REVISED

United States Court of Appeals
for the Fifth Circuit

No. 20-10344

VALERIE JACKSON,

Plaintiff – Appellant,

versus

LUPE VALDEZ; MARIAN BROWN; DALLAS COUNTY, TEXAS,

Defendants – Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CV-2935

(Filed May 18, 2021)

Before BARKSDALE, SOUTHWICK, and GRAVES, *Circuit Judges*.

PER CURIAM:*

We withdraw our previous opinion, issued March 29, 2021, and issue this revised opinion in its place. Valerie Jackson is a transgender woman who sued Dallas

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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

County, Texas, and its employees for violating her constitutional rights related to her gender identity. Pursuant to Federal Rule of Procedure 54(b), she appeals the district court's denial of her motion for recusal and the Rule 12(b)(6) dismissal of Dallas County and Sheriffs Lupe Valdez and Marian Brown in their official capacities. We AFFIRM.

I. Background

Because this is an appeal from a Rule 12(b)(6) dismissal, the following are allegations from the operative complaint.

Valerie Jackson is a transgender woman. She was assigned the sex of male at birth and had her gender legally changed to female prior to the events alleged in the instant case.

On or about November 4, 2016, Jackson was arrested for unlawful possession of a weapon and taken to the Dallas County jail. During booking, an officer asked her standard intake questions and gave her a wristband identifying her gender as female. She was taken to an enclosed corner and ordered to lift her shirt and bra to expose her bare breasts, to which she complied. She was then escorted to a nurse.

The nurse asked Jackson medical questions that led her to reveal that she was a transgender woman. The nurse left the paperwork the way it was filled out and concluded the medical assessment. When Jackson returned to the waiting area with the other female

detainees, an officer asked her in front of the other detainees if she had "a sex change or something" and whether she "had everything done even down there." She answered yes so that the humiliation would end.

Jackson was taken to the same enclosed corner and instructed to pull down her pants and underwear. When she asked why, an officer stated: "We need to know if you've had a sex change or not. We need to see if you have a penis or vagina. We have to protect you. We can't put you with men if you have a vagina." Jackson said she was not going to pull down her pants, and the officer replied: "You are coming up in the system as male. It doesn't matter what you do, it can never be changed." Jackson stated again that she was not going to pull down her pants and that she should not have to prove anything to them if none of the other women had to prove anything. The officer continued: "Now our policy is we have to verify that you've had a sex change. If you have a penis, you're going with the men. If you have a vagina, you're going with the women."

Jackson continued to insist that she did not want to pull her pants down. An officer told her that if she refused, they would transfer her to Parkland Hospital where she would have to show her genitals, thus adding hours to her incarceration. An officer also said: "That's our policy. You can talk to [Sheriff] Lupe Valdez about it when you get out." The officer explained that the process could not move forward without Jackson revealing her genitals. Feeling she had no other choice, Jackson complied with the strip search.

After the search, Jackson was eventually placed in her own cell. She was then taken in a line with male inmates to court, and when she returned to the jail, she was taken to the male locker room and instructed to strip down and shower because "it was something everyone had to do." An officer intervened and took her to a holding cell, where Jackson received a new wristband that identified her gender as male. Jackson was moved multiple times while waiting for her paperwork to be processed, each time encountering new officers and inmates who misidentified her gender.

After being released from custody, Jackson filed a formal complaint regarding her treatment in the Dallas County jail. On November 7, 2016, Captain Shelley Knight with the Dallas County Sheriff's Office was contacted by a local newspaper regarding Jackson's treatment. Knight informed the newspaper that there was an investigation on the incident and that the intake video from November 4, 2016, was pulled. She also informed the newspaper that she could see where some of the policy was misconstrued and other parts were not followed.

On April 19, 2017, Jackson was arrested for the second time and taken to the Dallas County jail, where she was classified male and held with the male inmates. She asked the officers to contact Knight, who could explain that Jackson should be classified and placed with female inmates, but they refused. She was later forced to shower with male inmates.

On June 15, 2018, Jackson was arrested for the third time and taken to the Dallas County jail, where she was again classified male and held with the male inmates. She was again forced to shower with male inmates.

In November 2018, Jackson sued Dallas County, Texas; former Sheriff Lupe Valdez and current Sheriff Marian Brown in their official and individual capacities; and Officer Lizyamma Samuel, Officer Samuel Joseph, and Unknown Dallas County Employee III in their individual capacities under 42 U.S.C. § 1983 for violations of her Fourth, Fifth, and Fourteenth Amendment rights.

In September 2019, the case was transferred to Judge Brantley Starr. Jackson moved for recusal under 28 U.S.C. §§ 144 and 455(a), arguing that Judge Starr held a bias against members of the LGBTQ community. The motion was denied. On motion, the district court later dismissed Dallas County and Valdez and Brown in their official capacities under Rule 12(b)(6). Jackson timely appealed.

II. Motion to Recuse

A. Standard of Review

We review the denial of a motion to recuse for abuse of discretion. *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 483 (5th Cir. 2003).

B. Legal Analysis

Jackson argues that the district court erred in denying her motion to recuse because of his personal bias against members of the LGBTQ community. Specifically, in an affidavit attached to the motion, Jackson averred that prior to his appointment to the federal bench, Judge Starr advocated against equal rights for members of the LGBTQ community as a Deputy Attorney General for the State of Texas by challenging federal guidance that directed schools to permit transgender students to use bathrooms that align with their gender identity; defending the right of county clerks to refuse to issue marriage licenses to same-sex couples; and testifying about state legislation that would protect adoption agencies that refuse to place children with same-sex couples. Further, Jackson stated that the judge "refused" to answer questions regarding the legal treatment of LGBTQ people during his judicial confirmation process, and that he supported the judicial nomination of Jeffrey Mateer, who, according to Jackson, allegedly said that "transgender children were part of " 'Satan's plan.' "

Section 144 aims exclusively at actual bias or prejudice. *Patterson*, 335 F.3d at 483. It requires a judge to recuse if a party to the proceeding "makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party." 28 U.S.C. § 144. The affidavit must "state the facts and the reasons for the belief that bias or prejudice exists" and "shall be accompanied by a certificate

of counsel of record stating that it is made in good faith." *Id*. The judge must pass on the sufficiency of the affidavit but may not pass on the truth of the affidavit's allegations. *Patterson*, 335 F.3d at 483. A legally sufficient affidavit must: (1) state material facts with particularity; (2) state facts that, if true, would convince a reasonable person that a bias exists; and (3) state facts that show the bias is personal, as opposed to judicial, in nature. *Id*.

Section 455(a) deals not only with actual bias and other forms of partiality, but also with the appearance of partiality. It requires a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). A party seeking such disqualification "must show that, if a reasonable man knew of all the circumstances, he would harbor doubts about the judge's impartiality." *Travelers Ins. Co. v. Liljeberg Enters., Inc*., 38 F.3d 1404, 1408 (5th Cir. 1994) (internal quotation marks and citations omitted). The objective standard relies on the "well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person." *Andrade v. Chojnacki*, 338 F.3d 448, 455 (5th Cir. 2003) (internal quotation marks and citation omitted). "The review of a recusal order under § 455(a) is 'extremely fact intensive and fact bound,' thus a close recitation of the factual basis for the [party's] recusal motion is necessary." *Republic of Panama v. Am. Tobacco Co*., 217 F.3d 343, 346 (5th Cir. 2000) (citation omitted).

We agree with Jackson that the district court improperly addressed the truth of her affidavit under

section 144. In reviewing a section 144 motion, the district court must only pass on the sufficiency of the affidavit and not its truth. *Patterson*, 335 F.3d at 483. The district court, however, expressly addressed the truth of Jackson's affidavit—claiming, *inter alia*, that Jackson "misconstrues the positions that this judge advocated on behalf of his client." It then evaluated, contested, and corrected each section of Jackson's affidavit. Instead, the district court should have stopped with this statement: "Instead of demonstrating personal bias, Jackson's allegations are merely against the positions Texas advanced in litigation and state 'no specific facts that would suggest that this judge would be anything but impartial in deciding the case before him.' "

We nevertheless conclude that the district court properly denied the recusal motion under both statutory provisions. Jackson did not state facts in her affidavit showing that the judge harbored an actual bias against Jackson under section 144 nor did she demonstrate that the judge's impartiality might reasonably be questioned under section 455(a). Jackson cited to examples of the judge's past legal advocacy in the course and scope of his employment for the State of Texas, during which the judge made statements reflecting solely the legal positions of his client, not his personal views. A lawyer often takes legal positions on behalf of his client that he may or may not personally agree with, and the statements made by the district judge when he was a Deputy Attorney General only involved pertinent legal issues; that is, they were

interpretations of statutes, caselaw, and administrative rules and reflected no personal animus against LGBTQ people.

If the instant case involved the judge's former employer or the same exact issue, recusal could be warranted. *See* 28 U.S.C. § 455(b)(3) (requiring recusal where a judge previously served in governmental employment and expressed an opinion concerning the merits of the particular case in controversy); *Panama*, 217 F.3d at 347 (holding that the judge's name listed on motion to file an amicus brief asserting allegations against tobacco companies similar to the ones made in the instant case against the defendant tobacco company may lead a reasonable person to doubt his impartiality). But the district judge's prior participation in high-profile cases involving a group of people with which Jackson identifies, without more, is insufficient to support a finding of actual bias or an appearance of bias. *See Higganbotham v. Oklahoma ex rel. Okla. Transp. Comm'n*, 328 F.3d 638, 645 (10th Cir. 2003) ("It is, of course, an inescapable part of our system of government that judges are drawn primarily from lawyers who have participated in public and political affairs.") (internal quotation marks and citation omitted).

Additionally, the affidavit and exhibits submitted by Jackson indicate that the district judge answered, during the judicial confirmation process, that he would set aside his personal beliefs and apply binding precedent when asked about the legal treatment of LGBTQ individuals. His answers support the conclusion that

he is committed to applying the law accordingly. Lastly, a judge's previous support for another judicial nominee does not amount to a support of that nominee's statements or beliefs. We cannot say that the district judge's decision not to recuse himself pursuant to 28 U.S.C. §§ 144 and 455(a) was an abuse of discretion.

III. Motion to Dismiss

A. Standard of Review

We review *de novo* a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Powers v. Northside Indep. Sch. Dist.*, 951 F.3d 298, 305 (5th Cir. 2020). "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Id*. (citation omitted). A plaintiff must plead specific facts, not merely conclusory allegations to state a claim for relief that is facially plausible. *Id*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "The factual allegations need not be detailed, but they must be enough to raise a right to relief above the speculative level, assuming all the allegations are true." *Id*. (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)).

B. Legal Analysis

On appeal, Jackson argues that the district court erred in dismissing her § 1983 claims of municipal

liability against Dallas County and Sheriffs Valdez and Brown in their official capacities.

To prevail against a municipality like Dallas County, a plaintiff must prove three elements: (1) Dallas County had a policy or custom, of which (2) a Dallas County policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose "moving force" is the policy or custom. *World Wide Street Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 753 (5th Cir. 2009); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). To state a cognizable failure-to-train claim, a plaintiff must plead facts plausibly demonstrating that: (1) the municipality's training procedures were inadequate; (2) the municipality was deliberately indifferent in adopting its training policy; and (3) the inadequate training policy directly caused the constitutional violations in question. *World Wide*, 591 F.3d at 756.

Jackson articulates two theories of municipal liability: (1) a policy of strip searching transgender detainees for the sole purpose of determining the detainee's gender and classifying them solely on their biological sex, and (2) the failure to train and supervise employees to follow official policy prohibiting strip searches and the classification of transgender inmates solely on their sex assigned at birth. We address each theory in turn.

i. Policy

A policy may be evidenced by "[a] policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's law-making officers or by an official to whom the law-makers have delegated policy-making authority;" or "a persistent, widespread practice of City officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002) (quoting *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc)). "A customary policy consists of actions that have occurred for so long and with such frequency that the course of conduct demonstrates the governing body's knowledge and acceptance of the disputed conduct." *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 169 (5th Cir. 2010). To plausibly plead a practice "so persistent and widespread as to practically have the force of law," a plaintiff must do more than describe the incident that gave rise to his injury. *Peña v. City of Rio Grande*, 879 F.3d 613, 622 (5th Cir. 2018) (quoting *Connick v. Thompson*, 563 U.S. 51, 61 (2011)). A pattern requires similarity and specificity, as well as "sufficiently numerous prior incidents" as opposed to "isolated instances." *Peterson v. City of Fort Worth*, 588 F.3d 838, 851 (5th Cir. 2009) (quoting *McConney v. City of Houston*, 863 F.2d 1180, 1184 (5th Cir. 1989)). "[O]ccasional acts of untrained policemen are not otherwise

attributed to city policy or custom." *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984).

Jackson alleged that she was forced to be examined in 2016 and was misclassified in 2016, 2017, and 2018; and that Dallas County officers forced another transgender female detainee named C.W. "to undress, spread her buttocks, show the bottom of her feet and then put on male jail attire" in 2013. Jackson also alleged that the officers stated to her: "Now our policy is we have to verify that you've had a sex change. If you have a penis, you're going with the men. If you have a vagina, you're going with the women," and "That's our policy. You can talk to Lupe Valdez about it when you get out."

