No. 21-___

Supreme Court of the United States

NICOLE HUTCHESON
RUTH BOATNER

Petitioners

v.

DALLAS COUNTY, TEXAS
FERNANDO REYES, TRENTON SMITH
ELVIN HAYES, BETTY STEVENS

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1a. This Court has permitted "limited discovery" in cases where the defendant has asserted the affirmative defense of qualified immunity in its answer. To what extent should discovery be allowed from third-party eyewitnesses when the only evidence in support of "what actually happened" is a soundless video and the defendants' self-serving testimony?

1b. This Court has held that if video evidence "*blatantly* contradicts" the plaintiff's testimony, a trial court may conclude that there is no genuine issue of material fact in dispute that would preclude summary judgment. But circuit courts of appeals throughout the country have held that *soundless* video does not provide conclusive evidence that would permit judgment as a matter of law. Did the lower courts err by denying Petitioner's request for limited discovery when the only evidence in support of Respondents' qualified-immunity defense was a soundless video and their self-serving testimony?

2. This Court has long held that municipalities can be liable for civil-rights violations if there is evidence that the need for more or different training of their law-enforcement officers is *so* obvious and the inadequacy *so* likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need for additional training. But without discovery, plaintiffs have no way of knowing what training the municipality

actually provided. How can a plaintiff satisfy this Court's "plausibility" requirement for pleading a cause of action in the absence of such discovery?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all of the parties.

CORPORATE DISCLOSURE STATEMENT

No corporations are involved in this proceeding.

STATEMENT OF RELATED PROCEEDINGS

No other proceedings in other courts are directly related to this proceeding:

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TABLE OF CITED AUTHORITIES

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OPINIONS AND ORDERS BELOW

The Fifth Circuit's per curiam order denying Petitioners' petition for rehearing en banc (May 11, 2021) is not reported and is reprinted in Petitioners' Appendix at App.1–App.2.

The Fifth Circuit's opinion affirming the district court's order granting Respondents' motion for summary judgment (April 7, 2021) is reported at 994 F.3d 477 (5th Cir. 2021) and is reprinted in Petitioners' Appendix at App.3–App.16.

The district court's final judgment granting Respondents' motion for summary judgment (April 7, 2021) is not reported and is reprinted in Petitioners' Appendix at App.17.

The district court's order granting Respondents' motion for summary judgment (April 7, 2021) has not been reported and is reprinted in Petitioners' Appendix at App.18–69.

The district court's order denying Petitioners' motion for limited discovery (May 2, 2019) has not been reported. and is reprinted in Petitioners' Appendix at App.70–81.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit had appellate jurisdiction over this dispute because the district court's order granting Respondents' motion for summary judgment was a final decision under 28 U.S.C. § 1291. The Fifth Circuit denied en banc review on May 11, 2021. Petitioners filed a petition for writ of certiorari in this Court on October 8, 2021. Accordingly, this petition is timely under the Supreme Court's Order Regarding Deadlines of March 19, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Amendment IV. Searches and Seizures; Warrants

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code

42 U.S.C. § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the

purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioners Nicole Hutcheson and Ruth Boatner are the surviving wife and mother of Joseph Hutcheson. Joseph died on August 1, 2015 in the lobby of the Dallas County Jail shortly after four sheriff's deputies (Respondents Reyes, Smith, Hayes, and Stevens) grabbed Joseph from behind, forced his feet out from under him, dropped him onto the floor, turned him onto his stomach, kneeled on his back, stepped on his feet, crossed his legs, and pushed his feet towards his buttocks until he stopped moving. (ROA.18).

Petitioners initiated this lawsuit under the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983 in which they alleged that the deputies and the County (also a Respondent in this proceeding) violated his right to be free from excessive force because he was unarmed, empty-handed, did not threaten anyone, and was only in the jail lobby to ask for help. (ROA.14). All of the Respondents claimed that Petitioners failed to plead sufficient facts to state *any* cause of action. (ROA.32).

Before litigation began, Petitioners obtained several redacted incident reports from the County, as well as a copy of the soundless closed-circuit video that depicted the incident. (ROA.187–88; video available at https://www.dropbox.com/s/yyx0lx47c6u7f7x/PelcoExport~28772973.m4v?dl=0). Petitioners filed a motion for limited discovery, arguing that "the viewer [of the video] is unable to determine exactly what (if anything) Joseph said to other individuals present in the waiting room" or "the reaction that these other individuals had to Joseph's statements or behavior."

