APPENDIX

OPINION AND ORDER

OTHER DOCUMENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 24, 2020
Lyle W. Cayce
Clerk

No. 19-20167

MONICA VOSS,

Plaintiff - Appellant

v.

GREGORY G. GOODE; FORT BEND COUNTY, TEXAS,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas

Before CLEMENT, HIGGINSON, and ENGELHARDT, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

Appellant Monica Voss appeals the district court's grant of summary judgment on her claim of false arrest in violation of the Fourth Amendment against Gregory Goode, a deputy of the Fort Bend County Sheriff's Office. For the following reasons, we AFFIRM.

I.

Slightly before midnight on June 20, 2016, Goode responded to a welfare check from Texas Child Protective Services (CPS) at Voss's house. Voss's fourteen-year-old daughter K.V. had allegedly reported suicidal thoughts to an

adult friend. Deputy Philip McGuigan was also dispatched to Voss's house as backup.

Goode approached Voss's house, knocked on her front door, and announced himself. Voss, a retired detective, answered the door and identified herself as Monica. Goode explained that he was there at the request of CPS to perform a welfare check on K.V. because of a report that K.V. was contemplating suicide. Voss called K.V. downstairs to speak with Goode and woke her husband, who also came down. K.V. denied being depressed or suicidal. Voss's husband went to bed. Goode then interviewed K.V. outside, away from her parents, at Voss's suggestion and with her consent. During this interview, K.V. confirmed to Goode that she had reported suicidal ideation. She also told Goode that she was in a mental health crisis, was depressed and wanted to "end her misery," and that her parents had acted abusively toward her. She stated that Voss had previously thrown hard or sharp objects at her, including a telephone and a pair of scissors. K.V. said that she was afraid of Voss because Voss acted like she was going to throw something at her, and because Voss had access to guns under her bed. K.V. did not have any visible injuries, but she reported that her home environment led her to thoughts of drowning herself in the family's pool or hanging herself. Goode determined that further investigation was warranted based on K.V.'s statements.

Voss came outside after 20 to 30 minutes. Goode told Voss that he needed to contact Texana Crisis Center to request an assessment by a mental health professional and that K.V. would wait in his squad car until the counselor arrived. Voss protested and demanded that she take K.V. to the hospital herself instead. Voss told K.V. to get in her car rather than the patrol car. She threatened to lock K.V. out of the house if Goode put her in the squad car. At this point, Goode explained to Voss that he had placed K.V. under his protective custody and that Voss could not leave the scene with K.V. in her car.

Goode also warned Voss that she was getting close to being arrested for interfering with his investigation. Voss's declaration states that she went inside for a few minutes "to sort the confusing situation out." When she came out a few minutes later, Goode ordered Voss to provide identifying information. Voss told Goode that she did not have an ID on her person and that it was in the house. Voss refused to go in the house and retrieve it.

Goode then arrested Voss. The reason Goode gave for the arrest at the time was "failure to identify to a police officer." McGuigan placed Voss in Goode's patrol car. After a short period of time in the parked car, Voss asked to get out, which Goode permitted her to do. Goode then agreed to remove her handcuffs. Voss asked Goode to call his supervisor. Sergeant Jerome Ellis arrived and allegedly told Voss that the events leading to her arrest had been "a big misunderstanding that had gotten out of hand." Shortly thereafter, a Texana counselor arrived and conducted an evaluation of K.V. K.V. was released into her mother's custody. The state did not press charges against Voss.

Voss filed a complaint in the Southern District of Texas on May 6, 2017. Voss asserted claims against Goode under the Fourth and Fourteenth Amendments for allegedly detaining and arresting her without probable cause. She also asserted a municipal-liability claim against Fort Bend County, alleging that the County was the moving force behind Goode's unconstitutional actions. The district court dismissed all claims against the County and all of Voss's claims against Goode—except for the Fourth Amendment false arrest claim—for failure to state a claim. On April 17, 2018, Goode filed a motion for summary judgment on the basis of qualified immunity on the last remaining

claim. On February 20, 2019, the district court granted the motion and entered judgment against Voss. Voss timely appealed.

II.

We review the district court's summary judgment decision de novo, applying the same legal standard used by the district court. *Hyatt v. Thomas*, 843 F.3d 172, 176–77 (5th Cir. 2016). Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine dispute of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Romero v. City of Grapevine*, 888 F.3d 170, 175 (5th Cir. 2018) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). To decide if the non-movant has raised a genuine dispute of material fact, we view all facts and evidence in the light most favorable to her and draw all reasonable inferences in her favor. *Hanks v. Rogers*, 853 F.3d 738, 743 (5th Cir. 2017) (citing *Griggs v. Brewer*, 841 F.3d 308, 312 (5th Cir. 2016)). "Summary judgment must be affirmed if it is sustainable on any legal ground in the record, and it may be affirmed on grounds rejected or not stated by the district court." *S&W Enters., L.L.C. v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 537–38 (5th Cir. 2003) (citations omitted).

III.

Voss makes two arguments on appeal as to why Goode is not entitled to qualified immunity.[1] First, she asserts that Goode cannot prevail on the theory

[1] Voss also asserts that the district court "drew every inference in favor of the movant, resolved fact and credibility disputes inappropriate for summary judgment, and failed to credit evidence that contradicted some of its key factual conclusions." This argument

that he had probable cause to arrest her for interfering with his investigation when he told her at the time that she was being arrested for failure to identify. Second, she argues that, even if Goode can use a new crime to justify her arrest, he did not have probable cause to arrest her for any crime.

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "A good-faith assertion of qualified immunity alters the usual summary judgment burden of proof, shifting it to the plaintiff to show that the defense is not available." *Melton v. Phillips*, 875 F.3d 256, 261 (5th Cir. 2017) (en banc) (quoting *King v. Handorf*, 821 F.3d 650, 653 (5th Cir. 2016)). A plaintiff must make a two-part showing to overcome a qualified immunity defense. First, a plaintiff must show that the official violated a statutory or constitutional right; second, she must show that the right was clearly established at the time of the challenged conduct. *Id.* The order in which to address the two prongs rests in the reviewing court's discretion. *Pearson*, 555 U.S. at 236.

Voss argues that, because Goode originally told her that she was being arrested for failure to identify, he is not entitled to qualified immunity if it was clearly established at the time of her arrest that no probable cause existed for

is contradicted by the district court's opinion, which mainly relies on Voss's account in reciting the facts of the case. The only time that the report and recommendation explicitly deviates from Voss's account is to discredit Voss's alleged characterization that she "was cooperative at all times, that she was calm, posed no threat, and was not argumentative." Voss's demeanor has no bearing on whether Goode had probable cause to arrest her for interference because interference requires physical action. *See Freeman v. Gore*, 483 F.3d 404, 414 (5th Cir. 2007) (holding that "'yelling' and 'screaming' . . . alone does not take [a plaintiff's] conduct out of the realm of speech"). Therefore, we find no material error in the district court's account of the facts.

that particular offense. A person commits failure to identify if he or she "intentionally refuses to give his [or her] name, residence address, or date of birth to a peace officer who has lawfully arrested the person and requested the information." Tex. Penal Code Ann. § 38.02(a). Goode concedes that he did not have probable cause to arrest Voss for failure to identify, because the offense applies only to someone who has already been "lawfully arrested" for another crime. *Id.* Goode instead seeks to show that he had probable cause to arrest Voss for a different crime: interference with public duties. *See id*. § 38.15(a)(1).

Despite Voss's assertions to the contrary, Goode may justify the arrest by showing probable cause for any crime. *See Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (holding that because "an arresting officer's state of mind . . . is irrelevant to the existence of probable cause," there is "no basis in precedent or reason" to require an officer to justify an arrest with reasons given at the scene); *see also Sam v. Richard*, 887 F.3d 710, 715–16 (5th Cir. 2018) (holding that justifying an arrest by pointing to probable cause for the misdemeanor of crossing an interstate highway was permissible even if it was "only an after-the-fact justification for the arrest"). Goode is therefore entitled to qualified immunity unless it was clearly established that no probable cause existed to arrest Voss for interference with public duties or any other crime at the time of arrest. Probable cause exists when an officer is aware of "reasonably trustworthy facts which, given the totality of the circumstances, are sufficient to lead a prudent person to believe" that a crime has been or will be committed. *Kohler v. Englade*, 470 F.3d 1104, 1109 (5th Cir. 2006).

Voss's second argument is that Goode is not entitled to qualified immunity because a reasonable officer would not have thought that he had probable cause to arrest her for interference with public duties.

We need not determine whether Goode had probable cause under the first part of the qualified immunity test, because Goode's behavior was

reasonable in light of the clearly established law at the time of the incident. An officer is entitled to qualified immunity even if he did not have probable cause to arrest a suspect, "if a reasonable person in [his] position 'would have believed that [his] conduct conformed to the constitutional standard in light of the information available to [him] and the clearly established law.'" *Freeman v. Gore*, 483 F.3d 404, 415 (5th Cir. 2007) (quoting *Goodson v. City of Corpus Christi*, 202 F.3d 730, 736 (5th Cir. 2000)). To determine whether a reasonable officer would have believed that his or her conduct conformed to the constitutional standard, courts look at the state of the law at the time of the incident. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018). The Supreme Court has not required a case "directly on point for a right to be clearly established," but "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)). In other words, "[a] clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix*, 136 S. Ct. at 308 (quoting *Reichle v. Howards*, 556 U.S. 658, 664 (2012)).