We recognize that Jackson is without the benefit of discovery, and that we have no rigid rule regarding numerosity to prove a widespread pattern of unconstitutional acts. Though it is a close call, for a Rule 12(b)(6) dismissal, we cannot conclude that allegations of two incidents of strip searches and four incidents of sex-based classifications of two transgender people in a span of five years support the reasonable inference that a practice of strip searches and classifications of transgender detainees solely on their biological sex is "so persistent and widespread as to practically have the force of law." *Connick*, 563 U.S. at 61; *see Prince v. Curry*, 423 F. App'x 447, 451 (5th Cir. 2011) (affirming dismissal of municipal liability claims where the alleged "existence of only one or, at most, two other similarly situated defendants" or "of one or two prior incidents" do not "plausibly suggest that [defendant

county] has a policy or custom of unconstitutionally subjecting sex offenders to enhanced sentences"). Such isolated violations "are not the persistent, often repeated, constant violations that constitute custom and policy." *Bennett*, 729 F.2d at 768 n.3. We conclude that the district court properly dismissed Jackson's municipal liability claim based upon her "policy" theory.

ii. Failure to Train or Supervise

When a municipal entity enacts a facially valid policy but fails to train its employees to implement it in a constitutional manner, that failure constitutes "official policy" that can support municipal liability if it "amounts to deliberate indifference." *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 624 (5th Cir. 2018) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). "'Deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick*, 563 U.S. at 61 (quoting *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 410 (1997)). Thus, when a municipality's policymakers are on actual or constructive notice that a particular omission in their training program causes municipal employees to violate citizens' constitutional rights, the municipality may be deemed deliberately indifferent if the policymakers choose to retain that program. *Id*.

Deliberate indifference may be proven in one of two ways. *Littell*, 894 F.3d at 624. First, "municipal employees will violate constitutional rights 'so often' that

the factfinder can infer from the pattern of violations that 'the need for further training must have been plainly obvious to the . . . policymakers.'" *Id*. (quoting *Canton*, 489 U.S. at 390 n.10) (alteration in original). This proof-by-pattern method is "ordinarily necessary." *Id*. (quoting *Brown*, 520 U.S. at 409). Absent proof of pattern, deliberate indifference can still be inferred in a limited set of cases, where "evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, [can] trigger municipal liability." *Brown*, 520 U.S. at 409 (citing *Canton*, 489 U.S. at 390). This "single-incident" exception applies when "the risk of constitutional violations was or should have been an 'obvious' or 'highly predictable consequence' of the alleged training inadequacy." *Littell*, 894 F.3d at 624 (quoting *Brown*, 520 U.S. at 409).

Jackson attempts to establish deliberate indifference under the "pattern" theory, so we do not address the "single-incident" exception. *See Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 653 (5th Cir. 2004) ("Issues not raised or inadequately briefed on appeal are waived."). Again, it cannot be said that Jackson sufficiently pleaded facts that Dallas County employees conducted strip searches and classified transgender detainees solely on the basis of biological sex "so often" as to give rise to a pattern. And without such a pattern, the need for training could not have been "plainly obvious" to Dallas County or its policymakers. Accordingly, the district court did not err in

dismissing Jackson's municipal liability claim based on its purported failure to supervise or train.

IV. Conclusion

For the foregoing reasons, we AFFIRM the denial of the motion to recuse and the dismissal of Dallas County and Valdez and Brown in their official capacities.

LESLIE H. SOUTHWICK, *Circuit Judge*, dissenting in part.

I agree with the majority's holding and reasoning on the question of recusal. On the merits, my only disagreement is that we should not affirm dismissal of the municipal-policy claim. I will explain.

To begin, a point about an issue that neither of today's opinions resolves. There was no district court ruling for us to review on whether a municipal policy mandating the jail intake procedures described in the complaint would violate the plaintiff's constitutional rights. Jackson argued that the policy violated her Fourth Amendment rights against unreasonable searches and seizures as well as her substantive-due-process and equal-protection rights. Dallas County did not brief the constitutionality of any policy but, like the district court, focused instead on the failure to allege a policy. Searches of inmates must be conducted in a reasonable manner, *see*, *e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 560 (1979), but the law on Jackson's due-process and

equal-protection claims is less settled. Jackson relies on cases about abortion and conscience-shocking actions by officials for support. *E.g.*, *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833 (1992); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998). She also cites to regulations under the Prison Rape Elimination Act that prohibit physical examinations of transgender inmates for the purpose of determining genital status. 28 C.F.R. § 115.15(e). I will explain my conclusion that the complaint sufficiently asserts the existence of a municipal policy, but I would remand for the district court to determine initially whether the policy violates Jackson's constitutional rights. I assert no opinion on that question today.

This appeal comes from the grant of a motion to dismiss for failure to state a claim. Fed. R. Civ. P. 12(b)(6). Though in part repeating what the majority opinion already has accurately stated, I discuss the pleading standard that is required to survive a motion to dismiss. We use the same words for the pleading standard, but I interpret their application differently than does the majority.

We give *de novo* review to motions to dismiss for failure to state a claim. *Powers v. Northside Indep. Sch. Dist.*, 951 F.3d 298, 305 (5th Cir. 2020). That means we accept the plaintiff's plausibly pled facts as true and view them in the light most favorable to her. *Id.* The complaint does not need to provide "detailed factual allegations." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Factual allegations are assumed to be true "even if doubtful in fact"; still, they must be enough to

raise a right to relief above the "speculative level." *Id.* The facts must state a claim "that is plausible on its face," but need not rise to the level of being probable. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Even where "recovery seems 'very remote and unlikely,'" a complaint may survive a motion to dismiss. *Innova Hosp. San Antonio, Ltd. P'ship v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 726 (5th Cir. 2018) (quoting *Twombly*, 550 U.S. at 555–56).

As the majority in this appeal states, a *Monell* claim requires proof of (1) a policymaker, (2) an official policy, (3) and "a violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski v. City of Hous.*, 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694–95 (1978)). There are two ways to prove a policy. One is to show that a policy has been "formally announced by an official policymaker." *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 168 (5th Cir. 2010). The other is to prove "[a] persistent, widespread practice of [county] officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Webster v. City of Hous.*, 735 F.2d 838, 841 (5th Cir. 1984) (*en banc*).

The majority concludes that Jackson has failed to allege enough incidents to prove a policy through the existence of a custom. In my understanding, a plaintiff is not required pre-discovery to distinguish between a formal policy and a custom. The evidence creating a plausible claim of a policy before a suit is filed may not create clarity about the form in which the policy is expressed. We know that a complaint's assertion of a customary policy can take the form of claiming a pattern of unconstitutional conduct by municipal actors or claiming a policymaker's single unconstitutional action. *Zarnow*, 614 F.3d at 169. Thus, even if no relevant, formal policy exists, a plaintiff may offer evidence "demonstrat[ing] the governing body's knowledge and acceptance of the disputed conduct." *Id.* Municipal liability "attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official . . . responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). An "'official policy' often refers to formal rules or understandings—often but not always committed to writing." *Id.* at 480.

In my view of the complaint, Jackson has sufficiently pled a policy that may ultimately be proven under either theory. Some of the details are as follows. The complaint alleges that during intake at the jail, Jackson was given a wristband identifying her as a woman. She then was strip searched for the purpose of determining her genitalia to assure proper placement. To support her allegation that this was county policy,

she alleges that a Dallas County employee, while instructing her to pull down her pants, stated: "[O]ur policy is we have to verify that you've had a sex change. If you have a penis you're going with the men. If you have a vagina you're going with the women." Further: "[T]hat's our policy. You can talk to [Sheriff] Lupe Valdez about it when you get out." That same officer told her, "It's not uncommon for men that look like women to be sitting in the men's section and vice versa. You'll probably see some like you over there. You aren't the first and you won't be the last." After the search, she was placed with the men. An officer told her, "[Y]ou're going with the men because that's what you are. You're a man."

Jackson's complaint sufficiently alleged a policy that existed in some form, as yet unknown. Counsel for Jackson restated the point in oral argument before this court:

> You can show a policy either by a written policy or you can show it by a custom and practice, and here we have an actual statement from the individuals who were tasked with enforcing this practice, this custom, and this unwritten policy, and actually attributing it to the policymaker, Lupe Valdez, who was the Dallas Sheriff. So, this is not simply a situation where we need to show a pattern of abuse, we actually have a statement of the policy that genital searches were required to determine the biological sex of detainees.

Dallas County employees told Jackson that they had a policy. She must plead facts that plausibly allege that the policy existed. Jackson did. After discovery, her allegations about the policy her jailers were referencing may become clearer, or, instead, discovery may reveal there is no policy in any form.

It is too early at this stage to conclude that she cannot show a policy simply because she has not yet discovered enough incidents. Jackson's complaint alleged four instances of placing transgender detainees based on their anatomy and two strip searches for determining physical sex characteristics. As the majority correctly states, "we have no rigid rule regarding numerosity to prove a widespread pattern of unconstitutional acts." The complaint also quotes jail personnel as saying, "It's not uncommon for men that look like women to be sitting in the men's section and vice versa. You'll probably see some like you over there. You aren't the first and you won't be the last," implying that Jackson was part of a larger and continuing collection of people subjected to this treatment. In other words, the quoted statement supports that the way Jackson was treated was the norm rather than the exception.

In my view, Jackson has plausibly pled facts which, if true, support the existence of a county policy. *See Iqbal*, 556 U.S. at 678. Whether it exists as an official policy "formally announced by an official policymaker," *see Zarnow*, 614 F.3d at 168, or a persistent, widespread custom "so common and well settled as to constitute a custom that fairly represents municipal policy," *see Webster*, 735 F.2d at 841, is irrelevant at this

stage. I would not charge Jackson with knowing what form the policy takes until she has had a chance to discover it. Respectfully, I dissent.

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for the Fifth Circuit

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Defendants – Appellees.

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(Filed Mar. 29, 2021)

Before BARKSDALE, SOUTHWICK, and GRAVES, *Circuit Judges*.

PER CURIAM:*

Valerie Jackson is a transgender woman who sued Dallas County, Texas, and its employees for violating her constitutional rights related to her gender identity. Pursuant to Federal Rule of Procedure 54(b), she appeals the district court's denial of her motion for

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recusal and the Rule 12(b)(6) dismissal of Dallas County and Sheriffs Lupe Valdez and Marian Brown in their official capacities. We AFFIRM IN PART, REVERSE IN PART, and REMAND for further proceedings.

I. Background

Because this is an appeal from a Rule 12(b)(6) dismissal, the following are allegations from the operative complaint.

Valerie Jackson is a transgender woman. She was assigned the sex of male at birth and had her gender legally changed to female prior to the events alleged in the instant case.

On or about November 4, 2016, Jackson was arrested for unlawful possession of a weapon and taken to the Dallas County jail. During booking, an officer asked her standard intake questions and gave her a wristband identifying her gender as female. She was taken to an enclosed corner and ordered to lift her shirt and bra to expose her bare breasts, to which she complied. She was then escorted to a nurse.

The nurse asked Jackson medical questions that led her to reveal that she was a transgender woman. The nurse left the paperwork the way it was filled out and concluded the medical assessment. When Jackson returned to the waiting area with the other female detainees, an officer asked her in front of the other detainees if she had "a sex change or something" and

whether she "had everything done even down there." She answered yes so that the humiliation would end.

Jackson was taken to the same enclosed corner and instructed to pull down her pants and underwear. When she asked why, an officer stated: "We need to know if you've had a sex change or not. We need to see if you have a penis or vagina. We have to protect you. We can't put you with men if you have a vagina." Jackson said she was not going to pull down her pants, and the officer replied: "You are coming up in the system as male. It doesn't matter what you do, it can never be changed." Jackson stated again that she was not going to pull down her pants and that she should not have to prove anything to them if none of the other women had to prove anything. The officer continued: "Now our policy is we have to verify that you've had a sex change. If you have a penis, you're going with the men. If you have a vagina, you're going with the women."

Jackson continued to insist that she did not want to pull her pants down. An officer told her that if she refused, they would transfer her to Parkland Hospital where she would have to show her genitals, thus adding hours to her incarceration. An officer also said: "That's our policy. You can talk to [Sheriff] Lupe Valdez about it when you get out." The officer explained that the process could not move forward without Jackson revealing her genitals. Feeling she had no other choice, Jackson complied with the strip search.

After the search, Jackson was eventually placed in her own cell. She was then taken in a line with male

inmates to court, and when she returned to the jail, she was taken to the male locker room and instructed to strip down and shower because "it was something everyone had to do." An officer intervened and took her to a holding cell, where Jackson received a new wristband that identified her gender as male. Jackson was moved multiple times while waiting for her paperwork to be processed, each time encountering new officers and inmates who misidentified her gender.

