023 APPLICATION FOR SUBPOENA
STATE:J.DELAGARZA, R.GARCIA, T.JEFFERSON, C.SCOTT, M.SCOTT, M.WARREN

05/03/2023 APPLICATION FOR SUBPOENA
STATE: B.BARINA, D.PILKINGTON

05/04/2023 MOTION
SEALED

05/04/2023 SIGNED ORDER
SEALED

05/04/2023 OTHER/NOTICE
SEALED

05/04/2023 ORD:ON MOTION IN LIMINE
INCORPORATED ORDER CONCERNING STATES MOTION IN LIMINE

05/04/2023 ORD:ON MOTION IN LIMINE

05/04/2023 APPLICATION FOR SUBPOENA
DEF: R.METCALF, APD #5942

05/04/2023 APPLICATION FOR SUBPOENA
DEF: S.LINDSEY, APD #5114

05/04/2023 APPLICATION FOR SUBPOENA
DEF: C.MEYER, APD #7221

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Case No. D-1-DC-20-900048

05/04/2023 APPLICATION FOR SUBPOENA
DEF: TABER WHITE, APD #6311

05/04/2023 APPLICATION FOR SUBPOENA
DEF: ALEXANDRA PARKER, APD #6614

05/04/2023 APPLICATION FOR SUBPOENA
DEF: ERIC HEIM, APD #7995

05/04/2023 APPLICATION FOR SUBPOENA
DEF: ANDRES PADILLA, APD #8936

05/04/2023 APPLICATION FOR SUBPOENA
DEFENSE: KERRY KELLY

05/04/2023 APPLICATION FOR SUBPOENA
DEFENSE: MITCHELL PIEPER

05/04/2023 APPLICATION FOR SUBPOENA
DEFENSE: JAMES MORGAN

05/04/2023 APPLICATION FOR SUBPOENA
DEFENSE: VALERIE TAVAREZ

05/04/2023 APPLICATION FOR SUBPOENA
DEFENSE: BENJAMIN HART

05/04/2023 APPLICATION FOR SUBPOENA
DEFENSE: DARRELL CANTU-HARKLESS

05/04/2023 APPLICATION FOR SUBPOENA
DEFENSE: GARY PHILLIPS

05/04/2023 APPLICATION FOR SUBPOENA
DEFENSE: KATRINA RATCLIFF

05/04/2023 APPLICATION FOR SUBPOENA
DEF: T.JEFFERSON

05/04/2023 APPLICATION FOR SUBPOENA
DEF: T.BURTON

05/04/2023 APPLICATION FOR SUBPOENA
DEF: C. SCOTT

05/04/2023 APPLICATION FOR SUBPOENA
DEF: M. SCOTT

05/04/2023 APPLICATION FOR SUBPOENA
DEF: D. KUBELKA

05/04/2023 APPLICATION FOR SUBPOENA
DEF: R. GARCIA

05/04/2023 APPLICATION FOR SUBPOENA
DEF: D. MIRELES

167th District Court

Case Summary

Case No. D-1-DC-20-900048

05/04/2023
EXECUTED SUBPOENA
STATE: BRENT BARINA, DREW PILKINGTON

05/05/2023
EXECUTED SUBPOENA
STATE: DANIEL MIRELES

05/08/2023
APPLICATION FOR SUBPOENA
STATE: RONALD JACKSON, ALEXANDER LAVELL

05/08/2023
APPLICATION FOR SUBPOENA
STATE: J KIETH PINCKARD

05/08/2023
STATE'S LIST OF WITNESSES
STATE'S AMENDED LIST OF WITNESSES

05/08/2023
NTC OF INTENT
STATE'S AMENDED NOTICE OF INTENT TO INTRODUCE EXTRAN OFFENSES AND BAD ACTS

05/08/2023
NTC:OF EXPERT WITNESSES
DEFENSE AMENDED NOTICE OF EXPERTS

05/08/2023
APPLICATION FOR SUBPOENA
STATE: TABER WHITE

05/08/2023
APPLICATION FOR SUBPOENA
STATE: ERIC HEIM, JONATHON KREISNER, CURTIS MEYER, JAMES PURCELL, BRANDON SWINDELL

05/08/2023
EXECUTED SUBPOENA
STATE: JENNIFER DELAGARZA

05/09/2023
APPLICATION FOR SUBPOENA
STATE: BECKY BRIEGAL 5143, STEVEN CARDELLA 6296, SHELLY HOLMSTROM 6557, JARED RETKOVSKY 7625, SHAY SAWYER 8591, ERIN TRUHO 5868, TABER WHITE 6311

05/09/2023
APPLICATION FOR SUBPOENA
STATE: EDUARDO EGUIA, KIMBERLY HIGGINS

05/09/2023
EXECUTED SUBPOENA
STATE: TABER WHITE 6311

05/09/2023
EXECUTED SUBPOENA
STATE: J. KEITH PINCKARD

05/10/2023
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORDINATOR TEXAS COMMISION OF LAW ENFORCEMENT

05/10/2023
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD TX COMMISSION ON LAW ENFORCEMENT: CARLOS LOPEZ RECORDS

05/10/2023
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD, TX COMMISSION OF LAW ENFORCEMENT: DANIEL MIRELES

05/10/2023

167th District Court

Case Summary

Case No. D-1-DC-20-900048

APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD, TX COMMISSION OF LAW ENFORCEMENT: ANTHONY PORTER

05/10/2023
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD, TX COMMISSION OF LAW ENFORCEMENT: JONATHAN SLAYTON

05/10/2023
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD, TX COMMISSION OF LAW ENFORCEMENT: JOE SWANN

05/10/2023
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD, TX COMMISSION OF LAW ENFORCEMENT: STEVEN WILLIS

05/10/2023
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD, TX COMMISSION OF LAW ENFORCEMENT: RODNEY WISE

05/10/2023
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD, TX COMMISSION OF LAW ENFORCEMENT: JEFF WOODWARD

05/10/2023 EXECUTED SUBPOENA
STATE: MEKO SCOTT

05/10/2023 EXECUTED SUBPOENA
STATE: TAVON JEFFERSON

05/11/2023 EXECUTED SUBPOENA
STATE: JONATHAN KREISNER 8555, CURTIS MEYER 7221, BRANDON SWINDELL 8960

05/11/2023
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD. TX COMMISSION ON LAW ENFORCEMENT: MICHAEL DECKER

05/11/2023
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD. TX COMMISSION ON LAW ENFORCEMENT: CARLOS LOPEZ

05/11/2023
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD. TX COMMISSION ON LAW ENFORCEMENT: DANIEL MIRELES

05/11/2023
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD. TX COMMISSION ON LAW ENFORCEMENT: ANTHONY PORTER

05/11/2023
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD. TX COMMISSION ON LAW ENFORCEMENT: JONATHAN SLAYTON

05/11/2023
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD. TX COMMISSION ON LAW ENFORCEMENT: JOE SWANN

05/11/2023
EXECUTED SUBPOENA

167th District Court

Case Summary

Case No. D-1-DC-20-900048

STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD. TX COMMISSION ON LAW ENFORCEMENT: STEVEN WILLIS

05/11/2023
EXECUTED SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD. TX COMMISSION ON LAW ENFORCEMENT: RODNEY WISE

05/11/2023
APPLICATION FOR SUBPOENA
STATE: CUSTODIAN OF RECORDS PUBLIC INFO COORD. TX COMMISSION ON LAW ENFORCEMENT: JEFF WOODWARD