(ROA.342). Their motion included three proposed interrogatories and two requests for production designed to obtain the identity of the eyewitnesses and any statements they had provided to the County. (ROA.343).

The district court denied Petitioners' motion for limited discovery, concluding that the proposed requests were not "narrowly tailored to uncover only those facts needed to rule on the immunity claim." (ROA.361, App.77). With regard to Petitioners' claims against the officers, it concluded from the soundless video that it could not find that any officer used excessive force against Joseph. (ROA.459, App.58). In the alternative, the district court concluded that the law was not sufficiently "clearly established" to allow the individual Respondents' to know that their conduct was excessive. (ROA.464, App.66). And with regard to Petitioners' claims against Dallas County, the district court concluded that because they had not pleaded a "pattern of similar violations," they had failed to adequately state a claim that the County failed to adequately train its officers. (ROA.439–42, App.30–35).

A panel of this Court consisting of Judges Higginbotham, Smith, and Dennis affirmed the district court's judgment in all respects. (App.4). Because the panel's interpretation of the video was that Joseph was "resisting arrest" and "moved to escape" from the officers, and that the officers "did not throw him to the ground" and "never struck" him, it concluded that "the video shows the officers using only the force necessary to restrain" him. (App.9). Accordingly, it also concluded that Petitioners had not

demonstrated a need for discovery from the eyewitnesses. (App.9–10).

Finally, with regard to Petitioners' failure-to-train claim against the County, the panel concluded that the allegations in their complaint were "speculative" and "conclusory." (App.14). And because Petitioners' complaint acknowledged that the County had "general orders" regarding the safe treatment of mentally-ill suspects, the panel reasoned that the County therefore provided at least "some relevant directives or training," which necessarily prevented a finding of deliberate indifference as a matter of law.

REASONS FOR GRANTING THE PETITION

Petitioners ask this Court to grant certiorari because the Fifth Circuit's decision conflicts with this Court's recent opinion in *Torres v. Madrid*, 141 S. Ct. 989 (2021), as well as the Fifth Circuit's own recent opinions in *Hobbs v. Warren*, 838 F. App'x 881 (5th Cir. 2021), *Darden v. City of Fort Worth, Texas*, 880 F.3d 722 (5th Cir. 2018), *cert denied*, 139 S. Ct. 69 (2018), and *Hinojosa v. Livingston*, 807 F.3d 657 (5th Cir. 2015).

In light of the well-publicized events over the past two years involving law-enforcement officers who cause the deaths of unarmed, non-threatening suspects, this case also presents an issue of exceptional public importance. Specifically, this case addresses the scope of discovery that victims and their families may obtain from third-party witnesses when their identities are known to law-enforcement, but intentionally kept secret. It also addresses the pleading requirements for a claim against a municipality's police department for failing to properly train its officers.

Because both of these legal issues are essential to a debate that is the heart of the national zeitgeist, Petitioners respectfully submit that this case is proper for this Court's review.

I. This Court should grant this petition to confirm when discovery from third parties must be permitted in cases involving the qualified-immunity defense.

As this Court is certainly well-aware, the criminal trial of Derek Chauvin made headlines for nearly a year as the nation waited to see whether a jury would believe that he was acting as a "reasonable officer" when he caused the death of George Floyd. And as we all now know, the jury concluded that he was not. After the jury reached its verdict, commentators acknowledged that among the most important evidence (other than the video itself) was the testimony from eyewitnesses. For example, the Minneapolis Star-Tribune published an article titled "Legal Analysts Say Emotional Eyewitnesses Amplified Powerful Video as Witness to Chauvin's Crimes," which included the following:

> [P]rosecutors brought the crime to life over the trial's first three days with a series of anguished eyewitnesses taking the witness stand. ...
>
> While it's become increasingly common for the public to see video captured by police body-worn cameras, the bystander video provided the unique perspective of Chauvin and Floyd together. Their reactions in the video obliterated the possibility of Chauvin successfully using the "reasonable officer" defense because it was clear that neither Floyd nor the crowd were threats, [Professor and director of the Community Justice and Civil Rights Clinic at Northwestern University

> Pritzker School of Law in Chicago Sheila] Bedi said. "The reasonable police officer standard has excused brutal acts for so long," she said.

