No. 21-710

In The
Supreme Court of the United States

VALERIE JACKSON,

Petitioner,

v.

LUPE VALDEZ; MARIAN BROWN;
DALLAS COUNTY, TEXAS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

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The Fifth Circuit Court of Appeals' unpublished Opinion affirmed: 1) the district court's denial of Petitioner's motion for recusal; and 2) the Rule 12(b)(6) dismissal of Respondents Dallas County and Sheriffs Lupe Valdez and Marian Brown in their official capacities. The unpublished Opinion can be found at 852 Fed. App'x 129 (5th Cir. 2020). Pet. App. at 1. This unpublished opinion withdrew and superseded a previous unpublished opinion, which can be found at 2021 WL 1183020 (5th Cir. Mar. 29, 2021). Pet. App. at 23.

The Fifth Circuit Court of Appeals denied Petitioner's Petition for Rehearing En Banc on June 15, 2021. Pet. App. at 92.

JURISDICTIONAL STATEMENT

Respondents do not dispute this Court's jurisdiction over this case pursuant to 28 U.S.C. § 1254(a), but deny that the case satisfies the standard set forth in Supreme Court Rule 10. Petitioner filed her Petition for Writ of Certiorari on November 10, 2021.

COUNTERSTATEMENT OF THE CASE

On November 2, 2018, Petitioner brought suit through counsel, alleging that a strip search violated her constitutional rights and filed a civil rights suit

under 42 U.S.C. § 1983 seeking unspecified damages arising from her pretrial detention as an inmate of the Dallas County Jail ("DCJ"). Pet. App. at 5. Subsequently, on May 22, 2019, Petitioner filed her First Amended Complaint ("FAC") against numerous Defendants, including Sheriff Lupe Valdez as former Sheriff of Dallas County; Sheriff Marian Brown, as current Sheriff of Dallas County (hereinafter, Sheriffs Valdez and Brown are collectively referred to as "Sheriffs"); and Samuel Joseph and Lizyamma Samuel as employees of Dallas County (hereinafter, Samuel Joseph and Lizyamma Samuel are collectively referred to as "Officers"); unknown Dallas County Employee III ("Nurse"); and Dallas County, Texas ("County"). Petitioner's FAC alleged that these Defendants, along with other detention officers at the DCJ employed by the Dallas County Sheriff's Department: 1) conducted an invasive and unconstitutional strip search under the Fourth and Fourteenth Amendments during Jackson's confinement in the DCJ; 2) violated her due process rights under the Fifth and Fourteenth Amendments; and 3) that Defendants Valdez and Brown failed to supervise and train employees.

On July 22, 2019, Defendants filed their Original Answer to Petitioner's FAC, in which they specifically denied the general allegations asserted by Petitioner and asserted qualified immunity and official immunity as affirmative defenses. Defendants denied that they violated the Petitioner's constitutional rights. On August 12, 2019, Defendants filed their First Amended Answer & Affirmative Defenses, asserting the same

general denial. Defendants also asserted the affirmative defenses of: 1) failure to state a claim; 2) qualified and official immunity; 3) *Monell v. Department of Social Services*; and 4) proximate cause.

On July 22, 2019, Respondents filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6). On February 27, 2020, United States Magistrate Judge Irma Ramirez issued her Findings, Conclusions, and Recommendation ("FCR") to grant Respondents' Motion to Dismiss. Pet. App. at 46. On March 12, 2020, Petitioner filed her objections to Judge Ramirez's FCR. Subsequently, on March 23, 2020, United States District Judge Brantley Starr accepted Judge Ramirez's FCR and granted partial judgment dismissing Petitioner's claims against: 1) Dallas County, Texas, and 2) Lupe Valdez and Marian Brown, in their official capacities. That same day, Petitioner filed a Notice of Appeal.

In between Respondents' filing of their motion to dismiss and the notice of appeal filed by Petitioner, Petitioner also filed a motion to recuse seeking recusal of the district judge. However, the district judge determined that recusal was unwarranted and denied Petitioner's motion. Pet. App. at 76. Due to the denial of her motion to recuse, on December 12, 2019, Petitioner filed a petition for writ of mandamus with the Fifth Circuit Court of Appeals, which was denied on December 19, 2019.