05/12/2023 APPLICATION FOR SUBPOENA
STATE: MARCUS JOHNSON 7310, KEVIN JONES 5144, TYLER LATHAM 6793

05/12/2023 STATE'S LIST OF WITNESSES
STATE'S SECOND AMENDED WITNESS LIST

05/12/2023 EXECUTED SUBPOENA
STATE: RONALD JACKSON

05/12/2023 APPLICATION FOR SUBPOENA
DEF: BECKY BRIEGEL

05/12/2023 APPLICATION FOR SUBPOENA
DEF: CHRISTIAN MAYNES

05/12/2023 APPLICATION FOR SUBPOENA
DEF: KARL KRYCIA

05/15/2023 EXECUTED SUBPOENA
STATE: REBECA GARICA

05/17/2023 APPLICATION FOR SUBPOENA
STATE: JELICKA LONG

05/18/2023 MTN:MOTION
MOTION TO SHUFFLE JURY PANEL

05/18/2023 MTN:MOTION
AMENDED MOTION TO SHUFFLE JURY PANEL

05/19/2023 SIGNED ORDER
MOTION TO QUASH AND PROTECTIVE ORDER

05/19/2023 RESPONSE
STATE'S RESPONSE TO DEFENDANT'S MOTION TO SHUFFLE JURY PANEL

05/19/2023 STATE'S LIST OF WITNESSES
STATE'S SECOND SUPPLEMENTAL LIST OF WITNESSES

05/22/2023 MTN:MOTION
FOR JURY SHUFFLE

05/22/2023 APPLICATION
DEFENDANTS APPLICATION FOR COMMUNITY SUPERVISION

05/22/2023 NOTICE
VERIFICATION

Case Summary

Case No. D-1-DC-20-900048

05/22/2023 ELECTN OF JURY TO ASSESS PUNIS
Party: Defendant TAYLOR, CHRISTOPHER

05/22/2023 JURY LIST

05/22/2023 ORD:ON MOTION IN LIMINE
INCORPORATED ORDER CONCERNING STATE SUPPLEMENTAL MOTION IN LIMINE

05/22/2023 ORD:ON MOTION IN LIMINE
STATE SUPPLEMENTAL MOTION IN LIMINE

05/22/2023 SIGNED ORDER
ORDER ON DEFENDANTS MOTION TO SHUFFLE JURY PANEL

05/22/2023 MTN:MOTION
Motion for Reconsideration Ex Parte Order

05/22/2023 MTN:IN LIMINE

05/22/2023 MTN:MOTION
MOTION TO SHUFFLE JURY PANEL

05/23/2023 JURY LIST

05/24/2023 JURY LIST

05/26/2023 MTN:MOTION
Defendant's Motion for Mistrial and Motion for Enactment of Additional Security Procedures

05/26/2023 NTC:NOTICE
STATE'S TRIAL BRIEF REGARDING VOIR DIRE PROCESS

05/31/2023
SIGNED ORDER
DEFENDANTS MOTION FOR MISTRIAL AND MOTION FOR ENACTMENT OF ADDITIONAL SECURITY PROCEDURES

06/08/2023 MTN:MOTION
STATES MOTION FOR GAG ORDER

06/12/2023 LETTER FROM COURT OF APPEALS
RELATORS PETITION FOR WRIT OF MANDAMUS FILED IN COURT

Hearings

01/21/2022 *CANCELED* **Pre-Trial Hearing** (9:00 AM) (Judicial Officer: 167TH, DISTRICT COURT)
Reset

02/25/2022 *CANCELED* **Pre-Trial Hearing** (9:00 AM) (Judicial Officer: 167TH, DISTRICT COURT)
Reset

11/07/2022 **Pre-Trial Hearing** (10:00 AM)

03/22/2023 **Writ Hearing** (1:15 PM)

05/04/2023 **Pretrial With Witness** (9:15 AM)

05/15/2023 **Pretrial With Witness** (9:15 AM)

05/17/2023 *CANCELED* **Jury Docket Call** (9:15 AM) (Judicial Officer: 167TH, DISTRICT COURT)

167th District Court

Case Summary

Case No. D-1-DC-20-900048

Reset

05/19/2023 **Pretrial With Witness** (1:15 PM)

05/22/2023 **Jury Trial** (9:15 AM)

05/23/2023 **Jury Trial** (9:15 AM)
5/23/2023-5/25/2023, 5/30/2023, 6/2/2023

06/07/2023 **Pre Jury Settings** (1:15 PM)

10/16/2023 **Jury Trial** (9:15 AM) (Judicial Officer: 167TH, DISTRICT COURT)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS,	§	
Plaintiff,	§	**CIVIL ACTION NO. 1:20-cv-1256-RP**
v.	§	
CITY OF AUSTIN AND CHRISTOPHER TAYLOR,	§	
Defendants.	§	

ORDER

Before the Court is Defendant City of Austin's Motion to Stay Further Proceedings. Having considered the motion, the applicable law, and the case file as a whole, the Court orders as follows:

IT IS ORDERED that Defendant City of Austin's Motion to Stay Further Proceedings is **GRANTED.**

SIGNED on _____.

_____
HON. ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Brenda Ramos, On Behalf Of Herself and The Estate of Mike Ramos	§	
Plaintiff,	§	
	§	**Civil Action No. 1:20-cv-01256-RP**
v.	§	
	§	
The City of Austin and Christopher Taylor,	§	
Defendants.	§	

PLAINTIFF'S RESPONSE TO DEFENDANT CITY OF AUSTIN'S MOTION TO STAY FURTHER PROCEEDINGS

TO THE HONORABLE ROBERT PITMAN:

Plaintiff respectfully requests that the Court deny the request for an indefinite stay in *Defendant City of Austin's Motion to Stay Further Proceedings* and instead consider an Order staying discovery for six months. [Doc. 87]. In support of her opposition to the Defendant City of Austin's Motion, Plaintiff shows the following:

I. Argument and Authorities

At the beginning of June, the parties agreed to continue discovery deadlines in light of the continuance of Defendant Officer Christopher Taylor's murder trial, which is now set to begin opening arguments on October 23, 2023. But Plaintiff is opposed to an *indefinite* stay of discovery. Plaintiff would argue that six (6) months would be a sufficient extension to allow the discovery phase of this case to continue after Defendant Taylor's criminal trial is completed.

Plaintiff recognizes the considerations laid out in Defendant's motion to stay, however the Court has broad discretion in controlling its own dockets. *See Clinton v. Jones*, 520 U.S. 681, 707 (1997). And while Plaintiff is not opposed to a stay on discovery, she would merely like to raise

additional considerations to the Court's attention that weigh against an *indefinite* stay. There are six factors that courts generally consider in determining the propriety of a stay:

> (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the criminal case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously, weighed against the prejudice to plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest.

Bean v. Alcorta, 220 F. Supp. 3d 772, 775 (W.D. Tex. 2016). Plaintiff does not disagree with Defendant the City of Austin that the issues in the criminal case overlap with those in the civil case or that Defendant has its own interests, as laid out in its motion. However, several of the above-listed factors weigh against an indefinite stay and should be considered. These include the interests of the Plaintiff, the interests of the Court, and the interests of the public.

This case involves the killing of Plaintiff Brenda Ramos's only child, Michael Ramos. Michael Ramos was killed on April 24, 2020 and this case began on December 30, 2020. [Doc. 1]. This case has been pending for over two-and-one-half years as the parties have agreed to extensions of the case because of the pending criminal matter. But those extensions have always had a date certain at which time the parties negotiated to obtain further extensions as needed. Granting an indefinite stay "could significantly delay the case and prejudice [Brenda Ramos's] ability to obtain relief." *See U.S. ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, 571 F. Supp. 2d 758, 765 (W.D. Tex. 2008). This factor weighs against the granting of an indefinite stay as it would leave Brenda Ramos with a significant delay with no certainty as to its end.

A court may also consider its own interests in "efficient administration and judicial economy." *U.S. ex rel. Gonzalez*, 571 F. Supp. 2d at 763. The uncertainty of an indefinite stay has the potential to interfere with the Court's management of its docket. The Court would be better

able to manage its extremely busy docket with a six-month extension that would maintain the reservation of certain dates for motions practice and trial on its calendar.

While there is undoubtedly a public interest in protecting an individual's Fifth Amendment rights, the public also has an interest in "both the prompt resolution of civil cases as well as the prosecution of criminal cases." *See In re CFS-Related Sec. Fraud Litig.*, 256 F. Supp. 2d 1227, 1242 (N.D. Okla. 2003). An indefinite stay would not serve the public's interest in a timely resolution. But a temporary, six-month stay would protect the Defendant Officer's Fifth Amendment rights while balancing the public's interest in prompt resolution of this matter.

Conclusion

Defendant the City of Austin's motion for an *indefinite* stay of discovery should be denied. This Court should, instead, respectfully consider a six-month stay of discovery. This would allow for the Defendant's concerns to be addressed while keeping a date certain on the docket, which is in the best interests of Plaintiff, this Court, and the public.

Dated: July 5, 2023

Respectfully submitted,
HENDLER FLORES LAW, PLLC

/s/ Laura A. Goettsche
Scott M. Hendler - Texas Bar No. 9445500
shendler@hendlerlaw.com
Laura Goettsche - Texas Bar No. 24091798
lgoettsche@hendlerlaw.com
Stephen Demik – *Pro Hac Vice*
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed on July 5, 2023 via the Court's CM/ECF system, which will serve all counsel of record.