Rochelle Olson, *Legal Analysts Say Emotional Eyewitnesses Amplified Powerful Video as Witness to Chauvin's Crimes*, Minneapolis Star-Tribune, Apr. 20, 2021 (available at https://www.startribune.com/legal-analysts-say-emotional-eyewitnesses-amplified-powerful-video-as-witness-to-chauvin-s-crimes/600048315/?refresh=true) (last viewed Oct. 8, 2021).

Although the video in this case may not be perceived as egregious as the now-infamous recording of Chauvin kneeling on Floyd's neck for over nine minutes, it cannot be disputed that the absence of sound on the video in this case prevented the district court, the Fifth Circuit, and any potential juror from knowing the full extent of *what actually happened* that led to the officers' decision to make contact with Joseph, or the audible reactions that he gave to the officers' use of force. *See, e.g.*, *Johnston v. City of Houston, Tex.*, 14 F.3d 1056, 1061 (5th Cir. 1994) ("clearly, a genuine dispute as to the material and operative facts of this case exists, as seen by the differing accounts of the various deponents").

Last term, this Court reiterated in *Torres v. Madrid* that a "seizure," for Fourth Amendment purposes, arises out of "the mere grasping or application of physical force with lawful authority"—even if "merely touching" a suspect—regardless of "whether or not it succeeded in subduing the arrestee." 141 S. Ct. 989, 995 (2021) (citing *California v. Hodari*

D., 499 U.S. 621, 624–25 (1991); *Whithead v. Keyes*, 85 Mass. 495, 501 (1862). Accordingly, Joseph was "seized" when Respondent Hayes first made physical contact with him, and this case ultimately turns on the question of whether the seizure was "reasonable." U.S. Const. amend. iv; *Torres*, 141 S. Ct. at 1003. But the panel's opinion jumps to this conclusion based on the sole fact that Joseph "staggered through the lobby" of jail and "when he sat down, others scattered." (App.4). Such behavior does not necessarily provide reasonable suspicion of criminal activity. He could have been staggering because he was hurt or disabled. The other people waiting in the lobby could have "scattered" because they knew him personally and did not like him, because they were claustrophobic, because they were in the lobby of a jail and (understandably) did not want to be close to other people, or even because he smelled foul. None of these would have provided a law-enforcement officer with a reason to arrest him.

Similarly, the panel's opinion simply tacitly assumes that Joseph was "moving to *escape*" after the officers attempted to handcuff him. (App.7). But in the absence of audio on the video—or the testimony of eyewitnesses who could confirm what Joseph and the officers were saying at the time of the incident—other justifications for Joseph's movements are equally plausible. The officers could have been restricting his ability to breathe, or he could have been having a seizure or a heart attack while they were handcuffing him. *See Darden*, 880 F.3d at 726. Although the panel concluded that *Darden* was inapposite because, there, the officers "threw the plaintiff to the ground and tased him," (App.7), this is a distinction without a difference. For the reasons discussed above, a seizure

occurs if law-enforcement officers "merely touch" a suspect. *Torres*, 141 S. Ct. at 995. Only two years ago, the Fifth Circuit held in *Darden,* that law-enforcement officers were not entitled to summary judgment on the qualified-immunity defense when "the videos do not show what happened...and there is conflicting testimony about what transpired." 880 F.3d at 725–26.

The district court—and the Fifth Circuit panel—refused Petitioners the opportunity to discover the reason that Respondent Hayes made contact with Joseph in the first place, whether it was reasonable for the other officers to then forcefully bring him to the ground and handcuff him, and what Joseph was saying while he was being handcuffed. And although the panel's opinion states that the officers "placed him on the floor," (App.4), Petitioners respectfully disagree with this characterization of the officer's actions. *See* ROA.14–16, ROA.188 (above-referenced hyperlinked video at 41:30). Petitioners do not deny that it is their burden to make such a showing, but the panel's opinion offers no guidance as to how they could have done so in the absence of the discovery that they requested.

A. The panel's analysis of the appropriateness of limited discovery in cases involving the qualified-immunity defense conflicts with other holdings from the same court.