After being released from custody, Jackson filed a formal complaint regarding her treatment in the Dallas County jail. On November 7, 2016, Captain Shelley Knight with the Dallas County Sheriff's Office was contacted by a local newspaper regarding Jackson's treatment. Knight informed the newspaper that there was an investigation on the incident and that the intake video from November 4, 2016, was pulled. She also informed the newspaper that she could see where some of the policy was misconstrued and other parts were not followed.

On April 19, 2017, Jackson was arrested for the second time and taken to the Dallas County jail, where she was classified male and held with the male inmates. She asked the officers to contact Knight, who could explain that Jackson should be classified and placed with female inmates, but they refused. She was later forced to shower with male inmates.

On June 15, 2018, Jackson was arrested for the third time and taken to the Dallas County jail, where she was again classified male and held with the male

inmates. She was again forced to shower with male inmates.

In November 2018, Jackson sued Dallas County, Texas; former Sheriff Lupe Valdez and current Sheriff Marian Brown in their official and individual capacities; and Officer Lizyamma Samuel, Officer Samuel Joseph, and Unknown Dallas County Employee III in their individual capacities under 42 U.S.C. § 1983 for violations of her Fourth, Fifth, and Fourteenth Amendment rights.

In September 2019, the case was transferred to Judge Brantley Starr. Jackson moved for recusal under 28 U.S.C. §§ 144 and 455(a), arguing that Judge Starr held a bias against members of the LGBTQ community. The motion was denied. On motion, the district court later dismissed Dallas County and Valdez and Brown in their official capacities under Rule 12(b)(6). Jackson timely appealed.

II. Motion to Recuse

A. Standard of Review

We review the denial of a motion to recuse for abuse of discretion. *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 483 (5th Cir. 2003).

B. Legal Analysis

Jackson argues that the district court erred in denying her motion to recuse because of his personal bias against members of the LGBTQ community.

Specifically, in an affidavit attached to the motion, Jackson averred that prior to his appointment to the federal bench, Judge Starr advocated against equal rights for members of the LGBTQ community as a Deputy Attorney General for the State of Texas by challenging federal guidance that directed schools to permit transgender students to use bathrooms that align with their gender identity; defending the right of county clerks to refuse to issue marriage licenses to same-sex couples; and testifying about state legislation that would protect adoption agencies that refuse to place children with same-sex couples. Further, Jackson stated that the judge "refused" to answer questions regarding the legal treatment of LGBTQ people during his judicial confirmation process, and that he supported the judicial nomination of Jeffrey Mateer, who said that transgender children were part of "Satan's plan."

Section 144 aims exclusively at actual bias or prejudice. *Patterson*, 335 F.3d at 483. It requires a judge to recuse if a party to the proceeding "makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party." 28 U.S.C. § 144. The affidavit must "state the facts and the reasons for the belief that bias or prejudice exists" and "shall be accompanied by a certificate of counsel of record stating that it is made in good faith." *Id*. The judge must pass on the sufficiency of the affidavit but may not pass on the truth of the affidavit's allegations. *Patterson*, 335 F.3d at 483. A legally

sufficient affidavit must: (1) state material facts with particularity; (2) state facts that, if true, would convince a reasonable person that a bias exists; and (3) state facts that show the bias is personal, as opposed to judicial, in nature. *Id*.

Section 455(a) deals not only with actual bias and other forms of partiality, but also with the appearance of partiality. It requires a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). A party seeking such disqualification "must show that, if a reasonable man knew of all the circumstances, he would harbor doubts about the judge's impartiality." *Travelers Ins. Co. v. Liljeberg Enters., Inc*., 38 F.3d 1404, 1408 (5th Cir. 1994) (internal quotation marks and citations omitted). The objective standard relies on the "well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person." *Andrade v. Chojnacki*, 338 F.3d 448, 455 (5th Cir. 2003) (internal quotation marks and citation omitted). "The review of a recusal order under § 455(a) is 'extremely fact intensive and fact bound,' thus a close recitation of the factual basis for the [party's] recusal motion is necessary." *Republic of Panama v. Am. Tobacco Co*., 217 F.3d 343, 346 (5th Cir. 2000) (citation omitted).

We agree with Jackson that the district court improperly addressed the truth of her affidavit under section 144. In reviewing a section 144 motion, the district court must only pass on the sufficiency of the affidavit and not its truth. *Patterson*, 335 F.3d at 483. Judge Starr, however, expressly addressed the truth of

Jackson's affidavit—claiming, *inter alia*, that Jackson "misconstrues the positions that this judge advocated on behalf of his client." Judge Starr then evaluated, contested, and corrected each section of Jackson's affidavit. Instead, the district court should have stopped with this statement: "Instead of demonstrating personal bias, Jackson's allegations are merely against the positions Texas advanced in litigation and state 'no specific facts that would suggest that this judge would be anything but impartial in deciding the case before him.' "

While we admonish the district court for addressing the truth of Jackson's affidavit, contrary to the directives of section 144, we nevertheless conclude that it properly denied the recusal motion under both statutory provisions. Jackson did not state facts in her affidavit showing that the judge harbored an actual bias against Jackson under section 144 nor did she demonstrate that the judge's impartiality might reasonably be questioned under section 455(a). Jackson cited to examples of the judge's past legal advocacy in the course and scope of his employment for the State of Texas, during which the judge made statements reflecting solely the legal positions of his client, not his personal views. A lawyer often takes legal positions on behalf of his client that he may or may not personally agree with, and the statements made by Judge Starr when he was a Deputy Attorney General only involved pertinent legal issues; that is, they were interpretations of statutes, caselaw, and administrative rules and reflected no personal animus against LGBTQ people.

If the instant case involved the judge's former employer or the same exact issue, recusal could be warranted. *See* 28 U.S.C. § 455(b)(3) (requiring recusal where a judge previously served in governmental employment and expressed an opinion concerning the merits of the particular case in controversy); *Panama*, 217 F.3d at 347 (holding that the judge's name listed on motion to file an amicus brief asserting allegations against tobacco companies similar to the ones made in the instant case against the defendant tobacco company may lead a reasonable person to doubt his impartiality). But the district judge's prior participation in high-profile cases involving a group of people with which Jackson identifies, without more, is insufficient to support a finding of actual bias or an appearance of bias. *See Higganbotham v. Oklahoma ex rel. Okla. Transp. Comm'n*, 328 F.3d 638, 645 (10th Cir. 2003) ("It is, of course, an inescapable part of our system of government that judges are drawn primarily from lawyers who have participated in public and political affairs.") (internal quotation marks and citation omitted).

Additionally, the affidavit and exhibits submitted by Jackson indicate that Judge Starr answered, during the judicial confirmation process, that he would set aside his personal beliefs and apply binding precedent when asked about the legal treatment of LGBTQ individuals. His answers support the conclusion that he is committed to applying the law accordingly. Lastly, the judge's support of Mateer's judicial nomination does not amount to a support of Mateer's statements or beliefs. We cannot say that the district judge's decision

not to recuse himself pursuant to 28 U.S.C. §§ 144 and 455(a) was an abuse of discretion.

III. Motion to Dismiss

A. Standard of Review

We review *de novo* a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Powers v. Northside Indep. Sch. Dist.*, 951 F.3d 298, 305 (5th Cir. 2020). "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Id*. (citation omitted). A plaintiff must plead specific facts, not merely conclusory allegations to state a claim for relief that is facially plausible. *Id*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "The factual allegations need not be detailed, but they must be enough to raise a right to relief above the speculative level, assuming all the allegations are true." *Id*. (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)).

B. Legal Analysis

On appeal, Jackson argues that the district court erred in dismissing her § 1983 claims of municipal liability against Dallas County and Sheriffs Valdez and Brown in their official capacities.

To prevail against a municipality like Dallas County, a plaintiff must prove three elements: (1) Dallas County had a policy or custom, of which (2) a Dallas County policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose "moving force" is the policy or custom. *World Wide Street Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 753 (5th Cir. 2009); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). To state a cognizable failure-to-train claim, a plaintiff must plead facts plausibly demonstrating that: (1) the municipality's training procedures were inadequate; (2) the municipality was deliberately indifferent in adopting its training policy; and (3) the inadequate training policy directly caused the constitutional violations in question. *World Wide*, 591 F.3d at 756.

Jackson articulates two theories of municipal liability: (1) a policy of strip searching transgender detainees for the sole purpose of determining the detainee's gender and classifying them solely on their biological sex, and (2) the failure to train and supervise employees to follow official policy prohibiting strip searches and the classification of transgender inmates solely on their sex assigned at birth. We address each theory in turn.

i. Policy

A policy may be evidenced by "[a] policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's

lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority;" or "a persistent, widespread practice of City officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002) (quoting *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc)). "A customary policy consists of actions that have occurred for so long and with such frequency that the course of conduct demonstrates the governing body's knowledge and acceptance of the disputed conduct." *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 169 (5th Cir. 2010). To plausibly plead a practice "so persistent and widespread as to practically have the force of law," a plaintiff must do more than describe the incident that gave rise to his injury. *Peña v. City of Rio Grande*, 879 F.3d 613, 622 (5th Cir. 2018) (quoting *Connick v. Thompson*, 563 U.S. 51, 61 (2011)). A pattern requires similarity and specificity, as well as "sufficiently numerous prior incidents" as opposed to "isolated instances." *Peterson v. City of Fort Worth*, 588 F.3d 838, 851 (5th Cir. 2009) (quoting *McConney v. City of Houston*, 863 F.2d 1180, 1184 (5th Cir. 1989)). "[O]ccasional acts of untrained policemen are not otherwise attributed to city policy or custom." *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984).

Jackson alleged that she was forced to be examined in 2016 and was misclassified in 2016, 2017, and 2018; and that Dallas County officers forced another

transgender female detainee named C.W. "to undress, spread her buttocks, show the bottom of her feet and then put on male jail attire" in 2013. Jackson also alleged that the officers stated to her: "Now our policy is we have to verify that you've had a sex change. If you have a penis, you're going with the men. If you have a vagina, you're going with the women," and "That's our policy. You can talk to Lupe Valdez about it when you get out." She was also told: "It's not uncommon for men that look like women to be sitting in the men's section and vice versa. You'll probably see some like you over there. You aren't the first and you won't be the last." When she asked to remain in a certain area to avoid potential harassment from male detainees, an officer denied the request: "No, you're going with the men because that's what you are. You're a man."

Because we must accept all well-pleaded facts as true and view those facts in the light most favorable to the plaintiff, we conclude that Jackson sufficiently pleaded a policy of strip searching transgender detainees for the sole purpose of determining their gender and classifying them solely on their biological sex. Specifically, her complaint alleged that she and another transgender female detainee were forced to endure two strip searches for determining their physical sex characteristics and four instances of being classified based on their anatomy. Further, alleged statements made by county employees support the reasonable inference that other transgender detainees have been treated similarly; for instance, officers told Jackson that it was their "policy" to classify detainees solely based on

biological sex and that "[y]ou aren't the first and you won't be the last" transgender person to be placed with detainees of the same biological sex. In other words, the statements suggest that the way Jackson was treated is the norm rather than the exception.

While it is true that the complaint alleged fewer instances than we have typically held are sufficient to survive post-discovery stages of a *Monell* claim in other contexts, Jackson is only in the early stages of litigation without the benefit of discovery. *Cf. Peterson*, 588 F.3d at 851–52 & n.4 (holding that 27 incidents of excessive force in four years, "with no context as to the overall number of arrests or any comparisons to other cities" was insufficient to survive summary judgment on the custom theory). Further, we have affirmed the dismissal of *Monell* claims where the plaintiff had alleged only one or two incidents of unconstitutional conduct. *See*, *e.g.*, *Ratliff v. Aransas Cty.*, 948 F.3d 281, 285 (5th Cir. 2020) (affirming dismissal of *Monell* excessive-force claim where "the complaint's only specific facts appear in the section laying out the events that gave rise to this action"); *Culbertson v. Lykos*, 790 F.3d 608, 628 (5th Cir. 2015) (finding no allegation of a widespread practice of retaliation where the plaintiffs alleged "there was a retaliatory campaign against them" but "offered no evidence that similar retaliation had victimized others"); *Prince v. Curry*, 423 F. App'x 447, 451 (5th Cir. 2011) (affirming dismissal of municipal liability claims where the alleged "existence of only one or, at most, two other similarly situated defendants" or "of one or two prior incidents" do not "plausibly suggest

that [the county] has a policy or custom of unconstitutionally subjecting sex offenders to enhanced sentences").

Here, Jackson alleged that she and another transgender female detainee experienced multiple instances of strip searches and sex-based classifications. We also acknowledge Jackson's point that the population of transgender detainees is relatively small, so the number of similar incidents alleged or possibly discovered later in litigation will likely be less than those in other municipality liability cases. Thus, construing Jackson's allegations in a manner required for Rule 12(b)(6) motions, this is a close call that, at this stage of the proceeding, should have gone in Jackson's favor. Although her *Monell* claim "ultimately may not withstand a motion for summary judgment filed after discovery, or prevail at trial, neither scenario is determinative of this appeal." *Covington v. City of Madisonville*, 812 F. App'x 219, 228 (5th Cir. 2020) (reversing dismissal of § 1983 failure-to-supervise claim based on the officer's misconduct relative to plaintiff's false arrest). Accordingly, the district court erred in concluding that Jackson did not plead a policy of strip searches and sex-based classifications of transgender detainees.

Next, we address whether Jackson sufficiently pled that the policymaker of Dallas County had actual or constructive knowledge of the policy:

> Actual knowledge may be shown by such means as discussions at council meetings or

> receipt of written information. Constructive knowledge may be attributed to the governing body on the ground that it would have known of the violations if it had properly exercised its responsibilities, as, for example, where the violations were so persistent and widespread that they were the subject of prolonged public discussion or of a high degree of publicity.

Pineda, 291 F.3d at 330. Jackson alleged that either Sheriffs Valdez or Brown served as policy maker for Dallas County "in relation to the policies, written and unwritten, regarding detainees held in the custody of the Dallas County Sheriff's Department and confined in the Dallas County jail." Appellees do not dispute the identity of the policymaker, but they argue that no knowledge of a policy can be imputed onto the sheriff. We disagree. The complaint plausibly pled that the sheriff had actual or constructive knowledge of a policy of strip searches and sex-based classifications of transgender detainees. In addition to the allegations regarding the frequency of these incidents and the officers' statements made to Jackson, Jackson alleged that she filed a formal complaint after her first arrest; a local newspaper contacted the sheriff's department about Jackson's treatment; and the department informed the newspaper of a pending investigation and that the intake video was pulled. These pleaded facts support the reasonable inference that the policymaker should have known or been aware of such incidents occurring in the jail. Accordingly, the district court also erred in concluding that Jackson failed to plead that the county policymaker had actual or constructive

knowledge of a policy of strip searches and sex-based classifications of transgender detainees.

However, there is no district court ruling for us to review on whether a municipal policy requiring the treatment described in the complaint would violate the plaintiff's constitutional rights; that is, the third element of a municipal liability claim. Thus, we remand for further proceedings so that the district court may fully address the constitutionality of strip searching transgender detainees for the sole purpose of determining their gender and classifying them based solely on their biological sex.

ii. Failure to Train or Supervise

When a municipal entity enacts a facially valid policy but fails to train its employees to implement it in a constitutional manner, that failure constitutes "official policy" that can support municipal liability if it "amounts to deliberate indifference." *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 624 (5th Cir. 2018) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). "'Deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick*, 563 U.S. at 61 (quoting *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 410 (1997)). Thus, when a municipality's policymakers are on actual or constructive notice that a particular omission in their training program causes municipal employees to violate citizens' constitutional rights, the

municipality may be deemed deliberately indifferent if the policymakers choose to retain that program. *Id*.

Deliberate indifference may be proven in one of two ways. *Littell*, 894 F.3d at 624. First, "municipal employees will violate constitutional rights 'so often' that the factfinder can infer from the pattern of violations that 'the need for further training must have been plainly obvious to the . . . policymakers.'" *Id*. (quoting *Canton*, 489 U.S. at 390 n.10) (alteration in original). This proof-by-pattern method is "ordinarily necessary." *Id*. (quoting *Brown*, 520 U.S. at 409). Absent proof of pattern, deliberate indifference can still be inferred in a limited set of cases, where "evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, [can] trigger municipal liability." *Brown*, 520 U.S. at 409 (citing *Canton*, 489 U.S. at 390). This "single-incident" exception applies when "the risk of constitutional violations was or should have been an 'obvious' or 'highly predictable consequence' of the alleged training inadequacy." *Littell*, 894 F.3d at 624 (quoting *Brown*, 520 U.S. at 409).

Jackson attempts to establish deliberate indifference under the "pattern" theory, so we do not address the "single-incident" exception. *See Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 653 (5th Cir. 2004) ("Issues not raised or inadequately briefed on appeal are waived."). Again, we conclude that Jackson sufficiently pleaded facts that Dallas County employees conducted strip searches and classified

transgender detainees solely on the basis of biological sex as to give rise to a widespread pattern. Further, Jackson's allegations that federal and county regulations prohibit searches of transgender detainees for the sole purpose of determining their genital status, yet employees conducted such searches regularly and called them county "policy," support the inference that Dallas County failed to adequately train its employees on how to process and screen transgender detainees in their jail facilities. Accordingly, the district court erred in concluding that Jackson failed to plead that the county's failure to train amounted to deliberate indifference.

But again, because there is no district court ruling for us to review on whether the county's failure to train its employees caused the violation of a constitutional right, we remand for further proceedings so that the district court may fully address the constitutionality of strip searching transgender detainees for the sole purpose of determining their gender and classifying them based solely on their biological sex.

IV. Conclusion

For the foregoing reasons, we AFFIRM the denial of the motion to recuse, REVERSE the dismissal of the municipal liability claims against Dallas County and Valdez and Brown in their official capacities, and REMAND for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VALERIE JACKSON, *Plaintiff*,	§	
v.	§	Civil Action No.
LUPE VALDEZ, MARIAN BROWN, SAMUEL JOSEPH, LIZYAMMA SAMUEL, UNKNOWN DALLAS EMPLOYEE III, and DALLAS COUNTY, TEXAS, *Defendants*.	§	3:18-CV-02935-X-BH Referred to U.S. Magistrate Judge

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed Mar. 23, 2020)

After reviewing all relevant matters of record in this case, including the *Findings, Conclusions, and Recommendation* [Doc. No. 45] of the United States Magistrate Judge and plaintiff Valerie Jackson's *Objection* [Doc. No. 47], in accordance with 28 U.S.C. § 636(b)(1), the undersigned District Judge is of the opinion that the Findings and Conclusions of the Magistrate Judge are correct and they are accepted as the Findings and Conclusions of the Court.

The Court **GRANTS** the *Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6) and Brief in Support of Defendants*, filed July 22, 2019 [Doc. No. 23]. By

separate judgment, the Court will **DISMISS WITH PREJUDICE** Jackson's claims against defendants Dallas County, Texas, and Sheriffs Lupe Valdez and Marian Brown in their official capacities.

IT IS SO ORDERED this 23rd day of March 2020.

/s/ Brantley Starr
BRANDLEY STARR
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VALERIE JACKSON, *Plaintiff*, v. LUPE VALDEZ, MARIAN BROWN, SAMUEL JOSEPH, LIZYAMMA SAMUEL, UNKNOWN DALLAS EMPLOYEE III, and DALLAS COUNTY, TEXAS, *Defendants*.	§ § § § § § § § § § §	Civil Action No. 3:18-CV-02935-X-BH Referred to U.S. Magistrate Judge

PARTIAL JUDGMENT

(Filed Mar. 23, 2020)

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered, the Court **ORDERS**, **ADJUDGES**, and **DECREES** that:

1. All of plaintiff Valerie Jackson's claims against defendants Dallas County, Texas, and Sheriffs Lupe Valdez and Marian Brown in their official capacities, are **DISMISSED WITH PREJUDICE** for failure to state a claim.

2. The taxable costs of court for Dallas County, Texas, as calculated by the Clerk of the Court, are assessed against Jackson.

3. Under Federal Rule of Civil Procedure 54(b), the Court expressly determines that there is not just reason for delay and directs the Clerk of the Court to enter this as a final judgment for Dallas County, Texas.

4. The Clerk shall transmit a true copy of this Judgment and the *Order Accepting the Findings and Recommendation of the United States Magistrate Judge* to all parties.

IT IS SO ORDERED this 23rd day of March 2020.

/s/ Brantley Starr
BRANDLEY STARR
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

VALERIE JACKSON, Plaintiff,	§	
	§	
v.	§	**Civil Action No.**
LUPE VALDEZ, MARIAN BROWN, SAMUEL JOSEPH, LIZYAMMA SAMUEL, UNKNOWN DALLAS EMPLOYEE III, and DALLAS COUNTY, TEXAS, Defendants.	§	**3:18-CV-2935-X-BH**
	§	
	§	
	§	
	§	
	§	**Referred to U.S. Magistrate Judge**[1]

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

(Filed Feb. 27, 2020)

Before the Court is the *Motion to Dismiss Under Fed.R Civ.P. 12(b)(6) and Brief in Support of Defendants*, filed July 22, 2019 (doc. 23). Based on the relevant filings and applicable law, the motion should be **GRANTED**.

I. BACKGROUND

Valerie Jackson (Plaintiff) sues Dallas County, Texas (the County), Sheriffs Lupe Valdez and Marian

[1] By *Standing Order of Reference* filed January 8, 2020 (doc. 43), this case was referred for full case management.

Brown (Sheriffs) in their official and individual capacities, and Officers Samuel Joseph and Lizyamma Samuel (Officers) and Unknown Dallas Employee III (Nurse) in their individual capacities under 42 U. S.C. § 1983 for violations of her rights under the Fourth, Fifth, and Fourteenth Amendments of the Constitution. (*See* doc. 18.)[2] She seeks actual and punitive damages, exemplary damages under § 41.003(a) of the Texas Civil Practice & Remedies Code, and attorney's fees and costs of court under 42 U.S.C. § 1988. (*Id.* at 28.)

Plaintiff is a transgender woman who was assigned the sex of male at birth, and had her gender legally changed to female. (doc. 18 at 3.) On November 4, 2016, she was arrested for unlawful possession of a weapon and taken to the Dallas County jail. (*Id.*) During the booking process, officers asked her "all the standard intake questions," and after verifying her name and gender from her driver's license, they gave her a wristband that identified her gender as female. (*Id.*) They took Plaintiff to an enclosed corner and ordered her to lift up her shirt and bra to expose her bare breasts, and she complied. (*Id.*) She was then escorted to a male nurse for a medical assessment, during which she was asked questions that led her to reveal that she was a transgender woman. (*Id.* at 3-4.) When the nurse asked why the paperwork listed her as a female, she explained that she was a female. (*Id.* at 4.)

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[2] Citations to the record refer to the CM/ECF system page number at the top of each page rather than the page numbers at the bottom of each filing.

The nurse left the paperwork the way it was filled out and concluded the medical assessment. (*Id.*) When Plaintiff returned to the waiting area with the other female detainees, a male officer asked her if she had a "sex change or something," and he asked in front of the other inmates whether she "had everything done even down there." (*Id*.) She "falsely told him that she had, because she wanted th[e] unnecessary and humiliating harassment to end." (*Id.* at 5.)

Officers and Nurse then took Plaintiff back to the enclosed corner and instructed her to pull down her pants and underwear, allegedly stating:

> We need to know if you've head a sex change or not. We need to see if you have a penis or vagina. We have to protect you. We can't put you with men if you have a vagina.

(*Id.*) Plaintiff told them she was not going to pull down her underwear and that "she should not have to prove anything to them if none of the other women had to prove anything." (*Id.*) Officers responded that she was "coming up in the system as male" and "it can never be changed" no matter what she did. (*Id.*) They also told her:

> [N]ow our policy is we have to verify that you've had a sex change. If you have a penis you're going with the men. If you have a vagina, you're going with the women.

(*Id.*) When Plaintiff continued to protest, Officers stated that "they would transfer her to Parkland Hospital if she refused, that [she] would have to show her

genitals at Parkland Hospital, and that it would add hours to her incarceration." (*Id.*) They also stated, "[T]hat's our policy. You can talk to Lupe Valdez about it when you get out." (*Id.* at 6.) Plaintiff alleges that she pulled down her underwear so Officers and Nurse "could verify her genitalia and gender" because she felt "she was out of options and had no other choice." (*Id.*)

After observing Plaintiff's genitals, Officers told her that she could watch TV with the men or go into a solitary cell. (*Id.*) She was ultimately placed in her own cell, but male inmates questioned her through the door about being a "tranny" or a "real girl," made sexual comments and gestures to her, and called her derogatory names. (*Id.* at 7.) Plaintiff was eventually taken in a line with male inmates to court, where she was repeatedly humiliated by loud discussions between the officers, in front of the other inmates, about her being a man even though she looked female. (*Id.* at 8.) When she was returned to the jail, Plaintiff was taken to the male locker room and instructed to strip down and shower because "it was something everyone had to do." (*Id.*) A female officer intervened and took her to a holding cell, where she received a new wristband that identified her gender as male. (*Id.* at 9.) Plaintiff "was moved multiple times while waiting for her paperwork to be processed, each time encountering new officers and inmates that misidentified her gender." (*Id.*)

After Plaintiff was released from custody, she "filed a formal complaint regarding her treatment in the Dallas County jail." (*Id.*) On November 7, 2016, a local newspaper editor allegedly contacted Captain

Shelly Knight with the Dallas County Sheriff's Office about Plaintiff's experience at the jail, and was told that "an investigation on the incident had been started and that intake video from November 4, 2016 was pulled." (*Id.*) Captain Knight also told the editor that she "could see where some of the policy was misconstrued and other parts were not followed." (*Id.* at 10.)

On April 19, 2017, Plaintiff was arrested a second time and taken to the Dallas County jail where she was classified male and held with the male inmates. (*Id.*) Plaintiff asked the officers to contact Captain Knight because she "could explain that she should be classified and placed with females," but they refused. (*Id.*) She alleges that she was "deemed suicidal as a result of the continuous harassment she was experiencing," and was taken to the psychiatric unit where she was the only female. (*Id.*) Plaintiff was not allowed to wear clothes and was only provided "a thin paper suit to wear." (*Id.*) She was also "forced [] to shower with the men, where one of the male inmates masturbated while staring at her in the shower." (*Id.*)

On June 15, 2018, Plaintiff was arrested a third time and again booked with the male inmates at the Dallas County jail. (*Id.* at 10-11.) She returned to the psychiatric unit, but was provided clothes. (*Id.* at 11.) She alleges that she had to "shower with the men, where once again a male inmate masturbated while staring at [her] in the shower." (*Id.*) A male officer also "recorded her in the shower while she was in the psychiatric unit." (*Id.*)

Plaintiff's complaint alleges that "the policy, custom, and practice of [the County] was to perform unconstitutional genital searches to determine gender identity and place inmates based off of genitalia rather than the gender with which they identify." (*Id.* at 15.) The "unconstitutional search to 'observe' her genitals and to 'determine' [her] gender and the harassment that accompanied her incarceration was objectively unreasonable as it violated Dallas County Sheriff's Office written policy and violated [her] rights under the Fourth and Fourteenth Amendment of the United States Constitution."[3] (*Id.* at 11.) This "written policy was essentially overridden or deemed a nullity due to the actual conduct and performance of observing and searching a person's genitals when that person is believed or known to be transgender for the sole purpose of making a placement decision and ostensibly 'determining' the person's gender," and that "[t]his conduct was so common and widespread as to constitute a custom and practice" representing the policy of the County. (*Id.* at 12.) The complaint also alleges that there was "a similar incident involving a transgender female, C.W., at the Dallas County Jail in 2013," where the officers questioned her about being a "real female" and having a "working vagina," "forced her to undress,

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[3] According to the complaint, the written policy referenced by Plaintiff is titled "Dallas County Sheriff's Department General Orders/Code of Conduct Vol. I Chapter 11.2 § VII(4) 1" and provides: "Transgender/intersex/gender nonconforming individuals will not be pat searched, frisk searched or strip searched for the sole purpose of determining their genital status." (doc. 18 at 13 fn. 2.)

spread her buttocks, show the bottom of her feet, and then put on male jail attire," and placed her in the male area of the jail, where she was harassed and embarrassed in the same manner as Plaintiff. (*Id.* at 14.)

According to the complaint, the genitalia searches and gender classifications by the Dallas County jail staff also violated the Prison Rape Elimination Act (PREA) because it provides that lockup facilities "shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status." (*Id.* (citing 28 C.F.R. § 115.15(e)).) Jail staff conduct also allegedly violated the Texas Administrative Code because it requires female inmates "be separated by sight and sound from male inmates." (*Id.* (citing Tex. Admin. Code § 27 1. 1 (a)(6)).) Plaintiff contends that "[t]he failure to ensure that written policies were adequately implemented and the implementation and toleration of the above practices, policies and customs, as well as the lack of adequate training by [the County], constitutes deliberate indifference to [her] constitutional rights," and "were the moving force, and the direct cause of [her] being unconstitutionally searched and harassed." (*Id.* at 16.)

On July 22, 2019, the County moved to dismiss Plaintiff's municipal liability claim against it for failure to state a claim. (doc. 23.) She responded to the motion on August 12, 2019 (doc. 29- 30), and the County filed its reply on August 26, 2019 (doc. 34).

II. RULE 12(b)(6)

The County moves to dismiss Plaintiff's municipal liability claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. (*See* doc. 23.)[4]

Rule 12(b)(6) allows motions to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Pleadings must show specific, well-pleaded facts, not mere conclusory allegations to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). The court must accept those well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable, and 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citation omitted). Nevertheless, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id*. at 555; *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasizing that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). The alleged facts

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[4] Although the County also moves to dismiss claims against Brenda Devers, Lola Pugh, Selma Littles, Pamela Nixon, and Unknown Dallas County Employees I-II, IV-XIII, Plaintiff clarifies in her response to the motion to dismiss that she is "no longer pursuing claims against [these defendants]." (docs. 23 at 23-24; 30 at 7 fn.2.)

must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In short, a complaint fails to state a claim upon which relief may be granted when it fails to plead "enough facts to state a claim to relief that is plausible on its face." *Id*. at 570 (emphasis added).

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' "

Iqbal, 556 U.S. at 678 (citations omitted). When plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 550 U.S. at 570; *accord Iqbal*, 556 U.S. at 678 (noting that "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense").

III. 42 U.S.C. § 1983

The County argues that Plaintiff's municipal liability claim under 42 U.S.C. § 1983 should be dismissed because she has failed to plead sufficient facts to

support the existence of an official policy. (doc. 23 at 14-17.)

Section 1983 "provides a federal cause of action for the deprivation, under color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994). It "afford[s] redress for violations of federal statutes, as well as of constitutional norms." *Id*. To state a claim, a plaintiff must allege facts that show (1) he has been deprived of a right secured by the Constitution and the laws of the United States and (2) the deprivation occurred under color of state law. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005).

Municipalities, including counties and cities, may be held liable under § 1983. *Hampton Co. Nat'l Sur., LLC v. Tunica Cty.*, 543 F.3d 221, 224 (5th Cir. 2008). A municipality may be liable under § 1983 if the execution of one of its customs or policies deprives a plaintiff of his or her constitutional rights. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690–91 (1978); *Jones v. City of Hurst*, No. 4:05-CV-798-A, 2006 WL 522127, at *3 (N.D. Tex. Mar. 2, 2006) (citing *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997)). It is well-settled that a municipality cannot be liable under a theory of *respondeat superior*, however.[5] *Piotrowski v. City of Houston*, 237

[5] *Respondeat superior* [Law Latin "let the superior make answer"] is "[t]he doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the

F.3d 567, 578 (5th Cir. 2001) (citing cases). "Under the decisions of the Supreme Court and [the Fifth Circuit], municipal liability under section 1983 requires proof of three elements: a policy maker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Id*. (citing *Monell*, 436 U.S. at 694); *see also Valle v. City of Houston*, 613 F.3d 536, 541-42 (5th Cir. 2010); *Cox v. City of Dallas*, 430 F.3d 734, 748 (5th Cir. 2005).[6]

"Official policy" is defined as:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the

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scope of the employment or agency." *Respondeat Superior*, Black's Law Dictionary (10th ed. 2014).

[6] Plaintiff identifies Sheriffs as the policymakers, and the County does not challenge whether she has sufficiently identified a policymaker. (*See* doc. 23 at 11, 20.)

> municipality liable under § 1983 unless they execute official policy as above defined.

Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984) (per curiam); *accord Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002). Where a policy is facially constitutional, a plaintiff must demonstrate that it was promulgated with deliberate indifference to known or obvious consequences that constitutional violations would result. *Piotrowski*, 237 F.3d at 579-80 & n.22; *accord Peterson v. City of Fort Worth*, 588 F.3d 838, 849-50 (5th Cir. 2009), *cert. denied*, 562 U.S. 827 (2010). "Deliberate indifference of this sort is a stringent test, and 'a showing of simple or even heightened negligence will not suffice' to prove municipal culpability." *Piotrowski*, 237 F.3d at 579 (citation omitted) (stressing that "*Monell* plaintiffs [need] to establish both the causal link ('moving force') and the City's degree of culpability ('deliberate indifference' to federally protected rights)").

"The description of a policy or custom and its relationship to the underlying constitutional violation . . . cannot be conclusory; it must contain specific facts." *Spiller v. City of Texas City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997); *accord Piotrowski*, 237 F.3d 578-79. "[A] complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) (citation omitted). In *Spiller*, the Fifth Circuit found the

allegation that "[an officer] was acting in compliance with the municipality's customs, practices or procedures" insufficient to adequately plead a claim of municipal liability. 130 F.3d at 167 (citing *Fraire v. City of Arlington*, 957 F.2d 1268, 1278 (5th Cir. 1992)).

A. Search/Classification

The County argues that Plaintiff failed to plead sufficient facts to show an official policy of improperly searching and classifying transgender inmates, as evidenced by custom. (*See* doc. 23 at 14-15.)

1. Custom

A plaintiff basing a municipal liability claim on an alleged " 'custom' that has not been formally approved by an appropriate decision-maker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Bd. of County Comm'rs*, 520 U.S. at 404. A plaintiff may prove the existence of a custom by alleging "a pattern of abuses that transcends the error made in a single case." *Piotrowski*, 237 F.3d at 582; *see also Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 169 (5th Cir. 2010) (explaining a plaintiff may prove the existence of a custom by showing a pattern of unconstitutional conduct by municipal employees).

The Fifth Circuit has explained that "[w]here prior incidents are used to prove a pattern, they 'must have occurred for so long or so frequently that the course of

conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees.' " *Peterson*, 588 F.3d at 850 (quoting *Webster*, 735 F.2d at 842). "A pattern requires similarity and specificity." *Id.* at 851. It "also requires 'sufficiently numerous prior incidents,' as opposed to isolated instances." *Id.* (quoting *McConney v. City of Houston*, 863 F.2d 1180, 1184 (5th Cir. 1989)); *see also Fuentes v. Nueces Cty.*, 689 F. App'x 775, 778 (5th Cir. 2017) (quoting *McConney*, 863 F.2d at 1184). "Although there is no rigid rule regarding numerosity, [the Fifth Circuit has found] that 27 prior incidents of excessive force over a three-year period . . . and 11 incidents offering 'unequivocal evidence' of unconstitutional searches over a three-year period . . . were not sufficiently numerous to constitute a pattern." *Fuentes*, 689 F. App'x at 778 (internal citations omitted); *compare Peterson*, 588 F.3d at 850-52 (finding 27 incidents over three years insufficient), *and Pineda*, 291 F.3d at 329 (finding 11 incidents over three years insufficient), *with Harper v. City of Dallas*, No. 3:14-CV-02647-P, 2015 WL 13729793, at *2-3 (N.D. Tex. Aug. 13, 2015) (determining that 14 shootings in the *same year* as the shooting at issue, along with other facts about DPD shootings, were sufficient to "support a reasonable inference that a persistent, widespread practice of excessive force" existed), *and Flanagan v. City of Dallas*, 48 F. Supp. 3d 941, 954 (N.D. Tex. 2014) (finding that "[w]hile it was a close call," 12 shootings in the *same year* as the shooting at issue, along with other facts regarding prior shootings, were sufficient to infer

a "persistent, widespread practice by DPD officers" at the motion to dismiss stage).

Here, Plaintiff's complaint alleges that there "was a widespread practice among the Dallas County jail to conduct genital searches to determine gender identity and to place inmates based off of genitalia rather than the gender with which they identify when confronted with a transgender inmate in the Dallas County jail," and that it "was so widespread as to constitute the policy and custom of [the County]." (doc. 18 at 21.) Although she points to her three prior detentions at the Dallas County jail and a 2013 incident involving C.W., she does not plead similar specific instances of genital searches for purposes of placement. She alleges that she had to show her genitalia when she was booked in 2016, but does not allege that she was subjected to a search when she was booked in 2017 and 2018. (*See* doc. 18 at 3-11.) She alleges that the 2013 incident with C.W. involved a transgender female forced to undress and spread her buttocks prior to being given male attire; she does not specifically allege that C.W. was subjected to a genital search to verify gender. (*See id.* at 14.) Plaintiff has alleged only a single incident, which is insufficient to infer a custom. *See World Wide Street Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 753-54 (5th Cir. 2009); *Pineda*, 291 F.3d at 329; *Piotrowski*, 237 F.3d at 581.

Even assuming for purposes of this motion only that Plaintiff's four examples over a five-year period between 2013 and 2018 are sufficiently similar and specific enough, they are not sufficiently numerous

under Fifth Circuit guidance. *See Fuentes*, 689 F. App'x at 778. At best, Plaintiff has only alleged two instances of genital searches, and four instances of gender classifications based on genitalia at the Dallas County jail. She has therefore not plausibly alleged a custom sufficient to support a claim for municipal liability. *See World Wide Street Preachers Fellowship*, 591 F.3d at 753-54; *Pineda*, 291 F.3d at 329; *Piotrowski*, 237 F.3d at 581; *Fuentes*, 689 F. App'x at 778.

Plaintiff argues that she has sufficiently pleaded a policy because she has alleged that the County's employees expressly acknowledged the policy and attributed it to a policy maker, Sheriff Valdez. (doc. 30 at 13.) Her complaint alleges that Officers and Nurse twice acknowledged a policy to search genitalia for purposes of determining placement that they impliedly attributed to Sheriff Valdez, and that Captain Knight stated to the media that she "could see where some of the policy was misconstrued and other parts were not followed." (*See* doc. 18 at 5-6, 10.) "[I]t is true that '[a]n official policy or custom can be gleaned from . . . public acknowledgments of failure on the part of [a] City[,] couple[d] with assertions by various Individual Defendants that they were simply doing as they were taught and trained.'" *Bryan v. City of Dallas*, 188 F. Supp. 3d 611, 618 (N.D. Tex. 2016) (quoting *Cook v. City of Dallas*, 3:12-CV-3788-P, 2013 WL 11084496, at *8 (N.D.Tex. Oct. 28, 2013)). In *Bryan*, the plaintiffs sued the city under § 1983 because it maintained "a policy, practice, and custom to delay and/or fail to provide assistance to victims who suffered domestic

violence, are racial minorities, and/or were attacked in socioeconomically deprived areas" and they had been harmed as a result. 188 F. Supp.3d at 616. They pointed to a letter from a 9-1-1 operator in another case who "expound[ed] upon her training, in an effort to demonstrate how she acted appropriately and yet still was involved in a 911 urgent response lasting roughly 50 minutes." *Id.* at 618 (quoting *Cook*, 2013 WL 11084496, at *8 (alterations omitted)). They also referenced public statements by the city's official policy makers acknowledging that prior incidents where 9-1-1 dispatchers failed to promptly respond to calls involving racial minorities or socioeconomically deprived areas were the result of institutional failures. *Bryan*, 188 F. Supp.3d at 618. The court ultimately found that the plaintiffs' allegations regarding a non-policymaker's statements that her actions were based upon her training (i.e., the alleged policy) and the admissions of institutional failures by the official policymakers were insufficient to plead an official policy to "inch[] past the Rule 12(b)(6) threshold to survive dismissal" because the policymakers' admitted institutional failures were far less specific than those made in *Cook*. *Id.* at 618-199 (quoting *Cook*, 2013 WL 11084496, at *8); *compare Groden v. City of Dallas*, 826 F.3d 280, 286 (5th Cir. 2016) (holding that the plaintiff's allegations that the city's official spokesman publicly announced the new policy of "cracking down" on street vendors and gave media interviews sufficiently plead an official policy made by the policymaker)).

Here, Plaintiff references three statements by County employees referring to a policy impliedly attributed to Sheriff Valdez, two of which were made by the same persons, and a third that did not specifically reference the alleged policy. Even viewing those allegations in the light most favorable to Plaintiff, however, she pleads no facts that "adequately connected a policy to the policymaker." *Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 271 (5th Cir. 2019) (*citing Groden*, 826 F.3d at 286). In contrast to *Bryan* and *Cook*, she pleads no institutional admissions or statements by a policymaker, only by non-policymaking employees. The wrongful conduct of an employee without policymaking authority cannot be considered a municipal policy. *Collins v. City of Harker Heights*, 503 U.S. 115, 121 (1992). Because Plaintiff only relies on statements from non-policymaking employees to show a policy or custom of searching genitalia for purposes of transgender detainee placement, she has not sufficiently alleged an official policy, as evidenced by a persistent widespread practice so common and well settled as to constitute a custom that fairly represents municipal policy

2. Constructive Knowledge

The County also argues that Plaintiff "has failed to plead any facts from which the knowledge of a custom or policy by a specific policymaker can reasonably be inferred." (*See* doc. 23 at 16-17.)

A municipality "cannot be liable for an unwritten custom unless '[a]ctual or constructive knowledge of such custom' is attributable to a city policymaker." *Pena v. City of Rio Grande City*, 879 F.3d 613, 623 (5th Cir. 2018) (citing *Hicks–Fields v. Harris Cty.*, 860 F.3d 803, 808 (5th Cir. 2017)). To establish municipal liability under § 1983 based on an alleged "persistent widespread practice or custom that is so common it could be said to represent municipal policy, actual or constructive knowledge of such practice or custom must be shown." *Malone v. City of Fort Worth*, 297 F. Supp. 3d 645, 654 (N.D. Tex. 2018) (citing *Hicks–Fields*, 860 F.3d at 808). In the Fifth Circuit, "[a]ctual knowledge may be shown by such means as discussion at council meetings or receipt of written information." *Hicks–Fields*, 860 F.3d at 808 (quoting *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984)). "Constructive knowledge may be attributed to the governing body on the ground that it would have known of the violations if it had properly exercised its responsibilities, as, for example, where the violations were so persistent and widespread that they were the subject of prolonged public discussion or a high degree of publicity." *Id.*

The complaint alleges that "either Valdez or [] Brown served as policy maker for Dallas County in relation to the policies, written and unwritten, regarding detainees held in the custody of the Dallas County Sheriff's Department and confined in the Dallas County jail." (doc. 18 at 26.) Even if Plaintiff had alleged facts of a widespread practice of genitalia

searches for gender classification by jail staff at the Dallas County jail, she has not alleged facts to show "'actual or constructive knowledge of such custom' by the municipality or the official who had policymaking authority." *Hicks–Fields*, 860 F.3d at 808 (citing *Webster*, 735 F.2d at 841); *see, e.g.*, *Singleton v. Champagne*, No. CV 17-17423, 2019 WL 917728, at *4 (E.D. La. Feb. 25, 2019) (dismissing municipal liability claim as bare allegations that the sheriff "maintained an atmosphere of lawlessness" failed to support claim that she had "actual or constructive knowledge of any alleged practices or customs that allegedly violated Plaintiffs' constitutional rights"). There are no allegations that issues involving transgender detainees at the Dallas County jail were considered at an official meeting attended by Sheriffs, or that information about the purported custom had been directed to Sheriffs. *See Hicks–Fields*, 860 F.3d at 808; *see also Pinedo v. City of Dallas*, No. 3:14-CV-0958-D, 2015 WL 221085, at *7 (N.D. Tex. Jan. 15, 2015) (finding allegations that police custom of using excessive force "were known by the City of Dallas, the City Attorneys, the City Manager, the City Council and the Chief of Police" were "insufficient to permit the court to draw the reasonable inference that the City Council-the City's final policymaker-can be charged with actual or constructive knowledge of the alleged custom of tolerating the unconstitutional use of excessive or deadly force").[7] Plaintiff has failed to

[7] Plaintiff's response to the motion to dismiss appears to argue that Sheriffs had been "aware of the violative behavior of its employees" because she had "filed a formal complaint regarding her treatment in the Dallas County jail, a Captain with the Dallas

allege facts that any policymaker had constructive knowledge of a custom of searching genitalia for purposes of determining placement of transgender detainees at the Dallas County jail.

B. Failure to Train, Supervise, or Discipline[8]

The County argues that Plaintiff's claims for failure to train, supervise, and discipline should be dismissed because she fails "to plead sufficient facts to permit a rational inference to support an official adopted or promulgated policy regarding failure to train," and she fails "to plead sufficient facts to permit

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County Sheriff's Office was specifically notified of [her] treatment, and an investigation of the incident was conducted involving reviewing video of employees mistreating [her]." (*See* doc. 30 at 21.) Even if considered part of the complaint, these allegations are insufficient to show Sheriffs' actual or constructive knowledge. *See Hatcher v. City of Grand Prairie*, No. 3:14-cv-432-M, 2014 WL 3893907, at *6 (N.D. Tex. Aug. 6, 2014) (allegations of actual or constructive knowledge based on multiple complaints and lawsuits that injuries were resulting from officers' misuse of force were no more than conclusory allegations); *compare Fennell v. Marion Indep. Sch. Dist.*, 963 F. Supp. 2d 623, 643-43 (W.D. Tex. 2013) (finding plaintiffs' presentation of a grievance to the school's board of trustees where "they described . . . the same incidents that they allege in [their complaint]" was sufficient to show that school board had knowledge of the impermissible treatment of plaintiffs).

[8] Although Plaintiff separately alleges claims for failure to train and failure to supervise or discipline against the County, (doc. 18 at 21-26), the elements required to prove a claim under either theory are the same. *E.G. v. Bond*, No. 1:16-CV-068-C, 2017 WL 129019, at *3 (N.D. Tex. Jan. 13, 2017) (citing cases). These claims are therefore considered together.

a rational inference of policymaker deliberate indifference on her failure to train claim." (doc. 23 at 17-21.)

1. Policy

"[W]hen a municipal entity enacts a facially valid policy but fails to train its employees to implement it in a constitutional manner, that failure constitutes 'official policy' that can support municipal liability if it 'amounts to deliberate indifference.'" *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 624 (5th Cir. 2018) (citing *City of Canton v. Harris*, 489 U.S. 378, 388 (1989); *see Peterson*, 588 F.3d at 849 (citing *Brown v. Bryan Co.*, 219 F.3d 450, 458 (5th Cir. 2000), *cert. denied*, 131 S. Ct. 66 (2010)) ("The failure to train can amount to a policy if there is deliberate indifference to an obvious need for training where citizens are likely to lose their constitutional rights on account of novices in law enforcement."). Nevertheless, "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61, (2011).[9] To establish municipal liability based on a failure to train in the Fifth Circuit,

[9] Courts recognize that even officers who are adequately trained, supervised, and disciplined "'occasionally make mistakes,'" and "'the fact that they do says little about the training,'" supervision, or disciplinary policies and procedures of a city. *E.G. by Gonzalez v. Bond*, No. 1:16-CV-0068-BL 2017 WL 3493124, at *5 (quoting *City of Canton*, 489 U.S. at 391), *adopted by* 2017 WL 3491853 (N.D. Tex. Aug. 14, 2017). Rather, the "law requires that the officer's shortcomings resulted from the faulty training program (or faulty supervision or discipline procedures) to impose municipal liability for an alleged failure to act." *Id*.

the plaintiff must show (1) inadequate training procedures; (2) that inadequate training caused the constitutional violation; and (3) the deliberate indifference of municipal policymakers. *Quinn v. Guerrero*, 863 F.3d 353, 365 (5th Cir. 2017) (quoting *Pineda*, 291 F.3d at 332). "In addition, for liability to attach based on an 'inadequate training' claim, a plaintiff must allege with specificity how a particular training program is defective." *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005) (citing *Benavides v. County of Wilson*, 955 F.2d 968, 973 (5th Cir. 1992)).

The complaint generally alleges that the County "failed to provide constitutionally adequate training and supervision regarding the use of searches to determine gender and placement of transgender inmates." (doc. 18 at 21.) Plaintiff has not identified a specific training policy and makes only conclusory allegations that the County's training policies or procedures were inadequate. *See Roberts*, 397 F.3d at 293; *see e.g.*, *Edwards v. Oliver*, No. 3:17-CV-01208-M-BT, 2019 WL 4603794, at *9 (N.D. Tex. Aug. 12, 2019), *adopted by* 2019 WL 4597573 (N.D. Tex. Sept. 23, 2019) (finding allegations that "Defendant the City of Balch Springs under the direction of the Balch Springs City Council and Chief Haber maintained a policy of deficient training of its police force in the use of force, including the proper use of deadly force and dealing with individuals during a raid of an event" was insufficient to plead an inadequate training policy); *Rodriguez v. Parker*, No. 1:15-CV-181-P-BL, 2016 WL 4179798, at *4 (N.D. Tex. Apr. 8, 2016), *adopted by* 2016 WL 4184437 (N.D. Tex.

Aug. 5, 2016) (dismissing failure to train claim as "Rodriguez makes only bare, conclusory allegations that Parker failed to train Wynn in the use of force and she make no attempt to specify how Wynn might have been trained differently"). "This absence of 'minimal factual allegations' that ultimately could support a showing that [the County's] training procedures were inadequate – and, further, inadequate as a result of deliberate indifference – requires rejection of this theory of municipal liability." *Montgomery v. Hollins*, No. 3:18-CV-1954-M-BN, 2019 WL 2424053, at *7 (N.D. Tex. May 8, 2019), *adopted by* 2019 WL 2422493 (N.D. Tex. June 10, 2019). Because Plaintiff has failed to allege even the existence of an allegedly inadequate training policy or procedure, she has failed to sufficiently plead the first element that "a training policy or procedure was inadequate." *Zarnow*, 614 F.3d at 170 (quoting *Roberts*, 397 F.3d at 293).

2. Deliberate Indifference

Even if Plaintiff had pointed to an inadequate training policy, she fails to allege facts showing deliberate indifference. As noted, "[t]he failure to train [or supervise] must reflect a 'deliberate' or 'conscious' choice by a municipality." *World Wide Street Preachers Fellowship*, 591 F.3d at 756 (quoting *City of Canton*, 489 U.S. at 389) (internal quotation marks omitted). To show that the municipality acted with deliberate indifference, a plaintiff must demonstrate "at least a pattern of similar violations arising from training that is so clearly inadequate as to be obviously likely to result

in a constitutional violation." *Burge v. St. Tammany Parish*, 336 F.3d 363, 370 (5th Cir. 2003); *see Flanagan v. City of Dallas*, 48 F. Supp. 3d 941, 956 (N.D. Tex. 2014) (quoting *Kitchen v. Dallas Cty.*, 759 F.3d 468, 484 (5th Cir. 2014)) (stating that the most common approach to asserting a failure to train claim is to demonstrate a pattern of similar violations that "were 'fairly similar to what ultimately transpired' when the plaintiff's own constitutional rights were violated."). As discussed, the alleged pattern of prior incidents require "similarity and specificity" and must be "sufficiently numerous." *See Fuentes*, 689 F. App'x at 778; *Peterson*, 588 F.3d at 851.

Here, Plaintiff generally alleges that the defendants were "deliberately indifferent to her safety and dignity" because they knew or should have known that the County's employees would have to deal with processing transgender detainees on a regular basis, and that the situation "had the real potential for injury and/or serious harm to a citizen," but they "provided no training or inadequate training to employees on how to deal with this situation." (doc. 18 at 25.) She claims that the County's "practices, policies, customs and/or the constitutionally inadequate training were the moving forces behind the constitutional violations that resulted in [her] mental/emotional injuries." (*Id.*)[10] In support, Plaintiff again points to the three times she

[10] She also asserts claims against Sheriffs in their individual capacities under § 1983 for supervisory liability and failure to train. (*See* doc. 18 at 20-21.)

was booked into the Dallas County jail and the 2013 incident involving C.W. (*See id.* at 21.)

As noted, four incidents over five years are not sufficient to show a pattern of constitutional violations. *See Fuentes*, 689 F. App'x at 778; *see, e.g.*, *Pinedo v. City of Dallas*, No. 3:14-CV-0958-D, 2015 WL 5021393, at *9 (N.D. Tex. Aug. 25, 2015) (noting "the occurrence of only two prior incidents involving the use of excessive force against mentally ill individuals is insufficient to permit the court reasonably to infer that there was a pattern of violations such that the City Council can be said to have been deliberately indifferent to the need for additional training"). Because these incidents are distinguishable from each other and are not sufficiently numerous to establish a pattern, they are insufficient to show a custom or policy supporting municipal liability under the theories of failure to train, supervise, or discipline. *See Lopez-Rodriguez v. City of Levelland, Tex.*, 100 F. App'x 272, 274 (5th Cir. 2004); *see also Fuentes*, 689 F. App'x at 778.[11]

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[11] There is an "extremely narrow" single incident exception in the context of failure-to-train claims. *Hobart v. Estrada*, 582 F. App'x 348, 358 (5th Cir. 2014). Under that exception, "§ 1983 liability can attach for a single decision not to train an individual officer even where there has been no pattern of previous constitutional violations" in "extreme circumstances." *Brown*, 219 F.3d at 459; *Khansari v. City of Houston*, No. H-13-2722, 2015 WL 6550832, at *16 (S.D. Tex. Oct. 28, 2015) ("The facts of *Brown* demonstrate that single violation liability applies only in extreme circumstances." (citing *Brown*, 219 F.3d at 452-48)). To show liability, "a plaintiff must prove that the highly predictable consequence of a failure to train would result in the specific injury suffered, and that the failure to train represented the moving

Moreover, Plaintiff makes only conclusory allegations regarding the County's alleged failures, and her allegations do not suffice to show that the County's policymakers were repeatedly put on notice that additional training or supervision for jail staff was needed. She alleges that she filed a formal complaint after the 2016 incident, and that Captain Knight received notice of that dispute, (*see* doc. 18 at 9-10), but these allegations are insufficient to show that the purported policymakers had notice of the 2016 incident or any other incident. Additionally, she alleges no facts in support of her assertion that the County's alleged failures reflect deliberate indifference on part of its policymakers. (*See id.* at 22.)

Even accepting her well-pleaded facts as true and viewing them in the light most favorable to her, as the Court must, Plaintiff has failed to nudge her failure to

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force behind the constitutional violation." *Sanders–Burns v. City of Plano*, 594 F.3d 366, 381 (5th Cir. 2010). To the extent Plaintiff relies on this exception based on her allegations the defendants "provided no training or inadequate training to employees on how to deal with" transgender detainees, she does not allege any facts in support of her conclusory allegations. (*See* doc. 18 at 25.) Additionally, the exception would not apply because she does not claim that the County's employees "w[ere] provided no training whatsoever." *Pena v. City of Rio Grande City*, 879 F.3d 613, 624 (5th Cir. 2018) ("Our caselaw suggests, however, that the exception is generally reserved for those cases in which the government actor was provided no training whatsoever"); *see McClendon v. City of Columbia*, 258 F.3d 432, 442-43 (5th Cir. 2001), *vacated for reh'g en banc*, 285 F.3d 1078 (5th Cir. 2002), *decision on rehearing en banc*, 305 F.3d 314 (5th Cir. 2002) (noting "there is a difference between a complete failure to train . . . and a failure to train in one limited area.").

train, supervise, or discipline claim across the line from conceivable to plausible. *See Twombly*, 550 U.S. at 555. She has failed to plead sufficient facts to support a finding of municipal liability under § 1983.[12]

[12] Plaintiff sues the Sheriffs in their official capacities. (*See* doc. 18 at 1-2.) An official capacity claim is merely another way of pleading an action against the entity of which the individual defendant is an agent. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Plaintiff's § 1983 claims against Sheriffs in their official capacities are therefore essentially claims against their government employer, the County. *See Graham*, 473 U.S. at 165. Because Plaintiff has failed to state a claim for municipal liability against the County, the official capacity claims against Sheriffs under § 1983 likewise fail. *See Beavers v. Brown*, No. 3:13-CV-1395-B, 2013 WL 6231542, at *3 (N.D. Tex. Dec. 2, 2013) (finding that claims against county employees in their official capacities should be dismissed where the plaintiff failed to state a claim for municipal liability).

IV. RECOMMENDATION

The County's motion should be **GRANTED**,[13] and Plaintiff's claims against it should be **DISMISSED with prejudice**.[14]

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[13] The County seeks attorney's fees in its motion to dismiss. (*See* doc. 23 at 24.) In a suit to enforce § 1983, the court may, in its discretion, grant the prevailing party reasonable attorneys' fees and related expenses. *See* 42 U.S.C. § 1988(b). While a prevailing plaintiff in a § 1983 action is usually entitled to an award of fees under § 1988, "prevailing defendants cannot recover § 1988 fees without demonstrating that the plaintiff's underlying claim was frivolous, unreasonable or groundless." *Merced v. Kasson*, 577 F.3d 578, 595 (5th Cir. 2009) (citation omitted). To the extent that the County seeks attorney's fees, it may file a postjudgment request under Federal Rule of Civil Procedure 54(d)(2) that also complies with the applicable Local Civil Rules for the Northern District of Texas.

[14] Plaintiff's response to the motion to dismiss "requests the opportunity to amend and allege additional facts to clarify [her] claims" if her allegations are found deficient. (doc. 30 at 24-25.) A party is not entitled to remedy a pleading deficiency simply by seeking leave to amend in response to a motion to dismiss, however. *Spiller*, 130 F.3d at 167. When a party opposes a motion to dismiss on its merits while also asking for leave to amend should dismissal be deemed proper, the party "may not avoid the implications" of her choices. *Id*. In addition, Plaintiff has not sought leave to amend in accordance with LR 15.1, and her request may be denied on this basis. *Shabazz v. Franklin*, 380 F. Supp. 2d 793, 798 (N.D. Tex. 2005) (accepting recommendation). The request to amend is denied without prejudice to filing a compliant motion.

SO RECOMMENDED on this 27th day of February 2020.

/s/ Irma Carrillo Ramirez
IRMA CARRILLO RAMIREZ
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VALERIE JACKSON, *Plaintiff*, v. LUPE VALDEZ, MARIAN BROWN, SAMUEL JOSEPH, LIZYAMMA SAMUEL, UNKNOWN DALLAS EMPLOYEE III, and DALLAS COUNTY, TEXAS, *Defendants*.	§ § § § § § § § § § §	Civil Action No. 3:18-CV-02935-X

MEMORANDUM OPINION AND ORDER

(Filed Nov. 22, 2019)

In this action for deprivation of rights under 42 U.S.C. § 1983, the Court considers plaintiff Valerie Jackson's motion to recuse and brief in support [Doc. No. 40], filed on September 19, 2019. Jackson is a member of the transgender community and is suing Dallas County and its employees and agents for their alleged violations of Jackson's constitutional rights related to Jackson's gender identity. In the motion, Jackson claims that "the judge of this court has a bias/prejudice against her"[1] because of Jackson's gender identity. Jackson also believes that "any person

[1] Plaintiff's Motion to Recuse and Brief in Support, at 1 [Doc. No. 40] (Motion to Recuse).

would reasonably question and harbor legitimate doubts as to this Court's impartiality as to the Plaintiff and her case."[2] No defendant responded to the motion. After careful consideration, and as explained more fully below, the Court **DENIES** the motion.

I.

The Court begins by providing the legal standards that Jackson must satisfy under each statute to make a sufficient showing for recusal, as well as summarizing the arguments Jackson makes for recusal under each statute.

i.

Jackson first moves for recusal under 28 U.S.C. § 144. Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be

[2] *Id.* at 5.

> shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.[3]

Section 144 "applies only to charges of actual bias."[4] When considering a motion under section 144, the Fifth Circuit has specified that the "judge must pass on the legal sufficiency of the affidavit, but may not pass on the truth of the matter alleged."[5] There are three requirements for an affidavit to be legally sufficient: "(1) the facts must be material and stated with particularity; (2) the facts must be such that if true they would convince a reasonable man that a bias exists; and (3) the facts must show the bias is personal, as opposed to judicial, in nature."[6] The alleged bias must be a "personal bias and prejudice against the party or in favor of the adverse party."[7]

Jackson's affidavit asserts that this judge, based on "positions advocated by the Court prior to becoming a federal judge," holds a bias or prejudice against Jackson "as a member of the transgender community

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[3] 28 U.S.C. § 144.

[4] *Harmon v. Dallas Cty.*, No. 3:13-CV-2083-L, 2017 WL 3394724 at *6 (N.D. Tex. Aug. 8, 2017) (Lindsay, J.) (citing *Henderson v. Dep't of Pub. Safety & Corr.*, 901 F.2d 1288, 1296 (5th Cir. 1990)).

[5] *Henderson*, 901 F.2d at 1296 (citing *Davis v. Bd. of Sch. Comm'rs of Mobile Cnty.*, 517 F.2d 1044, 1051 (5th Cir. 1975)).

[6] *Id.* (citing *Parrish v. Bd. of Comm'rs of Ala. State Bar*, 524 F.2d 98, 100 (5th Cir. 1975)).

[7] *Parrish*, 524 F.2d at 100.

asserting my constitutional rights."[8] Jackson attempts to support this claim with examples of this judge's legal advocacy in the course and scope of his prior employment with the State of Texas, including litigation, panel discussions, opinion letters, state congressional testimony, and press releases. Specifically, Jackson claims that:

- "[W]hile a Deputy Attorney General for the State of Texas, the judge presiding over my case was involved in a lawsuit by the State of Texas to restrict the rights of transgender people."[9]
- In June 2016, "the presiding judge participated in an Attorney General opinion concluding that the Fort Worth, Texas school district violated state law in adopting a policy to implement the Obama administration's guidance permitting transgender students to use the bathroom of their gender identity," and that the "opinion was viewed as seeking to give states like Texas a license to discriminate against transgender students."[10]
- In an October 2015 panel discussion, "the presiding judge over my case defended the right of county clerks to refuse to issue marriage

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[8] Affidavit of Valerie Jackson, at 2 [Doc. No. 40-1] (Affidavit).

[9] *Id.* at 2.

[10] *Id.* at 2–3. To support the assertion that this Texas Attorney General Opinion was viewed in this way, Jackson cites to letters from the Alliance for Justice and The Leadership Conference on Civil and Human Rights, who wrote the letters to express opposition to this judge's confirmation to this Court.

licenses to same-sex couples following the United States Supreme Court's opinion in *Obergefell v. Hodges*."[11]

- "The judge of this Court participated in a June 2015 Attorney General opinion making similar points written in the wake of the *Obergefell* decision, referring with apparent skepticism to '[t]his newly minted federal constitutional right to same-sex marriage.' "[12]
- "The judge presiding over my case has also testified before the Texas legislature supporting legislation to protect adoption agencies to place children with same-sex couples."[13]
- "[T]he judge of this Court supported the judicial nomination of Jeffrey Mateer, who was nominated in 2017 to preside over a different Texas federal court, but who was withdrawn in the wake of public outcry for such reasons as a comment that transgender children were part of 'Satan's plan.' " And although "claiming not to have known of Mr. Mateer's statement that transgender children were part of 'Satan's plan', the judge of this Court does not appear to have disavowed such a belief nor did he publicly withdraw his support for Mr. Mateer."[14]

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[11] *Id.* at 3.

[12] *Id.*

[13] *Id.* at 4.

[14] *Id.* at 4–5.

In addition to citing examples from this judge's prior employment, Jackson cited this judge's written answers to a questionnaire during his federal judicial confirmation process:

- "[T]he judge of this Court refused to answer whether the Fourteenth Amendment requires that states treat transgender people the same as those who are not transgender."[15]
- "The judge of this Court also refused to answer a question as to whether history and tradition should not limit the rights afford to LGBT individuals, other than to say he would apply binding precedent."[16]
- "The judge of this Court also refused to answer whether he believes that the government has a compelling interest in eradicating discrimination against LGBT people, other than to reference an irrelevant answer to another question."[17]

Because of these examples, Jackson claims that "it is clear the judge presiding over my case has a bias/prejudice against me as a transgender individual."[18] In this way, Jackson attempts to support the motion for recusal under section 144.