/s/ Laura A. Goettsche
Laura A. Goettsche

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS,	§	
Plaintiff,	§	**CIVIL ACTION NO. 1:20-cv-1256-RP**
v.	§	
CITY OF AUSTIN AND CHRISTOPHER TAYLOR,	§	
Defendants.	§	

DEFENDANT CITY OF AUSTIN'S REPLY IN SUPPORT OF MOTION TO STAY FURTHER PROCEEDINGS

Defendant the City of Austin (the "City") files this Reply in Support of its Motion to Stay Further Proceedings (Doc. 87) as follows:

ARGUMENT AND AUTHORITIES

In her response to the motion to stay further proceedings, Plaintiff acknowledges the considerations in support of a stay, but argues that an indefinite stay should not be granted. First, the City is not requesting an indefinite stay of this case. Instead, the City is only requesting a stay of all proceedings in this case until the resolution of the Travis County criminal case against Defendant Christopher Taylor. This is the same relief the City requested and this Court granted in several other civil cases with parallel criminal proceedings as discussed in the City's Motion to Stay. See *e.g. Sanders v. City of Austin. See* Order (Dkt. 72), *Sanders v. City of Austin*, No. 1:22-cv-00314-RP (W.D. Tex. May 12, 2023) (Howell, M.J.) and *Volter-Jones v. City of Austin, et al.* See Order (Dkt. 26), *Volter-Jones v. City of Austin, et al.*, No. 1:22-cv-00511-RP (W.D. Tex. June 8, 2023)(Howell, M.J.).

Plaintiff cites *U.S. ex rel. Gonzales v. Fresenius Med. Care N. Am.*, 571 F. Supp.2d 758 (W.D. Tex. 2008) where the Court denied a motion to stay over concerns of the indefinite nature of the requested stay. However, in *Gonzales*, the defendant in the civil case had not been indicted, but instead was merely subject to a pending criminal investigation. *Gonzales*, 571 F.Supp.2d at 761. The Court denied the motion to stay since the time period for the criminal investigation and any resulting criminal proceedings was indeterminate. *Id.* at 763.

Here, on the other hand, Taylor has been indicted, and the criminal trial is currently set to begin on October 23, 2023. Thus, the court's concerns in *Gonzales* about the indefinite nature of a potential stay in that case are not present here. Plaintiff provides no real analysis of how a stay of the case until the criminal proceedings conclude would have negative effects on the interests of the court or the public. Any "uncertainty" related to the Court's docket caused by a stay can be managed by the parties providing regular updates to the Court on the status of the criminal proceedings as the Court has ordered in other cases in which stays have been entered. The Court can then manage its docket and adjust deadlines and trial dates as needed.

Plaintiff also seems to suggest that all that is needed is a six month stay of discovery instead of a stay of all proceedings. A stay of discovery alone, without a corresponding stay of expert designations, dispositive motion deadlines and trial, solves few, if any, of the problems Defendants have defending the case while the criminal proceedings against Taylor are pending. For the many reasons fully discussed in the City's motion to stay, the City cannot fully defend this case via expert designations and motion practice without access to the officer's testimony. As a result, a stay of discovery alone is insufficient to address these issues. A stay of the entire case until the criminal proceedings against Taylor are resolved protects the interests of the Court, the parties and the public.

CONCLUSION

For these reasons, Defendant City of Austin respectfully requests the Court grant this motion, stay all further proceedings in this case until after the resolution of the pending parallel criminal proceeding, and award the City all other relief to which it may show itself to be entitled in connection with this motion.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN L. RILEY, LITIGATION DIVISION CHIEF

/s/ H. Gray Laird III
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ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2023, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system.

/s/ *H. Gray Laird III*
H. GRAY LAIRD III

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, *on behalf of herself and the Estate of Mike Ramos*, Plaintiff, v. CHRISTOPHER TAYLOR and THE CITY OF AUSTIN, Defendants.	§ § § § § § § § § § §	1:20-CV-1256-RP

ORDER

Before the Court is Defendant the City of Austin's motion to stay this case pending the underlying criminal trial of Defendant Christopher Taylor. (Mot. Stay, Dkt. 87). Plaintiff Brenda Ramos opposes the motion in part, asking for a three-month stay, rather than an "indefinite" stay. (Resp., Dkt. 88).

For good cause shown, the Court **ORDERS** that this action is **STAYED** pending the outcome of the underlying Travis County criminal trials against Defendant Christopher Taylor (Criminal Dkts. D-1-DC-20-900048 and D-1-DC-19-900111).

The Court further **ORDERS** that the parties shall file quarterly reports on the status of the underlying criminal cases, the first of which shall be due no later than **September 13, 2023**. The Court finally **ORDERS** that the parties shall provide status reports upon the commencement and close of each underlying criminal trial.

SIGNED on July 13, 2023.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF HERSELF AND THE ESTATE OF MIKE RAMOS, *Plaintiff*,	§	
v.	§	Case No. 1:20-cv-1256-RP
CITY OF AUSTIN and CHRISTOPHER TAYLOR, *Defendants*,	§	

STATUS REPORT REGARDING PENDING CRIMINAL PROCEEDINGS AGAINST DEFENDANT CHRISTOPHER TAYLOR

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

1. The parties file this status report pursuant to this Court's July 13, 2023 Order (Dkt. 90).

2. Voir dire for the *Ramos* criminal trial began on May 22, 2023. However, the Travis County District Court was unable to fill the required 14 juror seats in order to proceed, jury tampering issues arose, and a Motion for Mistrial was granted as a result. Officer Taylor's criminal defense counsel filed an Amended Motion for Change of Venue in the *Ramos* criminal matter on September 5, 2023 based on related grounds.[1] The motion is still currently pending before the Travis County District Court.

3. The *Ramos* criminal trial is currently re-set to begin on October 16, 2023 with a Pre-Trial Hearing set for tomorrow, Thursday, September 14, 2023 in Travis County District Court.

Date Submitted: **September 13, 2023.**

Respectfully submitted,

[1] Am. Mot. for Change of Venue, *State v. Taylor*, No. D-1-DC-20-900048, in the 167th Judicial District Court, Travis County, Texas, filed on Sept. 5, 2023.

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ATTORNEYS FOR DEFENDANT CHRISTOPHER TAYLOR

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2023, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service and/or E-Mail in accordance with the Federal Rules of Civil Procedure.

/s/ Blair J. Leake
Blair J. Leake

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Brenda Ramos	§	
	§	CIVIL NO:
vs.	§	AU:20-CV-01256-RP
	§	
Christopher Taylor, City of Austin	§	

ORDER CANCELLING JURY SELECTION AND TRIAL

IT IS HEREBY ORDERED that the above entitled and numbered case having been set for **JURY SELECTION AND TRIAL** on **Monday, January 22, 2024 at 09:00 AM is hereby CANCELLED until further order of the court**.

IT IS SO ORDERED this 15th day of November, 2023.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, *on behalf of herself and the Estate of Mike Ramos*, Plaintiff, v. CHRISTOPHER TAYLOR and THE CITY OF AUSTIN, Defendants.	§ § § § § § § § § § §	1:20-CV-1256-RP

ORDER

Before the Court is a motion to dismiss filed by Defendant City of Austin ("City of Austin" or "the City"), (Dkt. 47), a motion to dismiss filed by Defendant Christopher Taylor ("Taylor"), (Dkt. 49), and a motion to strike filed by Plaintiff Brenda Ramos ("Plaintiff"), (Dkt. 66). Having considered the parties' briefs, the record, and the relevant law, the Court will deny Taylor's motion to dismiss, moot Plaintiff's motion to strike, and grant the City's motion in part and deny the motion in part.

I. BACKGROUND

This case arises out of the April 24, 2020, police shooting of Mike Ramos ("Ramos"), a Black and Hispanic resident of Austin. His mother, Brenda Ramos, brought suit against the City of Austin and Austin Police Department ("APD") Officer Christopher Taylor, (2d. Am. Compl., Dkt. 45), and alleges the following facts:

On April 24, 2022, APD received a muffled, partially unintelligible 911 call reporting two Hispanic people in a car at the Rosemont Apartments at 2601 South Pleasant Valley Road, Austin, Texas. (*Id.* at 2). The operator struggled to understand the caller, whose audio was garbled and sounded as though she was pulling away the phone (*Id.* at 3). The caller stated that the man in the

car was armed, but after repeated questions from the police, the caller clarified that the man in the car was simply holding a gun, not pointing it at anyone. (*Id.*).