Texas Penal Code § 38.15 provides, "[a] person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with . . . a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law." *Id.* § 38.15(a)(1). In order to violate the statute, a person's interference must consist of more than speech alone. *Id.* § 38.15(d) ("It is a defense to prosecution under this section that the interruption, disruption, impediment, or interference alleged consisted of speech only."). Accordingly, we have held that "merely arguing with police officers about the propriety of their conduct . . . falls within the speech exception to section 38.15" and thus does not constitute probable cause to arrest someone for interference. *Freeman*, 483 F.3d at 414; *see also Westfall v.*

Luna, 903 F.3d 534, 544 (5th Cir. 2018). By contrast, actions such as "ma[king] physical contact with any of the officers or physically obstruct[ing]" them from performing their legally authorized duties could constitute interference. *Freeman*, 483 F.3d at 414. And "fail[ing] to comply with an officer's instruction, made within the scope of the officer's official duty and pertaining to physical conduct rather than speech" can also constitute interference. *Childers v. Iglesias*, 848 F.3d 412, 415 (5th Cir. 2017) (describing the state of the law as of September 2013).

Here, a reasonable officer could believe that Voss's conduct did not fall within the speech-only exception. While Voss maintains that she did not physically put K.V. in her car, she does not deny that she told K.V. to get in her car, contravening Goode's order that K.V. get in his patrol car. Importantly, her counsel acknowledged at oral argument that K.V. obeyed Voss and got in Voss's car after Voss ordered her to do so. A reasonable officer could think that this behavior gave rise to probable cause for interference. In *Barnes v. State*, 206 S.W.3d 601 (Tex. Crim. App. 2006), the Texas Court of Criminal Appeals held that a woman's shout to her son to "run" as police attempted to restrain them did not fall within the speech-only exception because it was a "command to act." *Id.* at 605–06. The court found that in the First Amendment context, words specifically designed to prompt action are not given full protection, and similarly, a command of this kind should be treated as conduct that can form the basis for probable cause. *Id.* at 606 (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)). The facts of *Barnes*, in which a mother told her minor child to physically disobey police orders and the child did so, are analogous to this case. *Barnes* therefore gave Goode reason to believe that probable cause existed to arrest Voss after Voss instructed her child to physically disobey an officer and the child complied.

Voss's conduct also went beyond the types of speech we have recognized as protected. While courts have sometimes held that similar behavior fell within the speech exception, those cases involved unlawful orders by police. *See, e.g.*, *Freeman*, 483 F.3d at 413 (holding that plaintiff's yelling and refusing to obey an unlawful order fell within speech exception); *Carney v. State*, 31 S.W.3d 392, 398 (Tex. App. 2000) (holding that defendant arguing with police officers about an unconstitutional search fell within the speech exception). Here, Goode had legal authority to place K.V. in protective custody, and Voss told her child to disobey a physical order. These circumstances are more similar to the facts of our cases upholding qualified immunity. *See Haggerty v. Tex. S. Univ.*, 391 F.3d 653, 657 (5th Cir. 2004) (holding that arresting someone for stepping within 10 to 15 feet of an officer after being ordered to move away did not violate clearly established law). Accordingly, Goode's conduct was not unreasonable in light of the prevailing law.

IV.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MONICA VOSS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-17-1408
	§	
GREGORY G. GOODE,	§	
	§	
Defendant.	§	

ORDER ADOPTING MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

Having reviewed the Magistrate Judge's Memorandum and Recommendation (Docket Entry No. 40) dated February 4, 2019, Plaintiff's Response in Opposition to Defendant Goode's Motion for Summary Judgment (Docket Entry No. 41), Defendant Goode's Reply to Plaintiff's "Objections" to the Magistrate's Memorandum and Recommendation (Docket Entry No. 42), and Plaintiff's Objections to the Magistrate's Report and Recommendation (Docket Entry No. 43), the court is of the opinion that said Memorandum and Recommendation should be adopted by this court.

It is, therefore, **ORDERED** that the Memorandum and Recommendation (Docket Entry No. 40) is hereby **ADOPTED** by this court.

SIGNED at Houston, Texas, on this 20th day of February, 2019.

SIM LAKE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MONICA VOSS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-17-1408
	§	
GREGORY G. GOODE and	§	
FORT BEND COUNTY, TEXAS,	§	
	§	
Defendants.	§	

MEMORANDUM AND RECOMMENDATION

Pending before the court[1] are Defendant Fort Bend County's ("Fort Bend") Amended Motion to Dismiss (Doc. 11) and Defendant Gregory G. Goode's ("Goode") Amended Motion to Dismiss (Doc. 12). The court has considered the motions, Plaintiff's response to Defendant Goode's motion, all other relevant filings, and the applicable law. For the reasons set forth below, the court **RECOMMENDS** that Defendant Fort Bend's motion be **GRANTED** and Defendant Goode's motion be **GRANTED IN PART AND DENIED IN PART.**

I. Case Background

Plaintiff filed this civil rights action pursuant to 42 U.S.C. § 1983 ("Section 1983"), alleging that Defendant violated her constitutional rights when he arrested her for failure to identify

[1] This case was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72. See Doc. 10, Ord. Dated Aug. 25, 2017.

during a welfare check on her daughter K.V.[2]

A. Factual Background[3]

On June 19, 2016, Defendant Goode, who was a deputy with the Fort Bend County Sheriff's Office ("FBCSO"), and another FBCSO deputy went to Plaintiff's home around midnight and knocked on her door. When Plaintiff answered, one of the deputies asked if she was Monica, to which Plaintiff replied affirmatively. Defendant Goode explained that they were responding to a request by the Texas Child Protective Services to perform a welfare check on K.V., who allegedly was threatening to commit suicide.

Plaintiff called K.V. to come out of her room. When K.V. joined Plaintiff and the deputies, K.V. answered Defendant Goode's questions whether she was depressed and whether she was planning to harm herself, denying both. Plaintiff suggested that Defendant Goode interview K.V. outside the house while Plaintiff waited inside, and he did so. After a period of twenty or thirty minutes, Plaintiff approached K.V. and the deputies and stated that she was willing to provide mental help for K.V., if necessary. Plaintiff instructed K.V. to get into Plaintiff's car, but Defendant Goode would not allow K.V. to go with Plaintiff. Instead, he asked if he

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[2] See Doc. 1, Pl.'s Orig. Compl. Plaintiff variously refers to her daughter as "E.V." and "K.V." throughout the complaint. See id. In Defendant Goode's motion to dismiss, he drew attention to this error and represented that the correct initials for the daughter were "K.V." See Doc. 12, Def. Goode's Am. Mot. to Dismiss p. 9 n.2.

[3] This account is taken entirely from Plaintiff's First Amended Complaint. See Doc. 7, Pl.'s 1st Am. Compl.

could take K.V. to a friend's house for the night. Plaintiff did not consent.

Plaintiff then went into her house for a few minutes. When she returned outside, Defendant Goode would not allow her to speak with K.V., who was in the backseat of the patrol car. Defendant Goode then asked for Plaintiff's physical identification, which she said was in her house. At that time, Plaintiff indicated that she would not answer any more questions without an attorney present. Defendant Goode arrested Plaintiff for failure to identify herself to a police officer, handcuffed her, and put her in the backseat of the patrol car.

Approximately fifteen or twenty minutes later, Plaintiff requested that she be removed from the vehicle because she felt nauseous. One of the deputies allowed her to sit outside of the vehicle on the ground and, upon Plaintiff's complaint of pain, moved the handcuffs from behind her back to the front. Plaintiff then made two telephone calls, after which she asked Defendant Goode to contact his captain. He refused to do so and asked if Plaintiff wanted him to "jerk that phone out of her hand." Plaintiff explained that she was attempting to record the events, and he responded that the events were being recorded.

Plaintiff complained to Defendant Goode that K.V. was not receiving proper care and asked that Defendant Goode call his supervisor. Shortly thereafter, an FBCSO sergeant arrived at the

scene. He addressed Plaintiff, stating that the encounter was "just a big misunderstanding that had gotten out of hand." A deputy removed the handcuffs from Plaintiff, and the sergeant said that a mental-health professional would arrive to interview K.V. After the sergeant and the mental-health professional interviewed K.V., she also was released.

B. Procedural Background

Plaintiff filed this complaint on May 6, 2017, alleging violations of the Fourth and Fourteenth Amendments to the U.S. Constitution against Defendant Goode and imputed liability against Defendant Fort Bend.[4] Plaintiff's constitutional claims were based on the alleged detention and arrest without probable cause or reasonable suspicion.[5] She made specific reference to the Fourth Amendment's protection against unreasonable searches and seizures and the Fourteenth Amendment's protection against the deprivation of liberty without due process of law.[6] To support imputed liability, Plaintiff alleged that: (1) Defendant Fort Bend failed to adequately train Defendant Goode; (2) that Defendant Fort Bend failed to adequately discipline him for a 1996 charge of burglary, a 1997 charge of driving while intoxicated, and a 2015 charge of abuse of authority; and (3) that FBCSO engaged in "a pattern and

[4] See Doc. 1, Pl.'s Orig. Compl. pp. 7-8.

[5] See id. p. 7.

[6] See id.

practice of arresting individuals for failure to identify and other crimes without probable cause or reasonable suspicion."[7]

On July 26, 2017, Defendants Goode and Fort Bend separately filed motions to dismiss.[8] Twenty days later, Plaintiff filed an amended complaint.[9] The only change in the allegations was the addition of a state-law claim for false imprisonment against Defendant Goode.[10] Within two weeks, Defendants Goode and Fort Bend separately filed the pending amended motions to dismiss, thereby supplanting their original motions.[11] On December 14, 2017, Plaintiff belatedly filed a response to Defendant Goode's motion.[12] Plaintiff did not file a response to Defendant Fort Bend's motion.