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[15] *Id.* at 4.

[16] *Id*.

[17] *Id*.

[18] *Id.* at 5.

ii.

Jackson also moves for recusal under 28 U.S.C. § 455(a). Section 455(a) requires any United States judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[19]

The test for recusal under section 455(a) "is an objective one."[20] Jackson must show that, "the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality."[21] A reasonable man is sometimes described as "the average person on the street."[22] But the Fifth Circuit adds that a court ought to consider "how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person."[23]

Guided by this objective standard, the analysis of a section 455(a) claim is "fact driven" and "must be guided, not by comparison to similar situations

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[19] 28 U.S.C. § 455(a).

[20] *Harmon*, 2017 WL 3394724 at *6 (citing *IQ Prods. Co. v. Pennzoil Prods. Co.*, 305 F.3d 368, 378 (5th Cir. 2002)).

[21] *IQ Prods. Co.*, 305 F.3d at 378 (citing *Potashnick v. Port City Cons. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980)).

[22] *Potashnick*, 609 F.2d at 1111.

[23] *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995) (citing *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990)); *see Republic of Panama v. Am. Tobacco Co., Inc.*, 265 F.3d 299, 302 (5th Cir. 2001) ("In order to determine whether a court's impartiality is reasonably in question, the objective inquiry is whether a well-informed, thoughtful and objective observer would question the court's impartiality." (quoting *Trust Co. v. N.N.P.*, 104 F.3d 1478, 1491 (5th Cir. 1997))).

addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue."[24] The district judge's decision to disqualify himself is within his "sound discretion" and is "reviewed for abuse of discretion."[25]

Based on the affidavit's examples listed above, Jackson adds and concludes, "I do not believe, nor do I think any reasonable person could believe, that the judge would preside over my case in an impartial manner."[26] In so doing, Jackson attempts to support the motion for recusal under section 455(a).

II.

Guided by these standards, the Court considers Jackson's arguments under sections 144 and 455(a).

i.

Contrary to the Fifth Circuit's requirements for legal sufficiency of claims under section 144, the facts alleged in Jackson's affidavit neither evince a personal

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[24] *U.S. v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999) (citing *Jordan*, 49 F.3d at 157).

[25] *In re Deepwater Horizon*, 824 F.3d 571, 579–80 (5th Cir. 2016); *see also Breitling v. LNV Corp*. No. 3:15-CV-0703-B, 2016 WL 4126393, at *1 (N.D. Tex. Aug. 3, 2016) (Boyle, J.) ("The Fifth Circuit has noted that, despite the statute's mandatory language, a decision to recuse under § 455(a) is discretionary." (citing *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997))).

[26] Affidavit, at 5.

bias nor would convince a reasonable person that a personal bias exists.

First, Jackson's affidavit cites examples of this judge's past legal advocacy in the course and scope of employment for the State of Texas—litigation, panels, opinion letters, state congressional testimony, and press releases. Never mind that these statements were on behalf of a client and not statements of personal views. But Jackson also misconstrues the positions that this judge advocated on behalf of his client. The Court responds to each allegation in turn:

- Jackson claims that the Texas Attorney General's litigation over the Department of Justice and Department of Education's "Dear Colleague Letter," which added "gender identity" as a category to Title IX, was "a lawsuit by the State of Texas to restrict the rights of transgender people."[27] But a different judge of this Court determined the case was not about policy but was actually about administrative law procedures and statutory interpretation.[28]

- Jackson claims that one Texas Attorney General Opinion "was viewed as seeking to give states like Texas a license to discriminate

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[27] *Id.* at 2.

[28] *See Texas v. United States*, 201 F. Supp. 3d 810, 815 (N.D. Tex. 2016) (O'Connor, J.) ("The resolution of this difficult policy issue is not, however, the subject of this Order. Instead, the Constitution assigns these policy choices to the appropriate elected and appointed officials, who must follow the proper legal procedure.").

against transgender students."[29] Opponents to this judge's confirmation may have *viewed* the letter in any number of ways. But the Texas Attorney General Opinion only interpreted the State's binding law on local agencies and officials regarding parental involvement and the role of school boards.[30]

- Jackson claims that this judge, in a panel discussion and in another Texas Attorney General Opinion, "defended the right of county clerks to refuse to issue marriage licenses to same-sex couples following the United States Supreme Court's opinion in *Obergefell v. Hodges*."[31] This judge, then an attorney for the State of Texas, did not defend this as an absolute right. Instead, he reiterated the holding of the Texas Attorney General Opinion that the appropriate analysis is a "factually specific inquiry" balancing several competing constitutional and statutory rights.[32] Three

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[29] Affidavit, at 2–3. To support the assertion that this Texas Attorney General opinion was viewed in this way, Jackson cites to letters from the Alliance for Justice and The Leadership Conference on Civil and Human Rights, who wrote the letters to oppose this judge's confirmation to this Court.

[30] *See* Op. Tex. Att'y Gen. No. KP-0100 (2016) (explaining that the letter was intended to answer "whether the 'Transgender Guidelines' adopted by the Fort Worth Independent School District ('FWISD') superintendent violate chapter 26 of the Education Code and whether the superintendent had authority to adopt them without adoption by a school board vote and without public comment").

[31] Affidavit, at 3.

[32] *See* Op. Tex. Att'y Gen. No. KP-0025 (2015) ("The Supreme Court has now declared a right under the Fourteenth Amendment

days after this Texas Attorney General Opinion was issued, the Fifth Circuit recognized that the religious liberties of government officials and employees continue to exist after *Obergefell*.[33] The accurate prediction of court rulings is not a ground for recusal.

- Jackson claims that this judge "testified before the Texas legislature supporting legislation to protect adoption agencies to place children with same-sex couples."[34] Actually, this judge, then as an attorney for the State of Texas, testified only as a neutral resource witness to answer legal questions regarding the bill.[35]

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for same-sex couples to be married on the same terms as accorded to couples of the opposite sex. County clerks and their employees possess constitutional and statutory rights protecting their freedom of religion. And employees possess rights under state and federal law to be free from employment discrimination on the basis of religion.").

[33] *De Leon v. Abbott*, 791 F.3d 619, 625 (5th Cir. 2015) ("*Obergefell*, in both its Fourteenth and First Amendment iterations, is the law of the land and, consequently, the law of this circuit and should not be taken lightly by actors within the jurisdiction of this court." (citation omitted)).

[34] Affidavit, at 4.

[35] Tex. H. of Reps., Comm. on Juvenile Justice & Family Issues, Hearing on Pending Legis. (Apr. 15, 2015), *at* https://tlchouse.granicus.com/MediaPlayer.php?view_id=37&clip_id=10699 ("Chair: "You are the Deputy Attorney General. You are neutral on the bill." . . . The judge: "Brantley Starr. Deputy Attorney General for Legal Counsel at the Attorney General's office. Here as a neutral resource witness to testify on the bill. I'm happy to answer any questions the committee members may have.").

- Jackson claims that this judge did not disavow statements by Jeffrey Mateer or publicly withdraw his support of Jeffrey Mateer.[36] This judge, then as an attorney for the State of Texas and a colleague of Jeffrey Mateer, is not and never has been under any obligation to respond to the statements attributed to Mateer, and those statements in no way reflect on this judge.

Second, Jackson also cites examples of this judge's federal judicial confirmation questionnaire answers. Contrary to Jackson's claim that these answers imply or express personal bias, they affirm this judge's commitment to faithfully apply the law and binding judicial precedent—including to Jackson's case. For example:

- Jackson claims that "the judge of this Court refused to answer whether the Fourteenth Amendment requires that states treat transgender people the same as those who are not transgender."[37] Actually, this judge affirmed that "[e]quality under the law is a vital element of our legal system," and then declined to comment on the specific question because Canon 3(a)(6) of the Code of Conduct for United States Judges prohibited him from opining on a legal issue in pending litigation.[38]

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[36] Affidavit, at 4–5.

[37] *Id.* at 4.

[38] Motion to Recuse, Exhibit 7, at 13–14 [Doc. No. 40-8] (Judicial Questionnaire).

- Jackson claims, "The judge of this Court also refused to answer a question as to whether history and tradition should not limit the rights afforded to LGBT individuals, other than to say he would apply binding precedent."[39] Jackson is correct: this judge said, "If confirmed, I would fully and faithfully apply *Obergefell* and any other binding Supreme Court or Fifth Circuit precedent."[40]
- Jackson claims, "The judge of this Court also refused to answer whether he believes that the government has a compelling interest in eradicating discrimination against LGBT people, other than to reference an irrelevant answer to another question."[41] Actually, in referencing a previous answer, this judge confirmed that any of the judge's personal beliefs regarding whether the government has a compelling interest in eradicating discrimination were "irrelevant" when he testified on behalf of the Office of the Texas Attorney General and are "immaterial" now.[42] This is because this judge promised to set aside any personal beliefs "as a district judge and would fully and faithfully apply all binding precedent, as well as the law if no precedent exists," to any case before this judge.[43]

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[39] Affidavit, at 4.

[40] Judicial Questionnaire, at 15.

[41] Affidavit, at 4.

[42] Judicial Questionnaire, at 28.

[43] *Id.*

Jackson's allegations not only fail to satisfy section 144's requirements, but any deference to them would also make unworkable law. Under Jackson's theory, any person who has served as a government attorney—and, in that role, advocated under administrative and constitutional law the government's legitimate legal positions—could be characterized as personally biased against anyone who happens to disagree with the government's legal positions and political interests.[44] But there is no question that persons who have previously served as government lawyers can effectively and fairly preside as federal judges.[45] Jackson's argument to the contrary is neither supported by authoritative evidence that demonstrates personal bias nor would convince a reasonable person of personal bias. Instead of demonstrating personal bias, Jackson's allegations are merely against the positions Texas advanced in litigation and state "no specific facts that would suggest" that this judge "would be anything but impartial in deciding the case before him."[46] Claims of bias like this are "general or impersonal at best."[47]

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[44] *See Harmon*, 2017 WL 3394724 at *7 ("Under Plaintiff's theory, a person who served as a criminal defense attorney, or one who served in a prosecutorial capacity, could never preside as a federal judge in a criminal case because he or she would either be biased in favor of the defense or prosecution.").

[45] *See id*. (noting that "[t]here is no question that persons who have served previously as criminal defense counsel or prosecutors can effectively and fairly preside as federal judges over criminal cases").

[46] *Parrish*, 524 F.2d at 101.

[47] *Id.*

Therefore, under section 144, Jackson's affidavit is legally insufficient.

ii.

Jackson's motion, affidavit, and supporting evidence also fail to satisfy section 455(a). The threshold reason for this failure is that although section 455 "controls recusal, it is not the proper statute under which to bring a motion to recuse."[48] Besides this threshold failure, the Court briefly addresses Jackson's erroneous claim that "it would be impossible not to question the impartiality of the presiding judge of this Court in this case."[49] The objective test for section 455(a) is "how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person."[50] Here, the Court has provided a detailed, factual analysis of Jackson's allegations misconstruing this judge's past employment and legal advocacy, as well as this judge's answers to a federal judicial confirmation questionnaire affirming that he would, if confirmed, faithfully apply precedent and the law to the facts of any case. And so this Court concludes that a well-informed,

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[48] *Brown v. Anderson*, No. 3:15-CV-0620-D, 2016 WL 4479515, at *1, n. 1 (N.D. Tex. Aug. 25, 2016) (Fitzwater, J.) (citing *Serino v. Florisi*, 2010 WL 2927304, at *1 (D. Nev. July 20, 2010)); *see*, *e.g.*, *Serino*, 2010 WL 2927304, at *1 ("Section 455 contains no procedural requirement and is directed at the judge, not the parties.").

[49] Motion to Recuse, at 7.

[50] *Jordan*, 49 F.3d at 156.

thoughtful, and objective observer—aware of all the facts and circumstances described in this opinion—would not question this judge's impartiality in applying precedent and the law to this case. Therefore, Jackson has not established that recusal is warranted or justified under section 455(a).

III.

The Court concludes that under both statutes Jackson makes an insufficient showing for recusal. The Court "recognizes that there may be valid reasons to seek recusal or disqualification of a judge, but Plaintiff's Motion to Recuse presents no valid reasons for recusal or disqualification."[51] Therefore, the Court **DENIES** Jackson's motion under 28 U.S.C. § 144 or 28 U.S.C. § 455(a).

IT IS SO ORDERED this 22nd day of November 2019.

/s/ Brantley Starr
BRANTLEY STARR
UNITED STATES DISTRICT JUDGE

[51] *Harmon*, 2017 WL 3394724 at *8.

United States Court of Appeals
for the Fifth Circuit

No. 20-10344

VALERIE JACKSON,

Plaintiff–Appellant,

versus

LUPE VALDEZ; MARIAN BROWN; DALLAS COUNTY, TEXAS,

Defendants–Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CV-2935

ON PETITION FOR REHEARING EN BANC

(Filed Jun. 15, 2021)

(Opinion _____, 5 CIR., _____, _____ F.3D _____)

Before BARKSDALE, SOUTHWICK, and GRAVES, *Circuit Judges*.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.