Plaintiff alleges that APD should have recognized several factors that made the call suspect. The story changed, there was no threat of imminent harm to anyone, and the description of the people in the vehicles did not match what Ramos was actually wearing when officers arrived. (*Id.* at 4). Plaintiff claims it was a swatting incident—where a caller deliberately reports a fictitious emergency so that police respond and frighten the victims. (*Id.* at 3). Despite the allegedly suspect nature of the call, APD mobilized seven officers, including Defendant Christopher Taylor, to the scene, along with a police helicopter and dog. (*Id.* at 4). The police arrived on the scene and several officers, including Taylor, were armed with semi-automatic rifles. (*Id.*). They blocked the entrance to the parking lots and enclosed the space around Ramos's Toyota Prius. (*Id.*). They then confirmed that Ramos did not have a weapon in his hand or on his person. (*Id.*).

According to the complaint, the officers then got out of their vehicles and aimed their rifles at Ramos and his companion in the Prius. (*Id.* at 5). Taylor was in the center of the cars, aiming his rifle at Ramos. (*Id.*). Officer Pieper, who was still in field training, had previously been told to stay in the car. (*Id.* at 10). However, at the scene, he got out of the vehicle and aimed a firearm at Taylor loaded with "less lethal" rounds. (*Id.*). The officers commanded Ramos to step out of the car. Ramos complied immediately. (*Id.* at 5). He got out of the car with his hands up. (*Id.* at 6). At that point, it was clear that he did not match the description of that the caller had given as he was wearing a different colored shirt and did not have a gun. (*Id.*). Ramos turned around at the direction of the police to show them that he did not have a handgun. (*Id.*).

At that point, according to the complaint, the situation escalated. The police began shouting conflicting commands at Ramos, all while pointing their rifles at him. (*Id.* at 7). The police did not explain why Ramos had been surrounded. (*Id.*). They did not explain why they pointed semi-

automatic rifles at him. (*Id.*). Ramos repeatedly asked with the police officers to explain what was going on, stating, "What's going on? What's going on?" (*Id.* at 8). As stated in the complaint, he plead with them, "Put the guns down, dawg. What the fuck is going on? Why? What the fuck? You're scaring the fuck out of me?" (*Id.*). In response, Officer Cantu-Harkless said, "I can't explain right now Mike." (*Id.* at 9).

The officers once again shouted allegedly conflicting commands. One told him to keep his hands up, another to walk forward, another to turn around in a circle, and another to get on his knees. (*Id.* at 10). Ramos stayed with his hands up, and Taylor began to order the trainee Pieper to "move up" and "impact up." (*Id.* at 11). Pieper shouted, "comply with us!" (*Id.*).

Ramos pleaded with them again. "Impact me for what? Put the gun down dawg. Man, what the fuck dawg?" (*Id.*). Taylor and other officers ordered Pieper to shoot Ramos with a less lethal projectile. (*Id.*). Pieper shot Ramos with his hands in the air above his head. (*Id.*). The complaint notes that bystanders began to shout, wondering why the police shot him. (*Id.* at 12). In reaction, Ramos entered his car, as his companion left the passenger side. (*Id.* at 15). Ramos began to drive away. He drove towards the dead end blocked by dumpsters, away from Taylor and the officers (*Id.*).

According to the complaint, Taylor opened fire as the car drove away. (*Id.*) Neither Taylor nor any other officer were in front of the Prius nor in the direction it was facing. (*Id.* at 16). Taylor fired from behind his police cruiser, standing at the passenger side door. (*Id.*). Bystanders began to yell, "Why you shootin him?" and "Why you murdering this man?" (*Id.*). Only Taylor, and no other officers, had fired their lethal weapons. (*Id.* at 18). He fired three shots at Ramos, who died of a gunshot to the back of his head. (*Id.* at 17).

Plaintiff filed her second amended complaint on March 15, 2022. She brings claims under Section 1983 for violating Ramos's Fourth Amendment rights, based on both the allegedly unwarranted and unreasonable killing of Ramos, as well as the discriminatory practices of the APD

more generally. In her complaint, she alleges that APD has systemically targeted Black and Hispanic neighborhoods. (*Id.* at 20). The complaint cites a 2016 study that APD officers use more violence in Black and Hispanic neighborhoods and are more likely to use severe force against Black people. (*Id.*). APD officers were also found to be more likely to shoot Black suspects rather than using hand-to-hand training. The complaint also cites a report from an Austin oversight office which highlights the disproportionate policing practices of APD. (*Id.* at 21–22). According to Plaintiff, these practices show a consistently racist and discriminatory pattern of behavior from APD officers.

In addition to APD's allegedly disproportionate policing of communities of color, Plaintiff claims that APD trained its officers in a "paramilitary" style, emphasizing conflict over de-escalation. (*Id.* at 19). She states that the City itself shut down its training academy after Ramos's shooting in order to transition from a "military-styled Academy" into one with a stronger emphasis on de-escalation and communication skills. (*Id.* at 19–20). Finally, Plaintiff alleges that the City failed to adequately discipline its officers, especially Taylor, for excessive use of violence. Plaintiff contends that Taylor has been involved in unwarranted shootings of civilians before and has not been punished by APD for either incident. (*Id.* at 18–19). Plaintiff argues that the City has failed to investigate violence and made a deliberate choice not to discipline officers from using excessive force.

Defendants City of Austin and Christopher Taylor filed separate motions to dismiss. (Dkts. 47, 49). The City alleges that Plaintiff has failed to plead a policy or practice of violence by APD personnel against Black and Hispanic residents. (City's Mot. Dismiss, Dkt. 47, at 2–5). The City also alleges that Plaintiff has failed to plead specific, non-conclusory facts that would support a failure to train or supervise or implement inadequate disciplinary policies. (*Id.* at 5–11).

Taylor's Motion to Dismiss, filed on April 12, 2022, argues that he is entitled to qualified immunity, and that Plaintiff has not plead facts which show Taylor's actions were clearly

unreasonable. (Taylor's Mot. Dismiss, Dkt. 49, at 7). He argues that both the temporal and physical proximity to Ramos placed him in reasonable fear of being hit by the Prius. (*Id.* at 7–11).

In support of his argument, Taylor relies on three video exhibits. The videos are a screen recording of YouTube videos provided by the City that show dashcam and bodycam videos of the events leading up to and including Ramos's death. (*Id.* at 5–6). Ramos filed a motion to strike these video exhibits on June 8, 2022. (Mot. Strike, Dkt. 66). Taylor responded by arguing that the motion to strike should be denied as untimely. (Resp., Dkt. 67).

II. LEGAL STANDARD

Pursuant to Rule 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a 12(b)(6) motion, a "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

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." *Id.* "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* A court ruling on a 12(b)(6) motion may rely on the

complaint, its proper attachments, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Dorsey v. Portfolio Equities, Inc.,* 540 F.3d 333, 338 (5th Cir. 2008) (citations and internal quotation marks omitted). A court may also consider documents that a defendant attaches to a motion to dismiss "if they are referred to in the plaintiff's complaint and are central to her claim." *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). But because the court reviews only the well-pleaded facts in the complaint, it may not consider new factual allegations made outside the complaint. *Dorsey,* 540 F.3d at 338. "[A] motion to dismiss under 12(b)(6) 'is viewed with disfavor and is rarely granted.'" *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (quoting *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009)).

III. DISCUSSION

As a preliminary matter, the Court will discuss whether the videos offered by Taylor are admissible at this stage of the litigation. The Court will then turn to Taylor's motion to dismiss, before addressing the City's motion.

A. Video Exhibits

Defendant Taylor provides three videos as attachments to his motion to dismiss. Collectively, these videos include helicopter footage of the scene, dashcam video of the shooting, and a "Critical Incident Briefing" provided by the City of Austin that provides police commentary on the footage of the shooting. (Exhs., Dkt. 49). Taylor argues that these videos are incorporated by reference in Plaintiff's complaint, and are thus admissible at the motion to dismiss stage. (Mot. Dismiss, Dkt. 49, at 5–6).

The general rule is that courts should consider a motion to dismiss based on the four-corners of the plaintiff's pleadings, not the evidence that Defendants may seek to introduce in response. *See Villarreal v. Wells Fargo Bank, N.A.,* 814 F.3d 763, 766 (5th Cir. 2016) ("A district court

is limited to considering the contents of the pleadings and the attachments thereto when deciding a motion to dismiss under Rule 12(b)(6)."); *see also Indest v. Freeman Decorating*, Inc., 164 F.3d 258, 261 (5th Cir. 1999) ("We may not look beyond the pleadings."). However, the Court may consider "[d]ocuments that a defendant attaches to a motion to dismiss . . . if they are referred to in the plaintiff's complaint and are central to her claim." *Villarreal*, 814 F.3d at 766 (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir.2000)). This Court has held that "a court may consider video evidence attached as an exhibit to the complaint." *Scott v. White*, No. 1:16-CV-1287-RP, 2018 WL 2014093 at *1 (W.D. Tex. Apr. 30, 2018) (citing *Hartman v. Walker*, 685 F. App'x 366, 368 (5th Cir. 2017)).