The panel's decision in this case also conflicts with other decisions from the same court in which it either approved or required limited discovery before a district court could dispose of a civil-rights claim on

qualified immunity grounds. Earlier this year, a different Fifth Circuit panel issued an unpublished opinion in *Hobbs v. Warren*, which involved a suspect who was running from police officers, even though they were telling him to stop. 838 F. App'x 881, 882 (5th Cir. 2021). An off-duty officer was riding in his car with his wife and saw the plaintiff running from other members of his department. *Id.* at 882. He ordered his wife to drive towards the suspect and, as they got close to him, the off-duty officer opened his passenger door, which struck the suspect, threw him to the ground, fracturing his ribs and skull, and rupturing his ear drum. *Id.* at 882. Although the district court concluded that the off-duty officer was entitled to qualified immunity as a matter of law, the Fifth Circuit disagreed, reiterating that "additional facts are particularly important when evaluating the second prong of the qualified immunity test—the reasonableness of the officers' actions in light of the clearly established constitutional right." *Id.* at 882 (citing *Morgan v. Hubert*, 335 F. App'x 466, 473 (5th Cir. 2009)). Specifically, the Fifth Circuit concluded:

> Facts crucial to the resolution of the qualified immunity issue remain unknown at this juncture, for example: the density of the traffic..., the speed of the vehicles..., the time of day the incident occurred, the number of lanes..., and [the suspect's] location at the time of impact. Without these facts, we cannot determine whether Hobbs posed a threat to the officers or others.

Id. at 882.

The Fifth Circuit's 2015 opinion in *Hinojosa v. Livingston* also reaches a different result from the panel that decided the instant case. 807 F.3d at 661. That case involved a prison inmate who died in his cell of heatstroke. *Id.* at 661. His heirs sued the Texas Department of Criminal Justice, alleging that it was awareness of numerous prior heat-related fatalities but took no corrective action. *Id.* at 662. The Fifth Circuit affirmed the district court's decision to allow limited discovery on the qualified-immunity issue because:

> The factual questions of what Defendants knew, when they knew it, and whether they investigated and considered possible remedial measures, are undoubtedly necessary to answer before determining whether Defendants acted reasonably in light of clearly established law.

Id. at 671.

Finally, it is important to note that Petitioners' discovery requests in this case do not implicate the public-policy concern that justifies such limitations. When this Court first adopted the qualified-immunity defense in its 1982 opinion in *Harlow v. Fitzgerald*, it justified the doctrine by noting that it reduced "social costs," specifically, "the expenses of litigation, the diversion of official energy from pressing public issues, the deterrence of able citizens from acceptance of public office, and that the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties. 457 U.S. 800, 814 (1982). Here, Petitioners merely sought

unredacted information from documents they had already obtained so that they could discover the same information *that Petitioners already knew* but refused to reveal. (ROA.343–44). This fact is not addressed in the panel opinion's analysis. And in light of the fact that the Fifth Circuit's opinion is published—and therefore precedent-setting, Petitioners respectfully submit that certiorari is appropriate, not only to provide them with an opportunity to develop their case, but also to clarify the law throughout the country for future victims of alleged police misconduct.

B. The panel's decision regarding the conclusiveness of images on a *silent* video recording conflicts with holdings from other circuit courts of appeals.

This Court should also grant this petition to resolve the conflict that the Fifth Circuit created with respect to the issue of when *soundless* video is sufficient to contradict a plaintiff's allegations. By affirming the district court's decision, it tacitly gave its imprimatur to that court's reliance on this Court's 2007 opinion in *Scott v. Harris*, 550 U.S. 372 (2007). (App.38). Because the facts of this case and the facts in *Scott* are demonstrably different, certiorari is appropriate to clarify the scope of that decision as well.

Scott involved a plaintiff who was involved in a high-speed vehicle chase with police and was badly injured when a pursuing officer ran his car off the road. 550 U.S. at 374–75. The plaintiff sued for excessive force, and the defending officer moved for summary judgment on his qualified-immunity

defense. *Id.* at 376. In response to the motion, the plaintiff included a declaration which stated:

> There was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [the plaintiff] remained in control of his vehicle. … remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and [the officer] rammed [the plaintiff], the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.