On March 29, 2021, the Fifth Circuit issued an unpublished opinion that: 1) affirmed the district court's decision to deny the motion to recuse, and 2) reversed

and remanded the district court's decision granting Respondents' Rule 12(b)(6) motion so that the district court could address an issue further. Pet. App. at 23. However, prior to the issuance of a mandate, on April 7, 2021, an Opposed Motion to Correct the Opinion of the Court by Third-Party Jeffrey C. Mateer was filed. Petitioner filed a Response to Opposed Motion to Correct the Opinion of the Court by Non-Party Jeffrey C. Mateer on April 8, 2021. A Reply In Support of Motion to Correct the Opinion of the Court by Third-Party Jeffrey C. Mateer was then filed on April 9, 2021. Subsequently, the Fifth Circuit Court of Appeals issued an unpublished opinion on May 18, 2021 that withdrew and superseded the first unpublished opinion. This opinion affirmed the judgment of the district court on both the issue of recusal and the 12(b)(6) motion to dismiss. Pet. App. at 1. Concurrently, on the same date, May 18, 2021, the Fifth Circuit Court of Appeals issued an order denying as moot the movant Jeffrey C. Mateer's motion to correct the first unpublished opinion. Thereafter, on May 31, 2021, Petitioner filed a Petition for Rehearing En Banc, which was subsequently denied on June 15, 2021. Pet. App. at 92. Petitioner then filed her Petition for Writ of Certiorari on November 10, 2021.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit Court of Appeals properly determined that recusal was not required.

On September 19, 2019, Petitioner filed a motion to recuse in the trial court under 28 U.S.C. §§ 144 and 455. The standard of review for the denial of a motion to recuse is abuse of discretion. *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 483 (5th Cir. 2003); *Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003) (citing *Trevino v. Johnson*, 168 F.3d 173, 178 (5th Cir. 1999)). Furthermore, with respect to Section 144, it "applies only to charges of actual bias." *Henderson v. Dep't of Pub. Safety & Corr.*, 901 F.2d 1288, 1296 (5th Cir. 1990). Additionally, a "judge must pass on the legal sufficiency of the affidavit, buy may not pass on the truth of the matter alleged." *Id.* at 1296 (citing *Davis v. Bd. of Sch. Comm'rs of Mobile Cty.*, 517 F.2d 1044, 1051 (5th Cir. 1975)). 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." *Id.* (citing *Parrish v. Bd. of Comm'rs of Ala. State Bar*, 524 F.2d 98, 100 (5th Cir. 1975)). The alleged bias must be a "personal bias and prejudice against the party or in favor of the adverse of the party." *Parrish*, 524 F.2d at 100.

Petitioner's affidavit asserted that the district judge, based on "positions advanced by the Court prior

to becoming a federal judge," holds a bias or prejudice against Jackson "as a member of the transgender community." Petitioner attempted to support this claim with examples of the district 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, Petitioner claimed that:

1) "[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."

2) 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."

3) In an October 2015 panel discussion, "the presiding judge over my case 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*."[1]

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[1] 576 U.S. 644 (2015).

4) "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.'"

5) "[T]he 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."

6) "[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 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."

In addition to citing examples from the district judge's prior employment, Petitioner cited the district judge's responses to a questionnaire during his federal judicial confirmation process:

1) "[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."

2) "The judge of this Court also refused to answer a question as to whether history and tradition should limit the rights afford to LGBT individuals, other than to say he would apply binding precedent."

3) "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."

With these examples, Petitioner claimed "it is clear the judge presiding over my case has a bias/prejudice against me as a transgender individual." While Petitioner seemingly would favor a literal reading of Section 144 to suggest that her affidavit alleging that the district judge is biased against her is enough to automatically trigger the requirement for recusal, such an interpretation would render Section 144 akin to a peremptory disqualification procedure and is incorrect. Petitioner hung her argument on this interpretation by noting that "[w]henever a party . . . makes and files a timely and sufficient affidavit that the judge . . . has a personal bias . . . against him . . . such judge shall proceed no further." *See Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 483 (5th Cir. 2003). However, even the language cited by Petitioner specifically indicates that Petitioner must file a "sufficient affidavit." Accordingly,

the district court properly took the time to evaluate Petitioner's affidavit to determine whether it was "legally sufficient." *Henderson*, 901 F.2d at 1296 (citing *Davis*, 517 F.2d at 1051).