Defendant's video exhibits are not attached to Plaintiff's complaint. The helicopter video is not referenced in Plaintiff's complaint, much less attached. The dashcam footage may overlap slightly with certain photos that are included in the complaint, but the video itself is not attached (*See* 2d. Am. Compl., Dkt. 45, at 13). Defendant's third video, which is the APD Community Briefing, is referenced in a footnote that hyperlinks to a site which has the YouTube video embedded. (*Id.* at 17 n.9). A hyperlink to a webpage does not qualify as an attached document, so there is no indication that Taylor's videos are attached to the complaint. *See Cantu v. Austin Police Dep't*, No. 1:21-CV-00084-LY-SH, 2021 WL 5599648 at *4 (W.D. Tex. filed Nov. 30, 2021), *report and recommendation adopted*, No. 1:21-CV-84-LY, 2022 WL 501719 (W.D. Tex. filed Jan. 24, 2022) ("Merely providing a web address or hyperlink is insufficient to submit documents to the Court or make them of record.").

Nor do the attached videos meet the standard set out in *Villareal*. Plaintiff *does* reference the videos in her footnote, but this is for the express purpose of criticizing the accuracy of the video. (*Id.*). Plaintiff notes that the "videos that are currently available publicly appear to have been edited by APD" and that "the timestamps are inconsistent, some by more than 3 seconds and one by more

than 5 minutes." (*Id.*). In as much as this is a "reference" to Defendant's videos, it is only to criticize the videos' accuracy. There mere fact that Defendant criticized a potential piece of evidence's reliability does not automatically make that evidence admissible.

Nor are Defendant's videos central to Plaintiff's claim. In general, in Fifth Circuit cases where the court considers evidence at the motion to dismiss stage, the use of such evidence is uncontested. Often, the evidence is "central" to the claim in that it is a written instrument at the heart of a dispute, as permitted by Rule 10(c), such as a contract or lien. *See* Fed. R. Civ. P 10(c). In *Collins*, this included financial statements core to the plaintiff's claim, which the plaintiff did not object to. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). In *Villareal*, the evidence at question was a notice of foreclosure that was expressly referenced in the pleadings and central to the plaintiff's claims. *Villarreal v. Wells Fargo Bank, N.A.*, No. 7:14-CV-584, 2014 WL 12600167 at *4 n.7 (S.D. Tex. Sept. 15, 2014), *aff'd*, 814 F.3d 763 (5th Cir. 2016). Taylor's videos are categorically distinct from these written instruments, as they are not central to the complaint itself, but merely depict evidence of the incident in question.

In at least two other cases, district courts within the Fifth Circuit have declined to consider videos of police violence at the motion to dismiss stage. In one case, the Eastern District of Texas declined to consider evidence such as a 911 call and body camera footage at the motion to dismiss stage because the references to the videos were insufficient. *Polnac v. City of Sulphur Springs*, 555 F. Supp. 3d 309, 325 (E.D. Tex. 2021). Moreover, the court noted that it would be inappropriate to take judicial notice of the facts within the call. *Id.* Likewise, this Court has declined to take judicial notice of a police video, noting that it "clearly exceeds the purview of judicial notice." *Ambler v. Williamson Cnty., Texas*, No. 1-20-CV-1068-LY, 2021 WL 769667 (W.D. Tex. Feb. 25, 2021) (Order, Dkt. 25) (Hightower, J.). Most importantly, *Ambler* noted that the mere fact that the video captured events at issue in the complaint does not render it "referenced" as a matter of evidence. (*Id.* at 3).

District courts outside the Fifth Circuit have also declined to consider videos of police conduct at the motion to dismiss stage. *See Turner v. Byer*, No. 2:17-CV-1869-EFB P, 2020 WL 5518401, at *1 (E.D. Cal. Sept. 14, 2020) ("As plaintiff points out, the video is not part of the complaint and thus is extrinsic material not properly considered in determining whether the allegations of the complaint are sufficient to state a claim for relief."), *R. & R. adopted*, 2020 WL 6582267 (E.D. Cal. Nov. 10, 2020); *Smith v. City of Greensboro*, No. 1:19CV386, 2020 WL 1452114, at *3 (M.D.N.C. Mar. 25, 2020) (finding that a police camera video attached to defendant's motion to dismiss was not central to plaintiff's complaint where complaint made "no express mention of the video"). As one district court noted, "Simply because a video that captured the events complained of in the complaint exists does not transform that video into a 'document' upon which the complaint is based." *Slippi-Mensah v. Mills*, No. 1:15-CV-07750-NLH-JS, 2016 WL 4820617, at *3 (D.N.J. Sept. 14, 2016).

Taylor's videos are nearly identical to those that this Court struck in *Ambler* in that they are only one perspective of the shooting. As this Court noted in *Ambler*, "the Video captures only part of the underlying incident." *Ambler*, 2021 WL 769667, at *4. Indeed, in this instance, at least one bystander also captured video of the event, whose video Taylor does not seek to include. (2d. Am. Compl., Dkt. 45, at 14). Given that multiple perspectives exist of this same incident, the Court sees no reason to deviate from *Ambler*'s holding declining to consider video evidence at the motion to dismiss stage.

Instead, Defendants rely on another case from this Court involving police violence—*Scott v. White*, No. 1:16-CV-1287-RP, 2018 WL 2014093 at *1 (W.D. Tex. Apr. 30, 2018) (Order, Dkt. 60, at 11). However, in that case, the Plaintiff attached dashcam footage of the incident to his complaint. (*Id*). Indeed, the video was marked as "Exhibit A." *Scott v. White*, No. 1:16-CV-1287-RP (3d. Am. Compl., Dkt. 64, at 5). Notably, in *Scott*, the plaintiff made no attempt to criticize the video or

suggest that they were inaccurate. Far from criticizing the videos, the plaintiff relied on them repeatedly in his complaint. (*Id.*). Thus, *Scott* can be readily differentiated from the instant case, both because this case presents a genuine dispute as to the accuracy of the evidence, as well as the fact that the Plaintiff has not voluntarily relied on the video evidence. The fact that a video may be central to Taylor's defense does not mean that it is central to the Plaintiff's claims. *Ambler*, 2021 WL 769667, at *4.

Finally, even if the videos were sufficiently referenced by Plaintiff, they would nonetheless be inadmissible for a Rule 12 motion. Taylor does not cite any instances in which a court has considered extrinsic evidence that the plaintiff plausibly argues has been edited. Indeed, Taylor cites several cases which stand for the opposite proposition—that courts deciding a motion to dismiss should only consider extrinsic evidence when its authenticity is uncontested. (Taylor's Mot. Dismiss, Dkt. 49, at 5 n.18 (citing *Meyers v. Textron, Inc.*, 540 F. App'x 408, 409 (5th Cir. 2013) (per curiam) ("court[s] may take into account documents . . . whose authenticity is unquestioned."))). Likewise, Taylor cites another case for the proposition that a court should "not adopt a plaintiff's characterization of the facts where *unaltered* video evidence contradicts that account." (*Id.* at 6 (citing *Thompson v. Mercer*, 762 F.3d 433, 435 (5th Cir. 2014) (emphasis added)). As these cases make clear, video evidence at a motion to dismiss stage must have unquestioned authenticity and be "unaltered." Here, neither is the case. The videos attached by Taylor are not the authentic, original video files. (Exhs., Dkt. 49). Instead, they are screen-recordings of the YouTube videos themselves. Because Taylor's defense deal with the exact timing of when the bullets were fired and the minute details of the scene, such as whether Ramos may have been blinded by the sunlight, it is important to authenticate any video exhibits prior to considering them. Moreover, Plaintiff has plausibly alleged, at least at the motion to dismiss stage, that the City altered the videos which Taylor includes. As Plaintiff points out, the various videos' timestamps are inconsistent by several seconds. (2d. Am.