To be clear, Plaintiff never pled claims on behalf of K.V. or related to K.V.'s arrest; Plaintiff raised no claim of excessive force and pled no injury resulting from the use of excessive force; and Plaintiff did not assert the false-imprisonment claim against Defendant Fort Bend.

II. Dismissal Standard

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[7] Id. p. 8.

[8] See Doc. 4, Def. Fort Bend's Mot. to Dismiss; Doc. 5, Def. Goode's Mot. to Dismiss.

[9] See Doc. 7, Pl.'s 1st Am. Compl.

[10] See id. p. 8.

[11] See Doc. 11, Def. Fort Bend's Am. Mot. to Dismiss; Doc. 12, Def. Goode's Am. Mot. to Dismiss. The court recommends that the original motions to dismiss be **DENIED AS MOOT**.

[12] Doc. 15, Pl.'s Resp. to Def. Goode's Mot. to Dismiss.

Rule 12(b)(6) allows dismissal of an action whenever the complaint, on its face, fails to state a claim upon which relief can be granted. When considering a motion to dismiss, the court should construe the allegations in the complaint favorably to the pleader and accept as true all well-pleaded facts. Harold H. Huggins Realty, Inc. v. FNC, Inc., 634 F.3d 787, 803 n.44 (5th Cir. 2011)(quoting True v. Robles, 571 F.3d 412, 417 (5th Cir. 2009)).

A complaint need not contain "detailed factual allegations" but must include sufficient facts to indicate the plausibility of the claims asserted, raising the "right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Plausibility means that the factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. 678. A plaintiff must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555. In other words, the factual allegations must allow for an inference of "more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. 678.

III. Analysis

Both defendants filed amended motions to dismiss Plaintiff's First Amended Complaint. The court first considers Defendant Fort Bend's amended motion.

A. Defendant Fort Bend's Amended Motion to Dismiss

Defendant Fort Bend argues that it cannot be held liable on the theory of respondeat superior for Defendant Goode's allegedly unconstitutional behavior and Plaintiff failed to adequately plead an official policy or custom that was the moving force behind the alleged constitutional violation. Defendant Fort Bend also contends that the state-law claim of false imprisonment should also be dismissed against it because it is entitled to sovereign immunity.[13] Plaintiff did not allege false imprisonment against Defendant Fort Bend. The only claim asserted against Defendant Fort Bend was liability for Defendant Goode's allegedly unconstitutional arrest based on a county policy or custom.

Local Rule 7.4 directs the court to take Plaintiff's failure to respond to Defendant Fort Bend's motion as "a representation of no opposition." However, even if a party fails to oppose a dispositive motion, the court should not grant the motion without carefully considering the movant's arguments. See Nat'l Bank v. Administracion Cent. Sociedad Anonima, 776 F.2d 1277, 1279 (5th Cir. 1985).

A county may be held liable under Section 1983 only for its own illegal acts, not pursuant to a theory of vicarious liability.

[13] Defendant Fort Bend argues that the state-law claim should also be dismissed against Defendant Goode pursuant to Texas Civil Practice and Remedy Code § 101.106(e). However, that provision only applies when both the governmental unit and the employee have been sued under the Texas Tort Claims Act.

Connick v. Thompson, 563 U.S. 51, 60 (2011). To succeed on a claim under Section 1983, the plaintiff must demonstrate that an official policy promulgated by the county policymaker was the moving force behind the alleged constitutional violation. Peña v. City of Rio Grande City, ___ F.3d ___, 2018 WL 386661, at *5 (5th Cir. 2018). "To proceed beyond the pleading stage, a complaint's description of a policy or custom and its relationship to the underlying constitutional violation cannot be conclusory; it must contain specific facts." Id. (internal quotation marks & alterations omitted)(quoting Spiller v. City of Tex. City, Police Dep't, 130 F.3d 162, 167 (5th Cir. 1997)).

Here, Plaintiff identified three theories of county liability: (1) failing to adequately train Defendant Goode; (2) failing to adequately discipline Defendant Goode; and (3) tolerating "a pattern and practice of arresting individuals for failure to identify and other crimes without probable cause or reasonable suspicion."[14]

To succeed on the theory of failure to train, Plaintiff must show that the county failed to train the officer, that the failure to train caused the alleged constitutional violation, and that the failure to train amounted to deliberate indifference. See id. at *7 (quoting Thompson v. Upshur Cty., 245 F.3d 447, 459 (5th Cir. 2001)). Here, Plaintiff did not in what way Defendant Goode was

[14] Doc. 1, Pl.'s 1st Am. Compl. p. 8.

untrained, much less how that lack of training caused the alleged constitutional violation or how it amounted to deliberate indifference.

To succeed on the theory of failure to discipline, Plaintiff must show, inter alia, that the pattern of lax discipline "must point to the specific violation in question." See Estate of Davis ex rel. McCully v. City of N. Richland Hills, 406 F.3d 375, 383 (5th Cir. 2005). "That is, notice of a pattern of *similar* violations is required." Id. Here, Plaintiff alleged a failure to adequately discipline Defendant Goode for a burglary charge, a DWI charge, and an abuse-of authority-charge. These charges are neither similar to one another nor similar to Defendant Goode's alleged misconduct in this case.

To succeed on the theory that Defendant Fort Bend tolerated a pattern and practice of false arrests or detentions for failure to identify and other crimes, Plaintiff must show that the practice was "so persistent and widespread as to practically have the force of law." Peña, 2018 WL 386661, at *6 (internal quotation marks omitted)(quoting Connick, 563 U.S. at 61). Here, Plaintiff relied on no specific facts other than the incident that formed the basis of her complaint. Such an allegation is "conclusional and utterly devoid of factual enhancements." Id. (internal quotation marks omitted)(quoting Iqbal, 556 U.S. at 678).

Accordingly, the court finds that Plaintiff failed to allege

a county policy or custom. Defendant Fort Bend should be dismissed. Plaintiff is not entitled to another opportunity to amend because she failed to make any changes to her allegations against Defendant Fort Bend when she amended in response to its original motion to dismiss, which identified this very deficiency.

B. Defendant Goode's Amended Motion to Dismiss

Defendant Goode argues that the false-arrest claim alleged pursuant to the Fourteenth Amendment is not a cognizable claim and that Plaintiff failed to allege facts to support a claim under the Fourth Amendment.[15] He further contends that he is entitled to qualified immunity for any viable constitutional claim. Finally, he contends that the state-law claim of false imprisonment should be dismissed pursuant to several provisions of the Texas Tort Claims Act. Plaintiff failed to respond to Defendant Goode's arguments related to the Fourteenth Amendment and the state-law claim.[16] The court finds that Plaintiff abandoned those claims.[17]

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[15] Both Defendant Goode and Plaintiff address excessive-force claims in their briefing, but Plaintiff did not raise a claim of excessive force. See Doc. 7, Pl.'s 1st Am. Compl.; Doc. 12, Def. Goode's Am. Mot. to Dismiss p. 8; Doc. 15, Pl.'s Resp. to Def. Goode's Mot. to Dismiss p. 11.

[16] In her responsive brief, Plaintiff did reassert the false-imprisonment claim but offered no response to Defendant Goode's specific arguments. Rather, she baldly asserted that her amended complaint stated a claim of false imprisonment and copied and pasted the portion of her amended complaint that alleged false imprisonment. See Doc. 15, Pl.'s Resp. to Def. Goode's Mot. to Dismiss p. 12.

[17] Regardless of Plaintiff's abandonment, these claims cannot survive the motion to dismiss. The Fourth Amendment, not the Fourteenth Amendment, protects against false arrest. The Supreme Court has consistently held that when a "more definite" provision exists, a constitutional claim must be considered under that provision, not the more general standard of traditional due process. See Cty. of Sacramento v. Lewis, 523 U.S. 833, 842 (1998). Additionally, the

In order to prevail on a claim under Section 1983 against a governmental official, a plaintiff must establish that the defendant deprived the plaintiff of her constitutional rights while acting under the color of state law. Moody v. Farrell, 868 F.3d 348, 351 (5th Cir. 2017). Government officials have qualified immunity from Section 1983 "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009)(quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). When responding to a motion to dismiss, a plaintiff can overcome an assertion of qualified immunity if the factual allegations, viewed "in the light most favorable to the plaintiff," include specific facts that "allow the court to draw the reasonable inference that the defendant is liable for the harm she has alleged and that defeat a qualified immunity defense with equal specificity." Lincoln v. Barnes, 855 F.3d 297, 301 (5th Cir. 2017)(internal alterations omitted).

Plaintiff's false-arrest claim falls within the unreasonable-seizure provision of the Fourth Amendment, which protects "[t]he right of the people to be secure in their persons, houses, papers,

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state-law claim should be dismissed pursuant to Texas Tort Claims Act § 101.106(f), which states that if the suit is brought against a government employee for conduct within the general scope of employment and could have been brought against the governmental immunity, the suit is considered to be against the employee in his official capacity only. See Franka v. Velasquez, 332 S.W.3d 367, 379-85 (Tex. 2011).

and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A warrantless arrest must be supported by "probable cause to believe that a criminal offense has been or is being committed." Devenpeck v. Alford, 543 U.S. 146, 152 (2004). The standard for the existence of probable cause is an objective one requiring that the officer draw a reasonable conclusion from the facts available to him at the time of the arrest. Id. The critical question when deciding whether qualified immunity protects an officer from false arrest claim, is whether "a reasonable officer could have believed the arrest to be lawful, in light of clearly established law and the information the officer possessed." Babb v. Dorman, 33 F.3d 472, 477 (1994) (internal alterations and quotation marks omitted) (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991)).