Id. at 378–79. The summary-judgment record, however, also included a videotape, which this Court said depicted the following:

> We see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same

> hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Id. at 379–80 (footnotes omitted). Because the plaintiff's story was "*blatantly* contradicted by the record, so that *no reasonable jury could believe it*," this Court concluded that the district court should not have adopted the plaintiff's version of the facts for purposes of ruling on the motion for summary judgment. *Id.* at 380 (emphasis added).

Other federal appellate courts have limited the applicability of this Court's holding in *Scott* to the specific language in that opinion, applying it *only* when the plaintiff's allegations were *blatantly* contradicted by the video evidence. *Id.* at 380.

For example, the Fourth Circuit distinguished *Scott* a decade ago in its 2011 opinion in *Witt v. West Virginia State Police*, 633 F.3d 272 (4th Cir. 2011). There, West Virginia state troopers detained a motor vehicle because they mistakenly believed that one of its passengers had outstanding warrants. *Id.* at 273. When the mistaken "suspect" exited the vehicle, the troopers pistol-whipped him in the head, kicked him, kneed on his neck while he laid face down in a mud puddle, dragged him across a yard, and threw him into a tree. *Id.* at 274. The troopers maintained that the soundless video from the dashboard camera in their cruiser substantiated their version of events, namely,

that the "suspect" initiated aggressive actions towards the troopers that justified their response. *Id.* at 274–75. Both the district court and the Fourth Circuit disagreed, with the appellate court holding that "the lack of neutral witnesses pitted the self-interested testimony of the troopers, who had one account of events, against the self-interested testimony of [the other passengers in the vehicle], and that the poor quality of the video did not resolve these disputes." *Id.* at 276. The Fourth Circuit further stated:

> *Scott* does not abrogate the proper summary-judgment analysis, which in qualified immunity cases "usually means adopting ... the plaintiff's version of the facts." Thus, *Scott* does not hold that courts should reject a plaintiff's account on summary judgment whenever documentary evidence, such as a video, offers *some* support for a governmental officer's version of events. Rather, *Scott* merely holds that when documentary evidence "blatantly contradict[s]" a plaintiff's account "so that no reasonable jury could believe it," a court should not credit the plaintiff's version on summary judgment. As such, *Scott* simply reinforces the unremarkable principle that "[a]t the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party" when "there is a '*genuine*' dispute as to those facts."
>
> Turning to the video in this case, it does not "clearly" or "blatantly" contradict [the plaintiff's] "version of the story." Rather, it provides little assistance in resolving the

> parties' disputes as to the facts. First, because [one of the troopers] failed to activate the camera's microphone, the video lacks sound. The viewer cannot hear whether [the plaintiff] properly answered [the trooper's] questions and followed the trooper's orders (as [the plaintiff] claims) or resisted arrest posing a threat to the troopers' safety (as the troopers claim).
>
> * * *
>
> In sum, the documentary evidence in this case—the dashboard video—does not blatantly contradict [the plaintiff's] account of the facts; therefore, it does not establish that the officers are entitled to summary judgment.

Id. at 277 (emphasis original) (cleaned up) (citing *United States v. Hughes,* 606 F.3d 311, 319–20 (6th Cir. 2010), *Iko v. Shreve*, 535 F.3d 225, 235 (4th Cir. 2008); *York v. City of Las Cruces,* 523 F.3d 1205, 1210–11 (10th Cir. 2008;) *Blaylock v. City of Philadelphia,* 504 F.3d 405, 414 (3d Cir. 2007)).

The same result should follow here. In contrast to both of the courts below, the Fourth Circuit correctly concluded that a soundless video does *not* provide *conclusive* evidence that will support a summary judgement on a qualified-immunity defense if the plaintiff offers a plausible alternative version of events. Here, Petitioners never had the opportunity to develop an alternative version of events because the courts below rejected their requests for limited discovery of the individuals who could have substantiated "what actually happened" on the video.

This Court should grant certiorari to confirm that a plaintiff in a civil-rights action has the right to pursue discovery that could controvert the defendants' self-serving accounts of a silent video recording, when such a recording does not "*blatantly* contradict" the plaintiff's version of events. *Scott*, 550 U.S. at 380 (emphasis original).