Compl., Dkt. 45, at 17 n.9). Only certain videos are available, and the footage from three other officers has not been provided. (*Id.*). Plaintiff has plausibly alleged that these videos have been altered, and, at the very least, do not contain all APD perspectives of the event. (*Id.*). In light of this allegation, it would be premature to introduce Taylor's exhibits into evidence prior to discovery that will presumably reveal the full, unaltered video evidence. Accordingly, the Court declines to consider Taylor's video exhibits at this stage of the pleading.[1]

B. Taylor's Motion to Dismiss

Having found that Taylor's video exhibits are inadmissible, the Court turns to Taylor's motion to dismiss itself. In his defense, Taylor asserts that he is entitled to qualified immunity, and that Plaintiff's complaint does not meet the high burden needed to show a clearly unreasonable use of excessive force. (Taylor's Mot. Dismiss, Dkt. 49). He further contends that no clearly established law supports liability for a "blink of an eye" decision, relying especially on a recent Fifth Circuit case involving police shooting a moving vehicle (*Id.* at 13 (citing *Irwin v. Santiago*, 21-10020, 2021 WL 4932988 (5th Cir. Oct. 21, 2021) (unpublished))).

At this early stage of the litigation, the Court does not need to delve into the contested facts of Taylor's actions in the moments before Ramos's death. Instead, the relevant inquiry remains whether the complaint states a valid, plausible claim when viewed in the light most favorable to the Plaintiff. *Iqbal*, 556 U.S. at 678–79 (2009). At the motion to dismiss stage, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness'." *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) (emphasis in original). Moreover, "[i]n showing that the defendant's actions violated clearly established law, the plaintiff need not rebut every conceivable

[1] Plaintiff contested the use of the video exhibits in her response to Taylor's motion to dismiss. (P's Resp., Dkt. 56), and later filed a motion to strike the exhibits (Mot. Strike, Dkt. 66). These two filings contain largely the same arguments, so the Court need not decide whether the motion to strike was timely filed, since, as a preliminary matter, the video exhibits do not qualify as evidence properly before the Court at this stage.

reason that the defendant would be entitled to qualified immunity, including those not raised by the defendant." *Cotropia v. Chapman*, 721 F. App'x 354, 360 (5th Cir. 2018) (per curiam).

"To prove an excessive-force claim, a plaintiff must show (1) an injury, (2) which resulted directly and only from the use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *See Roque v. Harvel*, 993 F.3d 325, 333 (5th Cir. 2021) (cleaned up); *Hathaway v. Bazany*, 507 F.3d 312, 321 (5th Cir. 2007). As the Fifth Circuit has noted, however, qualified immunity claims often involve intensive inquiries into the facts of the case. *Id.* ("Excessive-force claims are necessarily fact-intensive . . . .") (internal citations omitted). Taylor repeatedly urges the Court to examine the detailed facts of what happened during the incident in question, (Taylor's Mot. Dismiss, Dkt. 49 at 4–15), but this is premature. The mere fact that a plaintiff must plead facts which can overcome a qualified immunity defense does not automatically transform a motion to dismiss into a motion for summary judgment. The question remains at this stage whether Plaintiff has pled facts which plausibly suggest Taylor's force was excessive under the qualified immunity standard. Plaintiff has met her burden in this regard.

Supreme Court precedent demonstrates that an officer violates the Fourth Amendment when he shoots an unarmed person who poses no immediate threat to others. "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Tennessee v. Garner*, 471 U.S. 1, 2 (1985). More specifically, the Fifth Circuit has held that "it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle v. Bexar Cnty., Texas*, 560 F.3d 404, 408 (5th Cir. 2009).

Plaintiff's complaint repeatedly and plausibly alleges that Ramos posed no immediate danger to others. First, Plaintiff's complaint makes clear that Ramos was unarmed, and more crucially, that this was made aware to the officers at the scene. (2d. Am. Compl., Dkt. 45, at 6). Plaintiff alleges

that Ramos held his hands up for several minutes listening to conflicting directions from the police and pleaded with them to put their own rifles down because he was unarmed. (*Id.* at 6, 12). The passenger next to Ramos had already left the vehicle. (*Id.* at 13). Ramos made no move to reach for a weapon in the car. (*Id.* at 15). Plaintiff also alleges that the Prius "turned away from Taylor and all officers and headed slowly in the opposite direction" and "inched away toward" a dead end. (*Id.*). Plaintiff alleges that Taylor was not in front of the Prius when he fired his shots. (*Id.*). All of these alleged facts suggest that Ramos could not have reasonably posed a threat to Taylor or other officers.

The complaint also states facts that suggest Taylor could not have reasonably believed a Prius, moving slowly from a few yards away, would have been able to cause any injury to officers standing behind "a three-ton vehicle with a grill outfitted with bull bars." (*Id.* at 16). To support this claim, Plaintiff includes a photo of a bystander's video that shows the Prius clearly angled away from the police cars. (*Id.*). Based on the four corners of this complaint, Plaintiff has plausibly alleged that Taylor violated Ramos's constitutional rights and acted with unreasonable and excessive force.

Perhaps most importantly, Taylor's claim that he acted reasonably is belied by Plaintiff's allegation that Taylor was the only officer to fire his weapon at the car. (2d. Am. Compl., Dkt. 45, at 15). Six other officers at the scene had rifles pointed at Ramos, but only Taylor fired live shots. Drawing an inference in favor of the Plaintiff, it is difficult to see how Taylor acted reasonably—especially viewing the facts in the light most favorable to Plaintiff—when six other officers decided not to shoot. Because it is plausible that the excessiveness of the force was unreasonable, Plaintiff has met her burden at the pleading stage. *Roque*, 993 F.3d at 333.

Taylor urges the Court instead to dismiss the complaint based on a test adopted in *Hathaway v. Bazany*, 507 F.3d 312, 321 (5th Cir. 2007). This inquiry examines (1) the time an officer has to respond to a moving vehicle and (2) the physical proximity of the officer to the moving vehicle. *Id.*;

see also Roque, 993 F.3d at 333 (citing *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005)). Both *Hathway* and *Roque* were decided at the summary judgment stage, so their relevance here is limited. In addition, *Hathaway* materially differs from the instant case because the police officer in that was case was rammed by a car on an open street, whereas Ramos was stuck in a parking lot. (*Id.* at 314–6). Nonetheless, even assuming *Hathaway* does apply, Plaintiff's complaint sufficiently alleges that neither the timing nor the proximity rendered Taylor's actions unreasonable. The complaint describes Ramos's driving as "slow" and "inch[ing]", while his car was turned away from the officers. (2d. Am. Compl., Dkt. 45, at 15) ("The Prius turned away from Taylor and all officers and headed slowly in the opposite direction."). At this stage, where the Court accepts Plaintiff's well-plead facts as true, the complaint suggests that Taylor had time to realize Ramos posed no threat. In addition, while only seconds elapsed between when Ramos started his car and when Taylor fired the shots, these seconds were preceded by several minutes of Ramos standing with his hands up, begging the officers to put their weapons down. (*Id.* at 3–10). Taylor also directed Pieper to fire a less lethal round at Taylor. (*Id.* at 13). This itself was plausibly an excessive use of force as alleged by Plaintiff. Ramos had stood with his hands up for several minutes pleading with several officers to lower their semi-automatic rifles pointed at him, stating repeatedly that he did not have a gun. (*Id.* at 11–13). It is a reasonable inference that order an officer to shoot him with a less lethal round under these circumstances was an excessive and unreasonable use of force. Based on the facts alleged in Plaintiff's complaint, Taylor had sufficient time to realize that Ramos posed no violent threat.

Likewise, Plaintiff's complaint alleges that there was enough distance from Ramos to Taylor that he could not have reasonably feared being hit by the car when he shot. As the complaint states, "Talyor was the closest of any officer and he was a substantial distance from the car. The Prius is driving away from the officers[.]" (*Id.* at 16). Additionally, the proximity is mitigated by the fact that Taylor and every other officer was standing behind police vehicles specially equipped to handle

impacts from cars. (*Id.*). Whether Taylor or any other officer could have reasonably feared the impact from a compact car driving from start while they stood behind specially equipped police SUVs is a question to be decided by a jury, or potentially at summary judgment. For now, Plaintiff has plausibly alleged that Taylor could not have reasonably feared for his life under these circumstances.

In his motion, Taylor relies heavily on cases suggesting that officers are immune from split-second decisions. (Taylor's Mot. Dismiss, Dkt. 49, at 12–14). Every case cited by Taylor, however, deals with a motion for summary judgment, not a motion to dismiss. *See Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) (affirming grant of summary judgment); *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572 (5th Cir. 2009) (reversing denial of summary judgment); *Joseph on behalf of Est. of Joseph v. Bartlett*, 981 F.3d 319 (5th Cir. 2020) (affirming summary judgment in part*); Irwin v. Santiago*, No. 21-10020, 2021 WL 4932988 (5th Cir. Oct. 21, 2021) (unpublished) (affirming grant of summary judgment). There is a reason that these cases are dealt with at summary judgment, and not in a 12(b)(6) motion—they hinge on a question of fact that is inappropriate at the pleading stage. The reasonableness of a "split-second" decision is a question that requires an investigation into the facts of the case and is more suited to disposition after the parties have conducted discovery. It may very well be that the evidence produced shows no genuine dispute that Taylor could have feared for his life, but such a question must be reserved for when the Court has full evidence of the incident before it.