These constitutional standards were clearly established at the time of Plaintiff's arrest, which leaves the court only to consider whether Plaintiff pled sufficient facts that Defendant Goode's conduct violated Plaintiff's constitutional right to be free from unreasonable arrests.[18] The relevant facts are those in Plaintiff's live pleading, not the contradictory facts, the additional facts, and/or the suppositions posed in Defendant Goode's motion.

According to Plaintiff's allegations, the deputies asked her

[18] Plaintiff included the term "reasonable suspicion" in her complaint and discussed investigative stops in her responsive brief. However, she plainly pled that she was arrested, not subjected to an investigative stop. The applicable standard for arrests is probable cause.

to confirm her identity when she first answered the door, which she did. Later in the encounter, Defendant Goode asked for physical identification. Plaintiff responded that her identification card was in the house. Plaintiff then refused to answer any more questions without an attorney present. Defendant Goode arrested her for failure to identify herself to a police officer.

Under Texas law, a person commits the offense of failure to identify "if [s]he intentionally refuses to give h[er] name, residence address, or date of birth to a peace officer who has lawfully arrested the person and requested the information." Tex. Penal Code § 38.02. Under the facts pled, an arrest under this statute did not fit the circumstances. Plaintiff confirmed her identity at the onset of the encounter. When asked for a physical identification, Plaintiff was not under arrest and did not refuse to retrieve her identification card.

As Plaintiff's allegations indicate that Defendant Goode knew that Plaintiff identified herself and that she was not under arrest at the time Defendant Goode asked for physical identification,[19] no objective officer could have reasonably concluded, even mistakenly, that Plaintiff's arrest for failure to identify was lawful at the time Defendant Goode arrested Plaintiff. Defendant Goode's factual account of the encounter differs vastly from that of Plaintiff. Defendant Goode may reassert the defense on summary judgment, but

[19] The statute does not explicitly require physical identification. See Tex. Penal Code § 38.02.

he is not entitled to dismissal of the false-arrest claim at this juncture. Cf. Peña, 2018 WL 386661, at *4 ("[The plaintiff's] characterization is belied by the police reports, but on a motion to dismiss, [the plaintiff's] well-pleaded factual allegations enjoy a presumption of truth.").

IV. Conclusion

Based on the foregoing, the court **RECOMMENDS** that Defendant Fort Bend's motion be **GRANTED** and Defendant Goode's motion be **GRANTED IN PART AND DENIED IN PART.** If this Memorandum and Recommendation is adopted, the only remaining claim will be the Fourth Amendment claim of false arrest alleged against Defendant Goode.

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties who have fourteen days from the receipt thereof to file written objections thereto pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002-13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk electronically. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

SIGNED in Houston, Texas, this 31st day of January, 2018.

U.S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DIVISION OF TEXAS
HOUSTON DIVISION

MONICA VOSS,	)(	
Plaintiff,	)(	**Civil Action No.: 4:17-cv-1408**
V.	)(	**(JURY TRIAL)**
FORT BEND COUNTY, TEXAS; and GREGORY G. GOODE, *Individually,*	)(	
Defendants.	)(	

PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT

NOW COMES Plaintiff MONICA VOSS and files this first amended complaint complaining of FORT BEND COUNTY, TEXAS and GREGORY G. GOODE and will show the Court the following:

JURISDICTION AND VENUE

1. This Court has jurisdiction over Plaintiff's federal claims, under 28 U.S.C. § 1331, 42 U.S.C. §§ 1983 and 1988, and supplemental jurisdiction, under 28 U.S.C. § 1367(a), to hear Plaintiff's state law claims, if any.

2. Venue is proper in this Court, under 28 U.S.C. § 1391(b), because the incident at issue took place in Fort Bend County, Texas, within the United States Southern District of Texas.

PARTIES

3. Plaintiff Monica Voss is a resident of Fort Bend County, Texas.

4. Defendant Fort Bend County, Texas is a governmental unit existing within the U.S. Southern District of Texas and can be served with process by serving Robert Hebert,

County Judge of Fort Bend County, Texas at 401 Jackson Street, Richmond, Texas 77469.

5. Defendant Gregory G. Goode is an individual and resident of Fort Bend County, Texas and can be served with process at 1410 Williams Way Boulevard, Richmond, Texas 77469 or wherever he is found.

FACTS

6. Plaintiff Monica Voss ("Detective Voss") is 56 years, married with children and lives in Fort Bend County. Detective Voss was a Harris County Sheriff's deputy from 1984 until her retirement in 2008 as a sergeant. While a deputy she was promoted to detective and worked in the child abuse unit for about 9 years. Detective Voss has never been disciplined as a law enforcement officer. Detective Voss lives in a house in Fort Bend County with her husband Mark Voss, a minor daughter E.V., and three other disabled children. Detective Voss also takes care of her elderly mother at her home.

7. Defendant Gregory G. Goode ("Deputy Goode") currently works as a deputy with the Fort Bend County Sheriff's Office (FBCSO).

8. December 2014 Defendant Gregory G. Goode took a boat and motor in Chambers County, Texas from the owner Rick Powell's home while dressed in a Fort Bend County Sheriff's Office (FBCSO) uniform and armed with his duty weapon. Deputy Goode brought with him FBCSO deputy Marcelo Garcia in a Fort Bend County Sheriff's uniform and duty weapon. Chambers County Sheriff's deputies stopped the alleged theft and the boat and motor were returned to their rightful owner. Defendant Goode received a 3-day suspension from the Fort Bend County Sheriff's Office and Deputy Garcia was reprimanded. Sheriff Troy E. Nehls allowed Defendant Goode to keep his job. See **Exhibit 1,** Channel 2 News article. While a

Chambers County Grand Jury no-billed Defendant Goode they never called Rick Powell, who was also the eyewitness, to testify about the theft to the Grand Jury.

9. January 9, 1998 Deputy Goode plead guilty to DWI in Harris County Criminal Court at Law No.:2 and was sentenced to 1 year probation and fined $300. See **Exhibit 2,** judgment.

10. Deputy Goode was charged in 1998 with felony burglary of a habitation in Harris County District Court 232. See **Exhibit 3,** district clerk record. The case was dismissed.

11. Detective Voss adopted E.V. from Russia when she was one year old. Prior to being adopted E.V. was a "crib baby" and had been severely malnourished and mistreated and lacked medical care. E.V. has been diagnosed with possible fetal alcohol syndrome. Since Detective Voss adopted E.V. she has cared for and treated her as any mother would any child and loves her very much. School professionals and other mental health care providers have also diagnosed E.V. with several other severe mental health disorders such as Attention Deficit Hyperactivity Disorder, Oppositional Defiance Disorder, Reactive Attachment Disorder, Dysautonomia, and is possibly bipolar. E.V. takes medication prescribed by a psychiatrist for behavior.

12. June 19, 2016, around midnight, Detective Voss was sitting at her computer in the front part of her house. The rest of her family including E.V. were in their rooms for the night. Detective Voss heard someone knock on the front door and say "Sheriff's department" very loud. Detective Voss could see it was a uniformed person through the glass of the door. Detective Voss, frightened by this late-night law enforcement visit immediately answered the door not knowing what was happening. When Detective Voss opened the door there were two Fort Bend County Sheriff's deputies there.

13. One of the deputies present asked if she was Monica and Detective Voss said yes. Detective Voss' driver license record, easily accessible by their squad car computer, had the correct address on it. Identifying the person you are talking to is basic law enforcement training. FBCSO deputies had been to Detective Voss' residence on unrelated matters on several occasions. Deputy Goode told Detective Voss he was there at the request of Texas Child Protective Services to do a welfare check on E.V. who was allegedly threatening to commit suicide from her bedroom. Neither Detective Voss nor anyone in the Voss household has ever abused K.V. in any way.

14. Detective Voss was quite shocked as the family had just returned from a great family weekend trip out of state. Detective Voss immediately called E.V. from her room. E.V. came to the front foyer where the deputies and Detective Voss were. Deputy Goode asked E.V. if she was depressed and if she was going to harm herself and E.V. plainly denied these actions to Deputy Goode. E.V. was laughing about it and appeared shocked by Deputy Goode's questions.

15. Deputy Goode then asked Detective Voss in front of E.V. if she was Detective Voss' child by adoption or natural. This, of course, was very poor judgment to ask such a question in front of a child as parents sometime save such information for a later age when children may take it much better. However, despite such poor judgment by Deputy Goode Detective Voss complied again and answered Deputy Goode without comment.

16. Detective Voss woke husband Mark to come out and told Mark briefly what was happening. Deputy Goode told Mark why he was there and they made small talk about law enforcement. Mark, seeing it appeared everything was fine, went back to bed as he had to get up very early for work the next day.

17. Detective Voss then suggested to Deputy Goode he could interview E.V. out of her presence if he wanted to.

18. After 20 or 30 minutes Detective Voss went outside to see what was taking so long. Detective Voss then told Deputy Goode that if E.V. was depressed or needed mental help she would certainly provide for that. Previously, E.V.'s psychiatrist had suggested Methodist Hospital or St. Luke Hospital if a problem ever arose. Detective Voss knew she could be on her way downtown while waiting on the emergency call back from E.V.'s psychiatrist.

19. Detective Voss told E.V. to get into her car for the trip to the hospital. Deputy Goode then said K.V. could not and that he would not allow E.V. to go with Detective Voss. Deputy Goode then asked Detective Voss if he could take E.V. from her home to a "friend's" house for the night. Detective Voss said no as whatever "friend" Deputy Goode was talking about was most likely not a mental health care professional who would treat E.V.

20. Being at an impasse after Deputy Goode had taken E.V. into custody Detective Voss went back inside her house for a few minutes to sort the confusing situation out. Based upon Detective Voss' many years of service in the Harris County Sheriff's Office child abuse unit and CPS she knew that E.V. may end up in a temporary foster home even without any valid reason.