II. This Court should grant certiorari to clarify the pleading standard in cases involving *Monell* liability.

This Court should also grant this petition because the panel's opinion places Petitioners—and other similarly situated litigants—in a no-win situation with regard to clearly viable theories of liability for civil-rights violations by municipalities. This Court first acknowledged that municipalities may be liable for civil-rights violations in its 1978 opinion in *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978). And in this Court's 1989 opinion in *City of Canton, Ohio v. Harris*, this Court expanded the holding in *Monell* to encompass civil-rights claims based on a municipality's failure to properly train its law-enforcement officers:

> It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. **But it may happen that in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the**

> **policymakers of the city can reasonably be said to have been deliberately indifferent to the need.** In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

489 U.S. 378, 390 (1989) (emphasis added).

Accordingly, Petitioners alleged that if the officers *did*, in fact, arrest, tackle, handcuff, and forcibly restrain a person for no reason at all, or if they did so with conscious knowledge that they were killing him, it is "obvious" that the County did not effectively train its officers. ROA.276–78.

As noted above, however, the panel affirmed the district court's dismissal of Petitioners' *Monell* failure-to-train claim against the County for failing to state a claim on which relief could be granted after concluding that its allegations were "speculative" and "conclusory." (App.16). This necessarily begs the question: how could Petitioners have pleaded their claims more specifically in light of the fact that they were denied any discovery from the very people who could have provided them with such information? Once again, this Court has created what the Fifth Circuit has described as an "Escherian stairwell" where "heads government wins, tails plaintiff loses." *Cf. Joseph v. Bartlett*, 981 F.3d 319, 332 n. 40 (5th Cir. 2020).

Petitioners respectfully submit that this Court should adopt the analysis used in 2011 by Judge Keith

Ellison in the Southern District of Texas, who discussed the plaintiff's pleading burden of *Monell* claims in *Thomas v. City of Galveston*. 800 F. Supp. 2d 826, 843 (S.D. Tex. 2011). There, he noted:

> Only minimal factual allegations should be required at the motion to dismiss stage. **Moreover, those allegations need not specifically state what the policy is, as the plaintiff will generally not have access to it, but may be more general.** Even general facts which point to prior violations by the police department would allow the plaintiffs to survive the motion to dismiss phase.

Id at 843 (citing *Hobart v. City of Stafford*, 2010 WL 3894112, at *5 (S.D. Tex. Sept. 29, 2010) (Ellison, J.). Accordingly, allegations that provide such notice could include, but are not limited to:

— past incidents of misconduct to others, *Id.* at 843 n.11 (citing *Oporto v. City of El Paso*, 2010 WL 3503457, at *8 (W.D. Tex. Sept. 2, 2010); *Sagan v. Sumner County Board of Educ.*, 726 F. Supp. 2d 868, 887 (M.D. Tenn. 2010);

— **multiple harms that occurred to the plaintiff himself,** *Id.* at 843 n.12 (citing *Greenwood v. City of Yoakum*, 2008 WL 4615779, at *4 (S.D. Tex. Oct. 17, 2008); *Michael v. County of Nassau*, 2010 WL 3237143, at *4 (E.D.N.Y. Aug. 11, 2010);

— **misconduct that occurred in the open**, *Id.* at 843 n.13 (citing *Michael*, 2010 WL 3237143,

at *4);

— **the involvement of multiple officials in the misconduct,** *Id.* at 843 n.14 (citing *Matthews v. District of Columbia*, 730 F.Supp.2d 33, 38 (D.D.C. 2010); *Michael*, 2010 WL 3237143, at *4); or

— the specific topic of the challenged policy or training inadequacy. *Id.* at 843 n.15 (citing *Hobart*, 784 F.Supp.2d at 752; *Robinson v. District of Columbia*, 736 F.Supp.2d 254, 265 (D.D.C. 2010); *Evans v. City of Chicago*, 2010 WL 3075651, at *2 (N.D. Ill. Aug. 5, 2010); *Robbins v. City of Miami Beach*, 2009 WL 3448192, at *2 (S.D. Fla. Oct. 26, 2009).

Such allegations—"or any other minimal elaboration a plaintiff can provide"—satisfy the requirement of providing (a) fair notice of the nature of the claim and the grounds on which the claim rests; and (b) permits the court to infer more than the mere possibility of misconduct. *Id.* at 843. This Court should hold that if the allegations meet at least two of these criteria, dismissal is not appropriate.