At this early stage, these cases do not show that Plaintiff failed to plead an unreasonable and excessive use of force. The Fifth Circuit in *Irwin* did hold that "the projected path of Irwin's vehicle was in the officer's direction, at least generally," and that the officers were not unreasonable in firing at the vehicle. *Irwin v. Santiago*, No. 21-10020, 2021 WL 4932988 (5th Cir. Oct. 21, 2021) (unpublished). Plaintiff's complaint alleges a very different scenario. Unlike in *Irwin*, where a car

"narrowly avoided one of the two officers," the instant case presents a scenario where the officers were protected by their own vehicles and standing beside them such that it would have been physically impossible to be directly hit by Ramos's Prius. (2d. Am. Compl., Dkt. 45, at 16; *Irwin*, 2021 WL 4932988 at *1). Nor does *Irwin* overturn *Lytle*, which held that it was unlawful to shoot at a car that was, at the moment of the shooting, driving away from the officer. *Irwin*, 2021 WL 4932988 at *3 (citing *Lytle v. Bexar County*, Texas, 560 F.3d 404, 409 (5th Cir. 2009)). Plaintiff has pled a set of facts that are distinguishable from *Irwin* and suggest Taylor violated established law. She has thus pled a set of facts sufficient to survive a motion to dismiss.

C. The City's Motion to Dismiss

Finally, the Court turns to the City's motion to dismiss, (Dkt. 47), which argues that Plaintiff's claims are insufficient to establish a claim under *Monell*. (City's Mot. Dismiss, Dkt. 47, at 3 (citing *Monell v. Dep't of Social Service of City of New York*, 436 U.S. 658 (1978)). In order to survive a motion to dismiss under *Monell*, a plaintiff's pleadings "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ratliff v. Aransas County*, 948 F.3d 281, 285 (5th Cir. 2020) (quoting *Iqbal*, 556 U.S. at 678). However, the fact that a defendant has invoked *Monell* does not raise the plaintiff's pleading requirements above the *Twombly* and *Iqbal* standard. *See id.*; *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). The proper inquiry is whether a plaintiff pleads "facts that plausibly establish: a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Ratliff*, 849 F.3d at 285 (citing *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)).

In total, Plaintiff alleges seven different practices that violated Ramos's civil rights:

a. Disproportionate use of excessive force against people of color,
b. Condoning such disproportionate use of excessive force against people of color
c. Choosing not to adequately train officers regarding civil rights protected by the United States Constitution,

d. Choosing not to adequately supervise officers regarding the use of force against people of color,
e. Choosing not to intervene to stop excessive force and civil rights violations by its officers,
f. Choosing not to investigate excessive violence and civil rights violations by its officers, and
g. Making the deliberate choice not to discipline officers for— and deter officers from—using excessive force and violating civil rights.

(2d. Am. Compl., Dkt. 45, at 29).

At their core, these alleged practices constitute three distinct violations: (1) a policy and custom of discriminatory policing, (2) a failure to train officers not to violate the civil rights of residents, and (3) the failure to discipline officers for misconduct. The Court will address each claim in turn.

1. The Institutional Racism Claim

The City argues that Plaintiff's evidence of institutional racism is too attenuated from the actual harm suffered by Ramos and his family. (City's Mot. Dismiss, Dkt. 47, at 3–4). "[T]o plead a practice so persistent and widespread as to practically have the force of law, [the plaintiff] must do more than describe the incident that gave rise to his injury." *Ratliff*, 849 F.3d at 285 (quoting *Pena v. Rio Grande City*, 879 F.3d 613, 622 (5th Cir. 2018)). A plaintiff may show a "persistent, widespread practice of City officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Piotrowski*, 237 F.3d at 579 (quoting *Webster v. City of Houston*, 735 F.2d 838, (5th Cir. 1984) (en banc)). However, "[a]ctions of officers or employees of a municipality do not render the municipality liable under section 1983 unless they execute official policy as above defined." *Id.* "[A] facially innocuous policy will support liability if it was promulgated with deliberate indifference to the 'known or obvious consequences' that constitutional violations would result." *Id.* (quoting *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997)). "Deliberate indifference of this sort is a stringent test, and a showing of simple or even heightened negligence will not suffice to prove municipal culpability." *Id.*

In her complaint, Plaintiff does not allege that the City explicitly adopted a policy of discriminating against Black or Hispanic citizens in policing. Instead, Plaintiff's allegations focus on findings from reports—including one from the Austin City Council—which show that APD consistently engaged in increased violence against Black people and other people of color. (2d. Am. Compl., Dkt. 45, at 20). The complaint also alleges that APD officers were more likely to shoot Black individuals. (*Id.*). Likewise, the complaint alleges that APD officers were more likely to arrest people of color and give more warnings to people of color. (*Id.* at 20–22). She cites a statement from the Austin City Council which says, "The elected members of City Council have no confidence that current Austin Police Department leadership intends to implement the policy and culture changes required to end the disproportionate impact of police violence on Black Americans, Latinx Americans, other nonwhite ethnic communities." (*Id.* at 23). Finally, the complaint points to a report which stated that an assistant APD chief frequently used racial slurs, but also noted that anyone reporting such slurs "must be prepared in the present climate and culture to face almost certain retaliation" from APD. (*Id.*).

However, the relevant inquiry under *Monell* is not whether the City's policies had a disproportionate impact upon people of color, but whether this policy was promulgated with deliberate indifference to the "known or obvious consequences" that constitutional violations would result. *Bryan County*, 520 U.S. at 403. Plaintiff's complaint does not qualify under this "stringent test." *Id.* Plaintiff fails to allege a pattern or custom from APD with the known and obvious consequence of discriminating against people of color. Plaintiff's allegations suggest that the City's policies had discriminatory effects, but not that these effects were known or obvious. Plaintiff cites studies showing that APD was more likely to use deadly force against people of color, but not that this was a known result of the City's policies.

Nor does Plaintiff's complaint show a "moving force causation" between this discrimination and the shooting of Mike Ramos. A plaintiff must allege that an official policy or custom "was a cause in fact of the deprivation of rights inflicted." *Spiller v. City of Texas City, Police Dept.*, 130 F.3d 162, 167 (5th Cir. 1997) (quoting *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994)). Plaintiff does allege that Austin police were "more likely to shoot rather than use their hand-to-hand training or deploy pepper spray when the person subjected to force was Black." (2d. Am. Compl., Dkt. 45, at 20). Nonetheless, Plaintiff fails to show that this disproportionate use of deadly force against Black residents was a "cause-in-fact" of the shooting of Taylor. Under Fifth Circuit precedent, the Court finds that the fact that APD's police force disproportionate targets people of color is insufficient, absent more evidence, to support a finding that its customs and practices were a cause-in-fact of Ramos's shooting.

2. Failure to Train

Plaintiff also alleges that the City failed to train officers properly and to adequately supervise them. (2d. Am. Compl., Dkt. 45, at 29). "To prevail on a failure-to-train theory, [a plaintiff] must plead facts plausibly establishing "(1) that the municipality's training procedures were inadequate, (2) that the municipality was deliberately indifferent in adopting its training policy, and (3) that the inadequate training policy directly caused the violations in question." *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 170 (5th Cir. 2010). However, courts should treat failure to train claims with a high degree of caution. "A municipality's culpability for a deprivation of right is at its most tenuous where the claim turns upon a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). A plaintiff must demonstrate "at least a pattern of similar incidents" to establish municipal liability. *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir. 1998) (internal citations omitted).

Here, Plaintiff's complaint alleges two training failures. The first is that the City failed to "adequately train officers regarding civil rights protected by the United States Constitution [and

chose] not to adequately supervise officers regarding the use of force against people of color." This allegation, however, lacks factual support. By itself, the claim is a conclusory statement which the Court must strike. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The claim lacks sufficient facts to suggest plausibly allege the City was "deliberately indifferent" in its training policy. Plaintiff relies on the City Council's report criticizing APD for using a "paramilitary approach to policing." (2d. Am. Compl., Dkt. 45, at 19). She further relies on studies highlighting the disproportionate violence used against Black residents to show that APD failed to train its officers. (*Id.* at 18–24). However, the fact that the City criticized APD for this training approach *after* the Ramos shooting does not show that it was deliberately indifferent to the inadequacy of its training. Moreover, the studies which show the disproportionate impact do not suggest that the City knew its training was inadequate.