In reviewing the affidavit, both the trial court and the Fifth Circuit Court of Appeals determined that Petitioner did not state facts in her affidavit showing that the trial judge harbored an actual bias against Petitioner under Section 144, nor did she demonstrate that the trial judge's impartiality might reasonably be questioned under Section 455(a). While Petitioner cited examples of the trial judge's past legal advocacy in the course and scope of his employment for the State of Texas, the statements reflected the legal positions of the judge's client and not the judge's personal views. Because attorneys regularly take legal positions on behalf of a client that he may or may not personally agree with, and the statements made by the trial judge when he was a Deputy Attorney General for the State of Texas only involved legal issues he was actively taking positions for on behalf of the State of Texas, the statements he made and positions he took were interpretations of statutes, case law, and administrative rules. Therefore, those statements and positions did not reflect any personal bias against Petitioner or the LGBTQ community.

Respondents also note that "section 455 must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice." *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir.

1993). Section 455 "is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice." *Id.* (citing *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986)). Furthermore, while Petitioner attacks certain legal positions taken by the trial judge in his role as a litigator prior to taking the bench, extrajudicial conduct does not require the absence of preexisting views on the legal questions that the judge must decide. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002). Accordingly, the fact that a judge comes to a case with potentially preexisting views on the legal questions presented, based on prior, extrajudicial learning, is no grounds for disqualification. The standard for finding bias and the objective test under Section 455 is that for an objective observer, and not that of the "hypersensitive, cynical and suspicious person." *Andrade*, 338 F.3d at 462.

Furthermore, while Petitioner claims the facts stated in her affidavit establish the trial judge's partiality and bias, the general tone of those claims is a contention that the district court maintains a partisan or political affiliation that Petitioner presumes would make the trial judge partial or biased in this case and would be insufficient to establish a reason for recusal. A judge's prior participation in high-profile cases involving a group of people with which Petitioner identifies, without more, is insufficient to support a finding of factual 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).

Finally, Petitioner's citations to responses in the trial judge's confirmation questionnaire fail to provide any evidence of a personal bias against Petitioner, as they indicate only a lack of a response or a response that he would apply precedent. Declining to provide an answer cannot be tantamount to evidence that a position for or against a proposition is being provided. Furthermore, since the plain language of the trial judge's responses during the judicial confirmation process show that the trial judge answered that he would set aside his personal beliefs and apply binding precedent when asked about the legal treatment of LGBTQ individuals, those statements are insufficient to show a personal bias against Petitioner. Accordingly, a reasonable person would be unable to conclude that the responses or lack of responses in a questionnaire are evidence of the judge's actual personal bias against Petitioner.

Lastly, while Petitioner attacked the trial judge's previous support of another judicial candidate based on statements alleged to be attributed to that candidate, as noted by the Fifth Circuit Court of Appeals, a judge's previous support for another judicial candidate does not amount to support of that nominee's statements or beliefs.

In sum, the district court was correct in determining that Petitioner's affidavit was legally insufficient and that Petitioner failed to meet the test of showing evidence of actual bias as determined from the viewpoint of an objectively reasonable person. Accordingly, the Fifth Circuit did not err in its determination that the trial judge's decision to deny Petitioner's motion to recuse was not an abuse of discretion. Although Petitioner would propose that the trial judge was required to recuse himself merely upon receipt of Petitioner's affidavit, the trial judge properly took the time to analyze the affidavit for legal sufficiency and could readily determine that it was insufficient to warrant his recusal under Section 144 or 455(a).

II. The Fifth Circuit Court of Appeals retained jurisdiction to replace its first unpublished opinion with its subsequent unpublished opinion.