21. Detective Voss then returned outside and asked Deputy Goode if he had custody of K.V. and Deputy Goode stated he did. E.V. was in the backseat of the FBCSO's patrol car and Detective Voss was not allowed to talk to E.V. Deputy Goode then asked Detective Voss for her physical identification and she said it was in the house. Although Detective Voss was not under arrest or detention at that time Detective Voss stated that she wanted an attorney present for any further questioning.

22. Deputy Goode then arrested Detective Voss for failure to identify to a police officer. Detective Voss knew this was a false arrest as she had not committed the offense of failure to ID. Deputy Goode handcuffed Detective Voss and put her in the back of the patrol car. After 15 to 20 minutes had elapsed Detective Voss began to get sick due to the stress of E.V.'s predicament and the deputies unjustified actions. Detective Voss knocked on the squad car window with her head as she did not want to vomit in the squad car. A deputy opened the squad car door and let her sit on the ground.

23. As Detective Voss had recent nerve surgery on her elbow the behind the back handcuffing was hurting very bad and the cuffs were changed to the front. She then called her husband on her cell phone to tell him what was happening so he would not worry.

24. Detective Voss also called a friend and told him what was happening to which the friend suggested calling Deputy Goode's captain Holtz. Deputy Goode was standing right over Detective Voss and told her Holz was his captain but he was not going to call him. Deputy Goode asked Detective Voss if she wanted him to jerk that phone out of her hand.

25. Detective Voss told Deputy Goode she was trying to record what was happening. Deputy Goode replied not to worry as it was all being recorded. Detective Voss asked Deputy Goode to call his supervisor as she did not believe E.V. was being properly cared for and her arrest was unlawful. A few minutes later, while detective Voss was still sitting on the ground, another FBCSO patrol car came up. Deputy Goode went to this patrol car which was driven by FBCSO Sgt. Ellis. After Deputy Goode spoke with Sgt. Ellis for around 20 minutes Sgt. Ellis walked over and began to talk to Detective Voss. Sgt. Ellis said it appears everything was just a big misunderstanding that had gotten out of hand. After a few moments the deputies

took the handcuffs off. Sgt. Ellis stated they were calling a mental health person out to interview E.V. before they released her just to make sure E.V. was OK.

26. A mental health care worker from Texana Crisis Center eventually arrived and interviewed E.V., as did Sgt. Ellis, and then E.V. was released.

27. The events have caused Detective Voss at least past pain and suffering as well as past present and in all likelihood future anxiety, lost sleep, fear, embarrassment, anger, loss of enjoyment of life, and other mental anguish. It caused Detective Voss great humiliation to be handcuffed and arrested in front her E.V.

CAUSES OF ACTION

Violations of the Fourth and Fourteenth Amendments

28. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

29. The Fourth Amendment guarantees everyone the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *U.S. Const. amend. IV.* Fourth Amendment violation are actionable under 42 U.S.C. Section 1983.

30. Defendant Gregory G. Goode violated Detective Voss' Fourth Amendment and Fourteenth Amendments rights, at least, when he detained and arrested her without probable cause or reasonable suspicion.

31. The Fourteenth Amendment guarantees everyone the right not to be deprived of liberty without due process of law. *U.S. Const. amend. XIV.*

32. Defendants violated Detective Voss' Fourteenth Amendment rights when they detained and arrested her without probable cause or reasonable suspicion.

False Imprisonment

33. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

34. The elements of a False Imprisonment claim in Texas are: 1) willful detention; 2) without consent; and 3) without authority of law.*Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002); *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375 (Tex. 1985). Defendant Goode falsely imprisoned plaintiff.

Policy, Practice, Custom and Procedure

35. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

36. Deputy Goode should have been fired for his past abuse of authority and the boat incident combined with his past criminal history. Instead Fort Bend County policymaker Sheriff Troy E. Nehls and the internal affairs department were deliberately indifferent and kept Deputy Goode in his patrol position thereby causing Detective Voss to suffer unlawful detention and false arrest. Fort Bend County's training, retention of Deputy Goode and discipline was deliberately indifferent. Additionally, the FBCSO has a pattern and practice of arresting individuals for failure to identify and other crimes without probable cause or reasonable suspicion.

Punitive Damages

37. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

38. All individuals sued are liable for punitive damages as they were consciously indifferent to the plaintiff's constitutional rights and they did the acts knowingly, such acts being extreme and outrageous and shocking to the conscious.

Attorney's Fees

39. Plaintiff is entitled to recover attorneys' fees and costs to enforce her Constitutional rights and under 42 U.S.C. Sections 1983 and 1988, from Defendants.

Jury Trial

40. Plaintiff demands trial by jury on all issues triable to a jury.

Prayer For Relief

WHEREFORE, Plaintiff Voss requests that the Court:

A. Enter judgment for Plaintiff against Fort Bend County, Texas and each and every individually name defendant;

B. Find that Plaintiff is the prevailing parties in this case and award attorneys' fees and costs, pursuant to federal law, as noted against defendant Fort Bend County, Texas and the individually named defendant police officers;

C. Award damages to Plaintiff for the violations of her Constitutional rights claim and state law claims;

D. Award Pre- and post-judgement interest;

E. Award Punitive damages against all individually named defendants; and

F. Grant such other and further relief as appears reasonable and just, to which, Plaintiff shows herself entitled.

RESPECTFULLY SUBMITTED
KALLINEN LAW PLLC

/S/ Randall L. Kallinen

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been transmitted to the all counsel appearing in this cause and pro se parties on this the 16th day of August 2017, by filing with the ECF System of the United States District Court for the Southern District of Texas.

/s/ Randall L. Kallinen
Randall L. Kallinen

2019 WL 3074749 (C.A.5) (Appellate Brief)
United States Court of Appeals, Fifth Circuit.

Monica VOSS, Plaintiff - Appellant,

v.

Gregory G. GOODE; Fort Bend County, Texas, Defendants - Appellees.

No. 19-20167.
July 12, 2019.

On Appeal from the United States District Court for the Southern District of Texas Houston Division, (Case No. 4:17-cv-1408), The Honorable Sim Lake, United States District Judge

Principal Brief of Appellees Gregory G. Goode and Fort Bend County, Texas

Justin Carl Pfeiffer, Salvatore P. LoPiccolo, II, Assistant County Attorneys, Fort Bend County, Texas, 401 Jackson Street, 3rd Floor, Richmond, Texas 77469, [Tel] (281) 341-4555, [Fax] (281) 341-4557, Justin.Pfeiffer @Fortbendcountytx.gov, Sal.LoPiccolo@Fortbendcountytx.gov, for appellees Gregory G. Goode and Fort Bend County, Texas.

iv** ***Statement Regarding Oral Argument

Pursuant to Fifth Circuit Rule 28.2.3, the District Court's Final Judgment is appropriate for summary calendar without oral argument, but if the Court concludes that oral argument would be helpful, Appellees request an opportunity to present oral argument to address the relevant issues.

v** ***TABLE OF CONTENTS

vii *TABLE OF AUTHORITIES

Cases

Federal Cases

Supreme Court of the United States

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***1** *Jurisdictional Statement*

Defendants-Appellees Fort Bend Sheriff Deputy Gregory G. Goode ("Goode") and Fort Bend County ("County") agree with the Jurisdictional Statement of Plaintiff-Appellant Monica ("Voss") that the Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of the Issues

Pursuant to Federal Rule of Appellate Procedure 28(b)(2), Voss and the County disagree with Voss's Statement of the Issues and offer the following:

1. Does Voss preserve error where she failed to object specifically in her objections to the magistrate judge's report and recommendation to Magistrate Judge Johnson's conclusion that she physically interfered with Goode's duty by placing K.V. into her car?

2. Did the district court properly conclude that Goode had probable cause when he arrested Voss?

3. Even if the district did not properly conclude that Goode had probable cause, may this Court nevertheless affirm the district court's judgment on the basis of Goode's qualified immunity?

Statement of the Case

Pursuant to Federal Rule of Appellate Procedure 28(b)(3), Goode and the ***2** County disagree with Voss's Statement of the Case and offer the following:

I. Events Surrounding Voss's Arrest.

On June 20, 2016, Goode arrested Voss. [ROA.420.] Earlier that evening, Texas Child Protective Services requested a welfare check on Voss's then-fourteen-year-old daughter, K.V. (pseudonym). [ROA.421.] The Fort Bend County Sheriff's Office dispatched Goode and another deputy as backup, who arrived independently around midnight, to Voss's single-family residence in Fort Bend County, Texas. [ROA.421.]

Goode told Voss that he was there to perform a welfare check on K.V., who allegedly had expressed suicidal tendencies. [ROA.386.] [1] Voss suggested that Goode interview K.V. outside Voss's presence. [ROA.387.] Goode and the other deputy interviewed K.V. for around twenty or thirty minutes outside of Voss's dwelling. [ROA.387.] During her interview with the deputies, K.V. admitted that ***3** she had reported suicidal thoughts to an adult friend, and that her mother had engaged in relatively recent acts potentially constituting the state criminal offense of "family violence." [ROA.423.]

Voss "went outside to see what was taking so long." [ROA.387.] Goode informed Voss that he needed to have a mental-health professional assess K.V. and that he had decided to place K.V. in the back seat of his patrol vehicle for K.V.'s protection. [ROA.424.] Voss tried to resist Goode's efforts by insisting that she would unilaterally obtain any necessary psychiatric care for K.V. [ROA.387] She "told K.V. to get into her car for the trip to the hospital," [ROA.387], and then, admitting in her own declaration, "put K.V. in the car." [ROA.389.] Goode, thereafter, admonished Voss that he could not allow K.V. out of his custody. [ROA.387.]

Voss expressed her displeasure with Goode's decision to place K.V. in his squad car until the mental-health professional arrived at the scene. [ROA.201.] Voss thereafter told the deputies that she was "not coming back for K.V.," [ROA.254 (G6L65080.MP3 at 01:30--01:40)], [2] and if they put her in the squad car, they would have to "take K.V. with them." [ROA.254 (G6L65080.MP3 at 00:50--01:25).] Goode ***4** warned Voss that "she was getting close to being arrested for interfering with [Goode's] investigation." [ROA.254 (G6L65080.MP3 at 00:39--01:55); 425--26.] Goode placed K.V. in his squad car and Voss went back into her house. [ROA.387.]

Voss returned outside, Goode requested her identification, Voss refused to comply, and Goode arrested her for "failure to identify to a police officer." [ROA.387--88.] Goode directed the other deputy to detain Voss in that other deputy's patrol car. [ROA.388, 427.] Voss later requested that Goode call his supervisor. [ROA.388.] After Goode's call, a Fort Bend County Sheriff Sergeant arrived on the scene and spoke with Goode. [ROA.388--89.] The sergeant then told Voss that they were waiting for the mental-health professional to evaluate K.V. [ROA.388--89.] After the mental-health professional arrived and evaluated K.V., Goode released both K.V. and Voss. [ROA.389.]

II. Statement of the Relevant Procedural History.

Voss filed her initial complaint on May 6, 2017, alleging violations of her constitutional rights primarily under the Fourth Amendment against Goode and the County, filed pursuant to 42 U.S.C. § 1983. [ROA.1--28.] The County and Goode filed motions to dismiss, [ROA.38--65], which prompted Voss to file her First Amended Complaint. [ROA.70--79.] Defendants filed renewed motions to dismiss, [ROA.89--129], which the magistrate judge recommended to grant in part and deny ***5** in part on January 31, 2018. [ROA.148--61.]

The magistrate judge recommended granting the County's motion because Voss failed to plead that an official policy promulgated by a County policymaker was the moving force behind the alleged constitutional violations. [ROA.154--57.] The magistrate judge, moreover, concluded that Voss failed to plead the requisite pattern and practice to support allegations that a County custom caused the alleged constitutional violation due to Voss's alleged "failing-to-train," "failing-to-discipline," and "tolerating-similar-arrests-without-probable-cause" theories. [ROA.155--56.] The magistrate judge recommended granting and denying Goode's motion to dismiss in part. [ROA.157--61.] The magistrate judge concluded that Voss abandoned her claims under the Fourteenth Amendment as well as under state law. [ROA.157.] Regarding Voss's Fourth Amendment claim, the magistrate judge concluded that Voss had stated a claim. [ROA.159--61.] The magistrate judge concluded that Voss's complaint contained sufficient facts to allege that Goode lacked probable cause to arrest Voss for the offense of failure to identify herself to Goode under § 38.02 of the Texas Penal Code. [ROA.159--61.]

Because no party lodged objections to the magistrate judge's report and recommendation, the district court adopted it. [ROA.162.] The district court, consequently, granted the County's motion to dismiss and denied Goode's motion to ***6** dismiss to the extent that Voss alleged that Goode lacked probable cause to arrest her. [ROA.162.] Goode answered the complaint, [ROA.165--77], and filed a motion for summary judgment based upon his qualified immunity. [ROA.181--270.] The magistrate judge granted Voss's motion for a continuance to conduct additional limited and specified discovery, including the depositions of Goode, the backup deputy on scene, and the sergeant called out to the scene. [ROA.364.]

On February 4, 2019, the magistrate judge issued a report and recommendation to grant Goode's motion for summary judgment. [ROA.420--42.] The magistrate judge reasoned that Voss's admissions and the parties' uncontroverted audio and video evidence demonstrate that Goode had probable cause to arrest Voss for interference with public duties § 38.15 of the Texas Penal Code. [ROA.437-- 41.] Voss timely filed her objections to the magistrate judge's report and recommendation. [*See* ROA.443--50 & 460--67.]

On February 20, 2019, the district court adopted the magistrate judge's report and recommendation, [ROA.468.] after reviewing Voss's objections and Goode's reply thereto. [*See* ROA.443--67.] Also on February 20, 2019, the

district court issued a final take-nothing judgment against Voss. [ROA.469.] Voss timely filed her notice of appeal on March 16, 2019. [ROA.470--01.]

*7 *Statement of the Standard of Review*

Goode and the County agree with Voss that the standard of review is *de novo*. *Alvarez v. City of Brownsville*, 904 F.3d 382, 389 (5th Cir. 2018) (en banc). The Court may affirm the district court's judgment on any basis appearing in the record, including those not addressed by the district court. *Gilbert v. Donahoe*, 751 F.3d 303, 311 (5th Cir. 2014) ("Under our precedent, we may 'affirm on any ground supported by the record, including one not reached by the district court.' " (quoting *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 781 (5th Cir.2012))).

Summary of the Argument

Voss asserts that Goode lacked probable cause to arrest her. She is wrong. Voss interfered with Goode's investigation and his lawful welfare check concerning Voss's juvenile daughter, K.V.

First, Voss admits that after Goode informed her that he had decided to place K.V. in the back seat of his patrol vehicle pending K.V.'s assessment by a mental-health professional, [ROA.424], Voss "put K.V. in [her] car." [ROA.425.] Not only did Voss forfeit her objection to this factual conclusion by the magistrate judge by failing to raise it to the district court, this conduct *alone* constitutes probable cause for the offense of interference with a public duty because Voss disregarded the lawful instructions of a police officer. *See* Tex. Penal Code § 38.15(a)(1).

***8** Second, Voss's other conduct at the scene established probable cause. Voss impeded Goode's investigation. She tried to coerce the officers by threatening to exile K.V. if she cooperated with the officers attempt to provide her with a mental-health assessment. She also ignored Goode's clear verbal warnings that her conduct was constituting interference.

Third, even if Goode cannot establish probable cause for arresting Voss for interference, he is still qualifiedly immune for his conduct. Voss's actions went beyond mere speech. Even if the Court were to conclude that the majority of Voss's questioned conduct is protected by the speech-only defense of § 38.15(d) of the Texas Penal Code and/or the First Amendment to the Constitution, Goode is still entitled to qualified immunity under *Haggerty v. Texas Southern University*, 391 F.3d 653, 655 (5th Cir. 2004) (Garwood, J.). Goode's conduct, therefore, was not foreclosed by clearly established law.

Argument

I. Voss Forfeits Any Argument Against Goode that She Did Not Physically Interfere with Goode by Placing K.V. into Her Vehicle.

An appellant's failure to object timely in writing to a magistrate judge's report and recommendation forfeits all but plain-error review on appeal. *Douglass v. United Servs. Auto. Assoc.*, 79 F.3d 1415, 1428--29 (5th Cir. 1996) (en banc) (superseded by ***9** statute on other grounds) ("A party's failure to object timely in writing to a magistrate judge's report and recommendation relegates the appeal of a district court's adoption thereof to plain error review."); *see also Ortiz v. City of San Antonio Fire Dep't*, 806 F.3d 822, 825 (5th Cir. 2015) (same). "Under the plain error standard, this court may correct 'a plain forfeited error affecting substantial rights if the

error seriously affects the fairness, integrity or public reputation of judicial proceedings.' " *Delahoussaye v. Performance Energy Servs.*, 734 F.3d 389, 393 (5th Cir. 2013) (quoting *Douglas*, 79 F.3d at 1424). To succeed under plain-error review, an appellant "must show (1) that an error occurred; (2) that the error was plain, which means clear or obvious; (3) the plain error must affect substantial rights; and (4) not correcting the error would seriously impact the fairness, integrity, or public reputation of judicial proceedings." *Ortiz*, 806 F.3d at 825--26.

A. *Voss's Failure to Object to the Magistrate Judge's Report and Recommendation with Requisite Specificity.*

The magistrate judge's February 4, 2019, report and recommendation stated that after Goode informed Voss that he had decided to place K.V. in the back seat of his patrol vehicle pending K.V.'s assessment by a mental-health professional, [ROA.424], Voss "put K.V. in [her] car." [ROA.425.] Additionally, the magistrate judge later noted that "[b]y her own testimony, [Voss] 'put K.V. in the car.' " [ROA.440 n. 80.] In Voss's vague and sundry objections to the magistrate judge's ***10** report and recommendation, she does not specifically object to this factual determination by the magistrate judge. [*See* ROA.443-- 50 & 460--67.]

The closest that Voss comes to raising this issue to the district court in her objections to the magistrate judge's report and recommendation is the conclusory statement that "Monica [Voss] never interfered with any one putting K.V. in a squad car." [ROA.463 (citing ROA.396).] First, a conclusory and perfunctory statement in a party affidavit does not create a triable fact question. *See De la O*, 417 F.3d at 501. Second, this objection does not challenge the magistrate judge's specific factual conclusion concerning Voss's actions with respect to her own vehicle. The effect of Voss attempting to place K.V. into her own vehicle, according to the magistrate judge, necessarily "delayed the placement of K.V. in the patrol car." [ROA.440.] Such an action additionally indicates an intent to take K.V. away from the scene, [ROA.440], in a manner expressly contrary to Goode's communicated decision to place K.V. in the back seat of his patrol vehicle pending K.V.'s assessment by a mental-health professional.

Under a plain-error review, Voss must demonstrate that an error did in fact occur, which was plain and obvious. Voss cannot meet this standard because the magistrate judge quotes directly from Voss's declaration in support of her opposition to Goode's motion for summary judgment. [ROA.440 (quoting ROA.389).] ***11** Arguments concerning this factual finding by the district court are accordingly forfeited.