The panel's citation to *Ashcroft v. Iqbal* as authority for its conclusion that Petitioners' allegations against the County were "speculative" and "conclusory" is also misplaced. (App.11) (citing 556 U.S. 662 (2009). Petitioners respectfully submit that the Court must acknowledge the context-specific factors that helped undermine the plausibility of the plaintiffs' allegations in that case, which is *not* present here.

The relevant context in *Iqbal* included the potential for discovery about national-security matters, claims alleged against high-ranking officials who asserted immunity, and the September 11 attacks, which provided an obvious lawful explanation for the defendants' conduct. 556 U.S. at 682. Similarly, in *Bell Atlantic Co. v. Twombly*, the relevant context included the telephone industry's monopolistic history, the prospect of a massive class action and extremely expensive discovery, and the fact that "the same actionable conduct alleged…had been held in some prior cases to be lawful behavior." 550 U.S. 544, 567–69 (2007).

But here, the context is obviously different. There are no national-security implications; no high-ranking officials claiming immunity; no sweeping class allegations; and—most importantly—no cases holding that an "obvious lawful explanation" exists for jail staff to ignore the obvious medical needs of a disabled person, and to subject him to unreasonable physical abuse. Instead, this is the type of straightforward case in which it should "not be any more difficult…for plaintiffs to meet their burden than it was before the Court's recent decisions" in *Iqbal* and *Twombly*.

This case provides this Court with an opportunity to adopt the Seventh Circuit's interpretation of *Iqbal* and *Twombly* in which it held that these cases merely require the plaintiff to give enough details about the subject-matter of the case to present "a story that holds together." *See Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010). In other words, when district courts rule on summary-judgment motions, they should be asking "*could* these things have

happened, not *did* they happen." *Id.* (emphasis added)).

Indeed, as Judge Ellison recognized in *Thomas*:

> The concerns of protecting public servants from the 'concerns of litigation, including avoidance of disruptive discovery,' are not present in suits against municipalities. Moreover, municipal liability claims do not occur in a vacuum, but rather arise in the context of a plaintiff's specific allegations of misconduct by individual officials to which he was personally subjected.

800 F. Supp. 2d at 843 (citing *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166 (1993); *Owen v. City of Independence*, 445 U.S. 622, 635–657, (1980). Accordingly, where—as here—a plaintiff provides more than a boilerplate recitation of the grounds for municipal liability, and instead makes some additional allegation to put the municipality on fair notice of the grounds for which it is being sued, municipalities must rely on summary judgment to weed out unmeritorious claims. *Thomas*, 800 F. Supp. 2d at 844–45 (citing *Leatherman*, 507 U.S. at 166). The same analysis should have been applied here.

Finally, although the Fifth Circuit correctly noted in its opinion that Petitioners acknowledged in their complaint that the County has "general orders" in place, (App.16), this Court should grant this petition to confirm that such an allegation does not eviscerate a "failure-to-train" claim. Contrary to the Fifth Circuit's analysis, a holding that such allegations are

sufficient to satisfy the minimal pleading requirements imposed by the Federal Rules of Civil Procedure would not "result in the imposition of *respondeat superior* liability on municipalities;" (App.15), it would simply allow Petitioners to pursue the discovery necessary to satisfy the deliberate-indifference standard that the Supreme Court set forth in *Harris*, 489 U.S. at 392.

In sum, none of the Fifth Circuit's predicted parade of horribles would occur if the district court had granted Petitioner's discovery requests. If Petitioner's discovery did not yield the evidence that would support an excessive-force or a *Monell* claim, the Respondents could move for summary judgment or judgment as a matter of law. Nothing in the pleading stage "imposes liability" whatsoever. But if the Fifth Circuit's opinion remains precedential, a municipality could avoid liability on this basis simply by having "some relevant directives" in place that govern their employees' conduct, (App.16), even if it provided no training to its employees as to how they should comply with them. And because the details of a municipality's training program can rarely be learned without discovery, the panel's opinion again places Petitioners—and other similarly situated litigants—back on the Escherian stairwell.

CONCLUSION

This Court should grant this petition for writ of certiorari.

Respectfully submitted,

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