While Petitioner would attempt to pose that the publication of the second unpublished opinion occurred in a vacuum and that there was no justification for its issuance, Petitioner failed to account for the filings that the Fifth Circuit readily could determine permitted for the delay of the issuance of the mandate.

Petitioner correctly points out that on March 29, 2021, the Fifth Circuit issued an unpublished opinion that: 1) affirmed the district court's decision to deny the motion to recuse, and 2) reversed and remanded the district court's decision granting Respondents'

Rule 12(b)(6) motion so that the district court could address an issue further. However, prior to any possible deadline for the issuance of a mandate, on April 7, 2021, an Opposed Motion to Correct the Opinion of the Court by Third-Party Jeffrey C. Mateer was filed. Petitioner filed a Response to Opposed Motion to Correct the Opinion of the Court by Non-Party Jeffrey C. Mateer on April 8, 2021. A Reply In Support of Motion to Correct the Opinion of the Court by Third-Party Jeffrey C. Mateer was then filed on April 9, 2021. Subsequently, the Fifth Circuit Court of Appeals issued an unpublished opinion on May 18, 2021 that withdrew and superseded the first unpublished opinion; the second opinion affirmed the judgment of the district court on both the issue of recusal and the 12(b)(6) motion to dismiss. Concurrently, on that same date, May 18, 2021, the Fifth Circuit Court of Appeals issued an order denying as moot the movant Jeffrey C. Mateer's motion to correct the first unpublished opinion.

Petitioner would seemingly construe the requirement for a mandate to issue to be an immovable deadline, regardless of other motions that might be filed, such as a post-decision motion to amend or correct, as occurred in this case. However, Petitioner's own actions in filing a response to the Motion to Correct belie the fact that Petitioner understood that the Fifth Circuit Court of Appeals had before it a motion to be addressed prior to the issuance of a final mandate as the deadline to file a motion for rehearing could not have passed until after the Motion to Correct was addressed. As a practical matter, to allow for the result advocated by

Petitioner would readily render motions to correct or amend as an exercise in futility, as the appellate courts would have great difficulty in reviewing and responding to such motions prior to Petitioner's advocated hard and fast deadline for an "informal mandate" deadline being reached. Thereafter, long after Petitioner's proposed deadline for an "informal mandate," on May 31, 2021, Petitioner filed a Petition for Rehearing En Banc, which was subsequently denied on June 15, 2021. If, as Petitioner contends, the deadline for an "informal mandate" had passed, Petitioner would seemingly have filed a frivolous petition for rehearing. For all these reasons, Respondents would contend that the Fifth Circuit Court of Appeals was well within its prerogative to withdraw and supersede its original opinion with its second unpublished opinion, as well as to take the time necessary to review and rule on the Motion to Correct that was before the court.

The Federal Rules of Appellate Procedure and the Fifth Circuit's rules also make clear that while the mandate normally issues in most instances, there is no hard and fast rule. As outlined in the Internal Operating Procedures for Fifth Circuit Rule 41, "Absent a motion for stay or a stay by operation of an order, rule, or procedure, mandates will issue promptly on the 8th day after the time for filing a petition for rehearing expires; or after entry of an order denying the petition." Furthermore, "[a]s an exception, and by court direction, the clerk will immediately issue the mandate when the court dismisses a case for failure to prosecute an appeal or for lack of jurisdiction, or in such other

instances as the court may direct." Simply put, while there may be a "regular process" for when the mandate issues, there is no hard and fast "informal mandate" deadline as suggested by Petitioner and it should go without saying that a court can choose to issue or withhold the mandate "**in such other instances as the court may direct**" – such as in a situation when the court has a motion before it requesting affirmative relief, as was the case here. Accordingly, the Fifth Circuit Court of Appeals issued the subsequent unpublished opinion while it still maintained jurisdiction over the case.

III. The Fifth Circuit properly determined that the trial court's granting of Respondents' Motion to Dismiss under Rule 12(b)(6) should be affirmed.

Rule 12(b)(6) allows a motion 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). A 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). 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 must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Therefore, 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.

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is not 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. When a plaintiff has "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").

To state a claim under Section 1983, a plaintiff must allege facts that show: 1) deprivation 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). In their motion to dismiss, Respondents requested dismissal of Petitioner's claims of municipal liability under Section 1983 for failure to plead sufficient facts to support the existence of an official policy. A municipality may be liable under Section 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). Additionally, a municipality cannot be liable under a theory of *respondeat superior*. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). "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).

"Official policy" is defined as:

1. 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 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 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. F3d at 578-80 & 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 (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, Policy 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). In *Spiller*, this Court 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)).

In their motion to dismiss, Respondents noted that Petitioner failed to plead sufficient facts to show an official policy of improperly searching and classifying transgender inmates, as evidenced by 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 of Bryan City v. Brown*, 520 U.S. 397, 404 (1997). A plaintiff may prove the existence of a custom by alleging "a pattern of abuses that

transcends the errors 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).

"Where 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; *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 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).

In this case, Petitioner's complaint alleged that there "was a widespread practice within the Dallas County Sheriff's Office 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 a custom" of the County. However, although Petitioner points to her three prior detentions at the Dallas County jail and a 2013 incident involving C.W., Petitioner did not plead similar specific instances of genital searches for the purposes of placement. Petitioner alleged that she had to show her genitalia when she was booked in 2016, but did not allege that she was subjected to a search when she was booked in 2017 and 2018. Petitioner also alleged a 2013 incident involving C.W. as a transgender female forced to undress and spread her buttocks prior to being given male attire. However, Petitioner did not specifically allege that C.W. was subjected to a genital search to verify gender. Accordingly, Petitioner alleged only a single incident, which is insufficient to infer a custom. Absent proof of a pattern, deliberate widespread as to "practically have the force of law," a plaintiff must do more than describe the incident that gave rise to his injury. *Pena v. City of Rio Grande City*, 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)); *see also 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").

Petitioner candidly admitted in her appellate brief to the Fifth Circuit Court of Appeals that she was not strip searched on all three occasions. As such, Petitioner relied on an argument that the population of transgender detainees is very small, preventing a greater number of incidents to establish a pattern from occurring. At the same time that Petitioner argues there is a small population preventing a greater number of incidents, she attempts to argue that there was a widespread and common custom or policy in place; these two arguments contradict each other as a small population preventing a greater number of incidents would seemingly indicate that it would not be possible to establish any type of widespread and common custom. Regardless, even read in the light most favorable to Petitioner, Petitioner has only alleged two genital searches, and four instances of gender classifications based on genitalia at the Dallas County jail. Based on

this reading, Petitioner claims that pleading facts for only two such genital searches over a five-year period is somehow sufficient to establish a widespread custom. Since Petitioner failed to plead additional instances, the failure to do should not be somehow skirted over, since the entire reason for filing a Rule 12(b)(6) motion was due to Petitioner's failure to allege facts showing a custom "so persistent and widespread as to practically have the force of law." *Connick*, 563 U.S. at 61; *see also Prince*, 423 F. App'x at 451.

In any event, Petitioner additionally attempts to argue that she had sufficiently pleaded a policy because she alleged that the County's employees expressly acknowledged the policy and attributed it to a policymaker, Sheriff Lupe Valdez. Petitioner 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 Shelly Knight with the Dallas County Sheriff's Department stated that she "could see where some of the policy was misconstrued and other parts were not followed." However, a plaintiff's 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 is not necessarily sufficient to plead an official policy to "inch[] past the Rule 12(b)(6) threshold to survive dismissal." *Bryan v. City of Dallas*, 188 F. Supp. 3d 611, 618 (N.D. Tex. 2016).

In the present case, Petitioner referenced three statements by County employees referring to a policy impliedly attributed to Sheriff Valdez, two of which were made by the same person, and a third that did not specifically reference the supposed policy. Here again, even viewed in the light most favorable to Petitioner, she has pled 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). Petitioner has pled no institutional admissions or statements by a policymaker, only by non-policymaking employees. As noted by this Court, 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). Since Petitioner relies only on statements from non-policymaking employees to show a policy or custom of searching genitalia for purposes of transgender detainee placement, Petitioner 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.

Respondents would also note that Petitioner failed to plead any facts from which the knowledge of a custom or policy by a specific policymaker can reasonably be inferred. 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). "Actual 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.*

In this case, Petitioner alleges that either "Valdez or [ ] Brown served as a 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." However, even if Petitioner 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). 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. Accordingly, Petitioner failed to 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.

Next, Petitioner's claims for failure to train, supervise and discipline were properly dismissed because Petitioner failed to plead sufficient facts to permit a rational inference to support an official adopted or promulgated policy regarding failure to train. Petitioner further failed to plead sufficient facts to permit a rational inference of policymaker deliberate indifference on her failure to train claim. "[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) (quoting *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). To establish municipal liability based on a failure to train in the Fifth Circuit, a 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)).

Petitioner completely failed to plead any facts establishing any level of specificity for how a particular training program was defective. Petitioner generally alleged that the County "failed to provide constitutionally adequate training and supervision regarding the use of searches to determine gender and placement of transgender inmates." Petitioner did not identify a specific training policy and provided only conclusory allegations that the County's training policies or procedures were inadequate. *See Roberts*, 397 F.3d at 293. As Petitioner failed to allege even the existence of an allegedly inadequate training policy or procedure, she 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).

However, even if a Court were to presume that Petitioner had somehow properly pleaded facts establishing with specificity how a particular training program was defective, Petitioner also failed to allege facts showing deliberate indifference. "The failure to train [or supervise] must reflect a 'deliberate' or 'conscious' choice by a municipality." *World Wide Street Preachers Fellowship v. Town of Columbia*, 591 F.3d 747 (5th Cir. 2009) (quoting *City of Canton*, 489 U.S. at 389). To show that a 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 assert 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 previously noted, 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.

In the present case, Petitioner generally alleged 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." Petitioner then 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." However, in support thereof, Petitioner included in her pleadings only the three times she was booked in the Dallas County jail and the 2013 incident involving C.W. As noted above, the incidents pled by Petitioner do not rise to the level of a pattern of constitutional violations. *See Fuentes*, 689 F. App'x at 778. Since 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. Without such a pattern, the need for training could not have been "plainly obvious" to Dallas County or its policymakers.

Even if a Court were to accept Petitioner's well-pleaded facts as true and viewed them in the light most favorable to her, Petitioner has utterly failed to nudge her failure to train, supervise, or discipline claim across the line from conceivable to plausible. *See Twombly*, 550 U.S. at 555. For all these reasons, Petitioner failed to plead sufficient facts to support a

finding of municipal liability under Section 1983. Furthermore, Petitioner sued the Sheriffs in their official capacities and official capacity claims are 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). Therefore, Petitioner's Section 1983 claims against Sheriffs in their official capacities were essentially claims against their employer, Dallas County. *See Graham*, 473 U.S. at 165. But, since Petitioner failed to state a claim for municipal liability against Dallas County, the district court properly determined that the official capacity claims against Sheriffs under Section 1983 also failed. *Id.* For all these reasons, the Fifth Circuit did not err in affirming the decision of the trial court to grant Respondents' Rule 12(b)(6) motion to dismiss.

CONCLUSION

The Fifth Circuit properly determined that the district court did not abuse its discretion in denying the Petitioner's motion to recuse and the Fifth Circuit's review of that decision does not warrant review. Petitioner has failed to demonstrate that any prior precedent of this Court, or the Fifth Circuit, placed this determination as being unwarranted. Furthermore, the Fifth Circuit was well within its rights to provide a substituted opinion as the court had not issued a mandate and, per the Internal Operating Procedures of Fifth Circuit Rule 41, the court was well within its rights to withhold issuance of the mandate until it was

ready to do so. Finally, pursuant to this Court's standards set forth in *Monell*, *Iqbal* and *Twombly*, Petitioner failed to plead allegations with sufficient detail to establish a right to relief and the Fifth Circuit Court of Appeals did not err in affirming the trial court's decision to grant Respondents' 12(b)(6) motion to dismiss. Accordingly, Respondents respectfully request that this Court deny Petitioner's Petition for Writ of Certiorari.

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