B. *Voss's Principal Brief Cannot Resuscitate Appellate Challenge.*

Rather than perform a plain-error analysis, Voss's Principal Brief dismisses this key factual finding by the magistrate judge as nothing more than a misunderstood colloquialism. [Voss's Principal Br. 16--20.] Specifically, Voss argues that "[a]ny parent who maintains the actual care and control of her child, which includes directing and restricting the child's movement, might colloquially say she 'put' her child in the car, through referring to a merely verbal remedy." [*Id*. at 17--18]. First, Voss swore out her language in a declaration under penalty of perjury and filed that declaration in federal court. As such, she did not "colloquially say" anything. Second, this "colloquialism argument" was not raised in Voss's opposition to Goode's motion for summary judgment. [*See* ROA.375--83.] Or to put it colloquially: "that dog won't hunt."

This Circuit's general rule is that "arguments not raised before the district court are [forfeited] and will not be considered on appeal unless the party can demonstrate 'extraordinary circumstances.' " *Cent. Sw. Tex. Dev., L.L.C. v. JP Morgan Chase* ***12** *Bank, Nat'l Ass'n*, 780 F.3d 296, 300 (5th Cir. 2015). [3] The argument pressed by counsel below must be sufficient to put the court and opposing parties on notice of the intended appellate argument and not

simply intimated. *See Dall. Gas Partners v. Prospect Energy Corp.*, 733 F.3d 148, 157 (5th Cir. 2013). Arguments not presented to the district court are forfeited "unless it is a pure question of law and our refusal to consider the question will result in a miscarriage of justice." *Reickenbacker v. Foster*, 274 F.3d 974, 984 (5th Cir. 2001), *overruled on other grounds*, *Pace v. Bogalusa Sch. Bd.*, 403 F.3d 272, 277 (5th Cir. 2005).

Even if the briefing before the magistrate judge is somehow construed to consider Voss's colloquialism argument raised and ignored by the magistrate judge, it is not saved from forfeiture. It would be immaterial that the magistrate judge ignored the issue (which she did not because it was not raised.) In *Lockert v. Faulkner*, for example, the Seventh Circuit refused to reach the merits of an issue not raised before the district court even if it would have reached it had it been in the shoes of the district court. 843 F.2d 1015, 1018--19 (7th Cir. 1988) ("If we were reviewing the magistrate's report, the unusual course of events below might, as Lockert insists, ***13** excuse his failure to raise the 'liberty interest' argument and make it unfair for us not consider that argument."). But the Seventh Circuit declined because it was "reviewing the district court's judgment, and the unusual events below do not excuse Lockert's failure to raise the 'liberty interest' issue before the district court." *Id*. at 1019.

The magistrate judge's finding that Voss put K.V. in her car is seminally important because it shows that Voss "did physically interfere with [Goode's] efforts to place K.V. in the patrol vehicle." As will be fully delineated, *infra* Part II.A, such a fact conclusively demonstrates Goode's probable cause in arresting Voss for interference with public duties under § 38.15 of the Texas Penal Code. Consequently, the Court could simply affirm the district court's judgment for Voss's forfeiture of this issue. [4]

II. Voss Raises No Triable Fact Issue Regarding Goode's Probable Cause to Arrest Her for Interference with Public Duties.

Voss must raise a triable fact issue that Goode's decision to arrest her was not ***14** supported by probable cause. *See Haggerty v. Tex. S. Univ.*, 391 F.3d at 655--66. "The probable cause issue must be analyzed under the 'totality of the circumstances' as to whether there is a 'fair probability' that a crime is occurring." *United States v. Antone*, 753 F.2d 1301, 1304 (5th Cir. 1985) (quoting *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 2332 (1983)). "A 'fair probability' does not mean that a reasonable official would have thought it more likely than not that the defendant committed a felony." *United States v. Garcia*, 179 F.3d 265, 269 (5th Cir. 1999) (quoting *United States v. Adcock*, 756 F.2d 346, 347 (5th Cir. 1985) (per curium)). "In short, the requisite 'fair probability' is something more than bare suspicion, but need not reach the fifty percent mark." *Garcia*, 179 F.3d at 269.

It is not necessary that the offense of arrest exactly match the offense for which probable cause exists. *Devenpeck v. Alford*, 543 U.S. 146, 153--56 (2004) (rejecting "closely related" offense rule). The Fifth Circuit has summed up *Devenpeck* as holding that a "warrantless arrest [is] valid so long as the officers had probable cause to arrest [the suspect] for any crime based on the facts within their knowledge." *Arizmendi v. Gabbert*, 919 F.3d 891, 901 (5th Cir. 2019) (Higginbotham, J.) (citing *Devenpeck*, 543 U.S. at 153--56). [5]

***15** A. *Voss's Forfeited Factual Issue is Sufficient to Demonstrate Probable Cause for Interference.*

Under § 38.15 of the Texas Penal Code, "[a] person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with . . . a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law." Tex. Penal Code § 38.15(a)(1). Texas courts have "affirmed the convictions of defendants who have [simply] failed to comply with an officer's instruction to move

away from a crime scene." *Childers v. Iglesias*, 848 F.3d 412, 415 (5th Cir. 2017); *Duncantell v. Texas*, 230 S.W.3d 835, 842 (Tex. App.--Hous. [14th Dist.] 2007, pet. ref'd); *Key v. Texas*, 88 S.W. 3d 672, 676 (Tex. App.--Tyler 2002, pet. ref'd) (defendant engaged in conduct other than speech by ***16** refusing to obey the directives of a police officer designated to prevent the defendant from potentially assaulting another person).

As discussed, *supra* Part I.B., Goode informed Voss that he had decided to place K.V. in the back seat of his patrol vehicle pending K.V.'s assessment by a mental-health professional. [ROA.424.] Voss, thereafter, "put K.V. in [her] car." [ROA.425.] "[F]ailing to follow a deputy's instruction has been held to move beyond the realm of speech" and is thereby sufficient to support probable cause. *Westfall v. Luna*, 903 F.3d 534, 544 (5th Cir. 2018).

Voss's own admission accordingly precludes her argument. Her failure to follow Goode's instruction alone provides a sufficient basis for this Court to affirm the district court's conclusion that Goode had probable cause to arrest Voss for interference with his public duty.

B. *Voss's Other Actions Also Provided Goode with Probable Cause to Arrest Voss for Interference*.

Voss's other conduct also interrupted, disrupted, and/or impeded Goode from performing his public duty of ensuring K.V.'s safety by having her assessed by a mental-health professional. Voss asserts that all of her conduct at the scene constituted only speech. She is wrong.

Goode had a duty to take temporary possession of K.V. because the situation presented could have led "a person of ordinary prudence and caution to believe that ***17** there [was] an immediate danger to the physical health or safety of the child." Tex. Fam. Code § 262.104(a)(1). After interviewing K.V. for twenty-to-thirty minutes, Goode determined that K.V. needed to be assessed by a mental-health professional. When Goode placed K.V. in the back seat of his squad car, Voss told the deputies that she was "not coming back for K.V.," [ROA.254 (G6L65080.MP3 at 01:30--01:40)], and that she intended to abandon K.V. and force the deputies to "take K.V. with them." [ROA.254 (G6L65080.MP3 at 00:50--01:25).] [6] These audio recordings sufficiently demonstrate Voss's further interference, which, whether considered alone or under the totality of the circumstances, gave Goode probable cause to arrest Voss for the crime of interference with his public duty.

Voss contends that the district court improperly determined "credibility issues" in Goode's favor. [Voss's Principal Br. 13--14.] However, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that ***18** no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). Without specifically addressing the facts of the audio record, Voss baldly asserts that the audio and video evidence falls short of *Scott's* exacting standards. [Voss's Principal Br. 13--14.] The precedential decisions that Voss cites, however, involve crucial gaps in the recording of events and graver consequences to the arrestees than a brief detention. *Westfall*, 903 F.3d at 541, 549 (audio insufficient to demonstrate degree to which an arrestee hospitalized after a body slam resisted the arrest); *Darden v. City of Fort Worth, Tex.*, 880 F.3d 722, 729--30 (5th Cir. 2018) (gap in video did not show whether decedent arrestee got onto the ground as commanded thereby creating a fact question where arrestee later died as a result of the alleged excessive force); and *Ramirez v. Martinez*, 716 F.3d 369, 374, 377--79 (5th Cir. 2013) (divided panel concluded that gaps in video tape were sufficient to uphold the district court's denial of summary judgment on a tased bystander's excessive-force claim). [7]

Here, the record of audio recordings demonstrate a "fair probability" that Voss interfered in Goode's duty of protecting K.V. *See Garcia*, 179 F.3d at 269. This is ***19** especially true where Goode warned Voss that "she

was getting close to being arrested for interfering with [Goode's] investigation." [ROA.254 (G6L65080.MP3 at 00:39--01:55).] Proof that protection and unimpeded investigation were the primary motivations of Goode's arrest of Voss is evident by her prompt release after the mental-health professional arrived and was able to safely and professionally evaluate K.V. [ROA.389.] [8]

Accordingly, the Court should conclude that Goode had probable cause to arrest Voss for interference with public duties under § 38.15 of the Texas Penal Code and affirm the district court's judgment.

*20 III. Even if Goode Lacked Probable Cause to Arrest Voss, Goode is Entitled to Qualified Immunity Because He Did Not Violate Clearly Established Law.

The district court appropriately concluded that Goode had probable cause to arrest Voss for interference with Goode's public duties. Even if the Court were to conclude that Goode lacked probable cause, Goode is nonetheless protected by qualified immunity because Voss does not show that Goode violated clearly established law. [9] This court "is permitted to affirm the judgment on any ground supported by the record." *Morris v. Town of Independence*, 827 F.3d 396, 401 (5th Cir. 2016).

A. *Qualified Immunity Gave Goode Wide Latitude to Arrest Voss.*

"The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.' " *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting) (quoting *Butz v. Economou*, 438 U.S. 478, 507 (1978)). "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent ***21** or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). "For a legal principle to be clearly established, '[the court] must be able to point to controlling authority--or a robust consensus of persuasive authority--that defines the contours of the right in question with a high degree of particularity,' *Morgan v. Swanson*, 659 F.3d 359, 371--72 (5th Cir. 2011), and that places the statutory or constitutional question 'beyond debate,' *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)." *Waganfeald v. Gusman*, 674 F.3d 475, 483 (5th Cir. 2012). This portion of the analysis "focuses not only on the state of the law at the time of the complained of conduct, but also on the particulars of the challenged conduct and/or factual setting in which it took place." *Pierce v. Smith*, 117 F.3d 866, 872 (5th Cir. 1997).

B. *Goode's Conduct in Arresting Voss Was Within the Ambit of Qualified Immunity Because Voss's Conduct Did Not Clearly Consist of Speech Exclusively.*

Voss flatly asserts that her conduct consists *exclusively* of speech tracking the language in *Freeman v. Gore*. [Voss's Principal Br. 15--16 (citing *Freeman v. Gore*, 483 F.3d 404, 414 (5th Cir. 2007)).] Construing the record in the light most favorable to Voss, *some* of her conduct included significant speech aspects. For example, her stated disdain for Texas Child Protective Services and her offer to Goode "that if K.V. was depressed or needed mental help I would certainly provide for that" constitute speech. [ROA.387.] But Goode was confronted with an allegedly suicidal juvenile, ***22** K.V., and charged with securing her safety. *See* Tex. Fam. Code § 262.104(a)(1). Further, Goode reasonably believed that K.V.'s mother, Voss, had recently engaged in conduct potentially constituting the state criminal offense of "family violence." [ROA.423.] He also needed to determine whether Voss was the subject or a preexisting protective order. [ROA.227.]

"[L]aw enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity . . . ." *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000) (internal quotation marks omitted). "[W]hile [Voss's] relevant actions included speech, a reasonable officer could have believed that they were not limited to speech." *See Haggerty*, 391 F.3d at 657. Like *Haggerty*, Goode warned Voss not to interfere.[10] Like *Haggerty*, Voss continued to disregard the deputy's instructions.[11] Accordingly, the Court should conclude, as it did in *Haggerty*, "that it is not determinative that [plaintiff's] interruption, disruption, ***23** impediment or interference could ultimately be determined to have been by speech *only* and that [the officer's] probable cause judgment may have been wrong." *Haggerty*, 391 F.3d at 657. And that Goode, like the *Haggerty* defendant, "is entitled to qualified immunity from [the plaintiff's] false arrest/false imprisonment claim under section 1983." *Id*. at 658.

Given this Circuit's decision in *Haggerty*, it is not clearly established law that an arrest in Texas for interference with public duties lacks probable cause even where the arrest is largely, but not exclusively, motivated by conduct constituting speech. Consequently, even if this Court concludes that Goode lacked probable cause for arresting Voss for interference with public duties on the basis of the current record, Goode's conduct falls within the ambit of qualified immunity.

***24** *Conclusion*

For the foregoing reasons, the Court should affirm the district court's judgment.

Dated: July 12, 2019

Respectfully submitted,

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Footnotes

1 Voss submitted a declaration in opposition to Goode's motion for summary judgment, which the magistrate judge and undersigned counsel rely upon for certain key factual admissions. [ROA.385--98.] Undersigned counsel note that Voss's Principal Appellate Brief does not cite to the Electronic Record on Appeal in its factual background section in violation of Federal Rule of Appellate Procedure 28(e) and Fifth Circuit Rule 28.2.2. "Judges are not like pigs, hunting for truffles buried in briefs [,]" or, here, a five-hundred page appellate record. *Cf. De la O v. Housing Auth.*, 417 F.3d 495, 501 (5th Cir. 2005) (Smith, J.) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)) (perfunctory and conclusory affidavit assertions not sufficient to create a triable fact issue).

2 The physical disc remains at the clerk's office district court. [*See* ROA.270.] The authenticating information precedes this in the Electronic Record on Appeal. [*See* ROA.265--69.]

3 "Failure to raise a claim to the district court 'constitutes a forfeiture, not a waiver, of that right for the purposes of appeal.' " *United States v. Zuniga*, 860 F.3d 276, 284 n. 9 (5th Cir. 2017) (quoting *United States v. Chavez-Valencia*, 116 F.3d 127, 130 (5th Cir. 1997)).

4 Voss's Principal Brief makes no argument with respect to the district court's dismissal of the County at the motion-to-dismiss stage. This failure forfeits the issue. *See Baisden v. I'm Ready Prods.*, 693 F.3d 491, 501 (5th Cir. 2012) ("It is well-settled that, generally, we will not consider issues raised for the first time in a reply brief." (citing *United States v. Jackson*, 50 F.3d 1335, 1340 n. 7 (5th Cir.1995))). As in the district court, Voss fails to point to record evidence ignored by magistrate judge and the district court, let alone any alleged "manifest injustice" of these conclusions.

5 Voss mistakenly asserts that *Arizmendi* supports her position. [Voss's Principal Br. 10--12.] But the issue in *Arizmendi* concerned "whether an officer who knowingly or recklessly included false statements on a warrant affidavit can be held liable for false arrest despite having had probable cause to arrest the plaintiff without a warrant for a different offense not identified in the affidavit." 919 F.3d at 899. *Arizmendi* specifically acknowledges that "*Devenpeck* applies with significantly more force in the warrantless arrest context." *Id*. at 902. The concerns of *Devenpeck* "have little force [for] arrests based on warrants," which was at issue in *Arizmendi*, *id*. at 902--03, and ***not*** at issue here.

Voss's Principal Brief does attempt to acknowledge this distinction by suggesting that the interference-with-public-duties charge was manufactured since probable cause was lacking for the failure-to-identify charge. [Voss's Principal Br. 12--13.] First, *Devenpeck* squarely forecloses this argument. Second, the argument would not even be viable under the Ninth Circuit's abrogated "closely related" rule, which allowed an officer to invoke a different offense after arrest if such was closely related to the offense of arrest. *See Devenpeck*, 543 U.S. at 152--55. The distinction between the failure to identify, which was delaying and/or impeding a legitimate investigation and interference, is hardly discernable.

6 Lacking any semblance of self-awareness or remorse, Voss asserts that her conduct constituted only protected speech. In *Freeman v. Gore*, this Circuit concluded that deputies lacked probable cause to arrest a plaintiff for "yelling" and "screaming" about the deputies' right to search plaintiff's home. 483 F.3d 404, 414 (5th Cir. 2007). This speech-only provision is neither an element of the offense nor an exception thereto. *Trevino v. Texas*, 512 S.W. 3d 587, 601 (Tex. App.--El Paso, 2017, no pet.) That means that "the State has no affirmative obligation to negate its existence." *Id*. It is not necessary for the Court here to reach this issue because Voss's conduct went beyond mere speech.

7 Even in *Ramirez*, the entire panel concluded that the district court erred in denying the officer qualified immunity on the arrestee's claim that the officer lacked probable cause to arrest. *Id*. at 375--77. The dissent only concerned the excessive-force question. *Id*. at 380--83 (Jones, J., dissenting).

8 At the scheduling conference, counsel below told the magistrate judge that the video and audio evidence from the scene indicated that Voss asked to be arrested. Counsel below indicated that when Goode told Voss that she was being detained, Voss responded by asking to have cuffs placed on her. [ROA.476--78.] The following exchange between opposing counsel and the magistrate judge thereafter ensued:

Mr. Kallinen: Well, Your Honor, that's sarcasm. And If I go to a Police Officer and say, "Please arrest me" and he arrests me, know what that's called? False arrest.
The Court: That's called dumb shittedness, Mr. Kallinen.
[ROA.478:6--10.]
N.B. Mr. Kallinen may have refrained from this line of argument if he had listened to the audio video that Goode and the County had previously provided, adding critical tonal and auditory context to the exchange. [*See* ROA.488:16-- 20.]

9 A court considers whether "the officer's conduct violated a constitutional right" and whether the right was "clearly established" at the time of the defendant's alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). A court may grant summary judgment in favor of the governmental actor based on either step in the qualified-immunity analysis. *Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

10 *Compare id. with* [ROA.254 (G6L65080.MP3 at 00:39--01:55) where Goode warned Voss that "she was getting close to being arrested for interfering with [Goode's] investigation."]

11 *Compare id*. ("Haggerty stepped forward toward [an officer] after having previously been warned to not interfere and was within relative proximity (10 to 15 feet away).") *with* [ROA.254 (G6L65080.MP3 at 00:50-- 01:25) where Voss told the deputies if they put K.V. in the squad car, they would have to "take K.V. with them"] *and* [ROA.254 (G6L65080.MP3 at 01:30-- 01:40) where Voss improperly foisted K.V. into the care, custody, and control of the deputies (interfering with other duties that might have required their attention that night) by telling the deputies that she was "not coming back for K.V."].

SELECT POLICE RECORDINGS FROM JUNE 20, 2016 ARREST
LINKS TO AUDIO FILES

G6L65079MP3	https://youtu.be/ZDiuB-rEXOA
G6L65080MP3	https://youtu.be/UdeEqMCMFs8
G6L65082MP3	https://youtu.be/VIOke5OjvHs