Second, Plaintiff appears to allege that "APD policy or practice allowed Pieper to be in field training, even though he had only completed minimal training." (*Id.* at 10 n.6). She further states that APD policy requires officers to go through four months of "academy" before entering field training. Officer Pieper, when he fired a less-lethal round at Ramos, was allegedly only in this third month with the APD. (*Id.*). However, Plaintiff does not actually state any facts. There is no indication that this incident was a pattern with APD or that the City knew of it happening. Accordingly, the Court will dismiss Plaintiff's claim for failure to train.

3. Inadequate Disciplinary Policies

Finally, Plaintiff alleges that APD implemented inadequate disciplinary policies with its officers. In order to plead a failure to discipline, a plaintiff must show: (1) the municipality failed to discipline its employees; (2) that failure to discipline amounted to deliberate indifference; and (3) the failure to discipline directly caused the constitutional violations in question. *See Deville v. Marcantel*, 567 F.3d 156, 171 (5th Cir. 2009). When a municipality approves a subordinate's conduct and the

basis for it, liability for that conduct is chargeable against the municipality because it has "retained the authority to measure the official's conduct for conformance with their policies." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion); *Groden v. City of Dallas*, 826 F.3d 280, 284 (5th Cir. 2016); *see also Balle v. Nueces Cty., Tex.*, 690 F. App'x 847, 852 (5th Cir. 2017).

Here, a core part of Plaintiff's claim rests upon a 2019 incident involving two of the same officers who responded to the Ramos call—Officers Taylor and Kyrcia. According to Plaintiff's complaint, on July 31, 2019, four APD officers responded to a welfare check call in an Austin high-rise. (2d. Am. Compl., Dkt. 45, at 18–19). When they got to the scene, Taylor and Krycia encountered Dr. Mauris DeSilva, a neuroscientist who was having a mental health episode. Despite having knowledge of Dr. DeSilva's mental health history, Taylor and Krycia both shot and killed Dr. DeSilva. (*Id.*). After the shooting, APD allowed Taylor and Krycia to return to duty. (*Id.* at 19). On August 27, 2021, a grand jury indicted Taylor and Krycia for the shooting. (*Id.*).

Plaintiff argues that the City had inadequate disciplinary policies based on APD's failure to punish officers whose conduct was sufficient to receive a grand jury indictment. Plaintiff further alleges that APD ratified this conduct because it consistently failed to discipline Taylor for his excessive uses of force and constitutional violations. (*Id.* at 29–30). Plaintiff states that the City compounded the failure to discipline because it did not punish Taylor for shooting Ramos. Although APD played Taylor on administrative leave after the Ramos shooting, APD never subjected him to any other discipline, according to the complaint. (*Id.* at 18).

Plaintiff's claim that the City should have disciplined Taylor and Krycia for this incident is sufficient to survive the motion to dismiss. *Deville*'s three-pronged test applies here, asking whether (1) the municipality failed to discipline its employees; (2) that failure to discipline amounted to deliberate indifference; and (3) the failure to discipline directly caused the constitutional violations in question. *Deville*, 567 F.3d at 171. Here, Plaintiff's allegations meet the first prong. The City failed to

discipline Taylor at all for his involvement in the shooting of Dr. DeSilva, for which a grand jury indicted him for murder and third-degree felony deadly conduct. (2d. Am. Compl., Dkt. 45, at 19). Likewise, placing an officer on administrative leave generally does not amount to "discipline" under *Monell*. *See McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007) (citing *Green v. Administrators of Tulane Educ. Fund*, 284 F.3d 642 (5th Cir. 2002), *overruled on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)). In light of the fact that APD allegedly failed to discipline officers for conduct that a grant jury found sufficient to warrant an indictment for murder, Plaintiff has adequately alleged that APD maintained a deliberate policy of improperly disciplining officers for excessive force.

Plaintiff has also plausibly alleged that the City knew of the shootings and was deliberately indifferent to them. The shooting of Dr. DeSilva was a high-profile incident that received significant press coverage, as well as statements from APD officials.[2] Given the notoriety of the shooting, as well as the fact that APD briefed the shooting to local media, it is more than plausible that the City knew of the shooting but deliberately chose not to discipline the officers involved. The same is true for the shooting of Ramos himself, which led to major protests in Austin.[3] Plaintiff's complaint alleges two separate incidents where the City knew of a lethal and unwarranted shooting but failed to discipline the officers responsible. It is a reasonable inference at this stage that the City's disciplinary policies—as described by Plaintiff—deliberately failed to sanction conduct that violated § 1983.

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[2] *See, e.g.*, Mark D. Wilson, *Man killed in police shooting in downtown Austin ID'd*, AUSTIN AM. STATESMAN, (Aug. 2, 2019), https://www.statesman.com/story/news/local/2019/08/02/man-killed-in-police-shooting-in-downtown-austin-idd/4550313007; Drew Knight & Britny Eubank, *Police identify man killed in officer-involved shooting in Downtown Austin*, KVUE, (Aug. 2, 2019), https://www.kvue.com/article/news/local/police-responding-to-officer-involved-shooting-in-downtown-austin/269-9ae26db2-0796-46ab-8fe3-46e0922a176d. *See also*, *Roque v. Harvel*, No. 1:17-CV-932-LY-SH, 2019 WL 5265292 (W.D. Tex. Oct. 16, 2019) (noting that newspaper articles are relevant for the purpose of notice of excessive use of force).

[3] *See, e.g.*, Michael Barajas, *Why Protestors in Austin are Chanting 'Justice for Mike Ramos'*, TEXAS OBSERVER (June 5, 2020), https://www.texasobserver.org/mike-ramos-austin-police.

Finally, Plaintiff has plausibly alleged that the failure to discipline directly caused the death of Ramos. In both instances, Taylor shot an unarmed man, and it is reasonable to infer that the City's failure to sanction the shooting of Dr. DeSilva implicitly condoned APD's excessive use of force. *See Rivera v. City of San Antonio* No. SA-06-CA-235-XR, 2006 WL 3340908, at *13 (W.D. Tex. 2006) (citing *Grandstaff v. City of Borger*, 767 F.2d 161, 170 (5th Cir. 1985) ("Where police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force requirement is satisfied."). The excessive use of force—both telling Pieper to shoot Ramos with a less lethal round and Taylor's own gunshots—are alleged to be the direct causes of Ramos's death. Given the City's alleged prior failures to discipline, Plaintiff plausibly suggests that Taylor's excessive use of force was a result of APD's failure to discourage such conduct.

In response, the City alleges that the actions of its officers were not "manifestly indefensible." (City's Mot. Dismiss, Dkt. 47, at 7–9). This assertion is premature. Whether APD's actions were manifestly indefensible is a question for the jury, or perhaps summary judgment, but it is a question of fact that is not properly before the Court at a motion to dismiss. The relevant inquiry is simply whether Plaintiff has met its burden of pleading facts which plausibly show a manifestly indefensible act. *Iqbal*, 556 U.S. at 678–79 (2009). Plaintiff has pled that Taylor's actions have led to two grand jury indictments for murder in state court. Indeed, Plaintiff's complaint sets out facts which plausibly suggest that Taylor has, on two occasions, met the elements of criminal homicide under Texas law. To put it simply, an allegation of an unlawful killing, supported by properly alleged facts, is more than sufficient to plead a manifestly indefensible action. The fact that the City twice failed to discipline Taylor after these deaths plausibly suggests that the City condoned excessive uses of force and had a policy of failing to properly discipline its officers. Accordingly, the City's motion to dismiss is denied as to the inadequate disciplinary policies claim.

IV. CONCLUSION

For these reasons, **IT IS ORDERED** that Defendant Christopher Taylor's motion to dismiss, (Dkt. 49), is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff's motion to strike, (Dkt. 66), is **MOOT**.

IT IS FURTHER ORDERED that the City of Austin's motion to dismiss, (Dkt. 47), is **GRANTED IN PART** as to Plaintiff's first four claims, (2d. Am. Compl., Dkt. 45, at 29), of using or condoning disproportionate use of force against people of color, failure to train, and failure to supervise. The City's motion to dismiss is **DENIED IN PART** as to Plaintiff's final three claims of choosing not to intervene to stop excessive force violations, choosing not to investigate excessive violence, and making the deliberate choice not to discipline officers for excessive force.

SIGNED on December 18, 2022.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE