APPENDIX

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App. 1

United States Court of Appeals
for the Fifth Circuit

No. 20-50367
CONSOLIDATED WITH
Nos. 20-50372, 20-50380, 20-50408, 20-50453

JOHN WILSON, ET AL.,

Plaintiffs—Appellants,

versus

BRENT STROMAN, *Chief of Police for the Waco Police Department, in his individual capacity*; MANUEL CHAVEZ, *Waco Police Department Detective, in his individual capacity*; ABELINO "ABEL" REYNA, *Elected District Attorney for McLennan County, Texas, in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *in his individual capacity*; JEFFREY ROGERS, *in his individual capacity*; SERGEANT PATRICK SWANTON, *in his individual capacity*; STEVEN SCHWARTZ, *in his individual capacity*; CHRISTOPHER FROST, *in his individual capacity*,

Defendants—Appellees.

Appeals from the United States District Court
for the Western District of Texas,
USDC Nos. 1:17-CV-453; 1:17-CV-471;
1:15-CV-1040; 1:15-CV-1041; 1:15-CV-1044;
1:17-CV-479; 1:18-CV-1044; 1:18-CV-1045;
1:18-CV-1046; 1:18-CV-1047; 1:17-CV-448;
1:17-CV-474; 1:15-CV-1042; 1:15-CV-1043;

1:15-CV-1045; 1:16-CV-575; 1:17-CV-457;
1:17-CV-480; 1:19-CV-475 and 1:17-CV-465

(Filed Apr. 28, 2022)

Before RICHMAN, *Chief Judge*, and CLEMENT and HIGGINSON, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

In this consolidated appeal, Plaintiffs-Appellants challenge the district court's application of the independent intermediary doctrine to dismiss their Fourth Amendment false arrest claims. We REVERSE and REMAND for further proceedings.

I.

This case concerns the fallout from the deadly shootout that occurred on May 17, 2015, at the Twin Peaks restaurant in Waco, Texas. This court recently resolved a related set of appeals concerning the Twin Peaks shootout in *Terwilliger v. Reyna*, 4 F.4th 270 (5th Cir. 2021). The individual plaintiffs here are similar to the plaintiffs in *Terwilliger* in several respects. All are motorcyclists who had gathered at the Twin Peaks for a meeting of the Texas Confederation of Clubs & Independents. *See id.* at 277. All were eventually arrested following the shootout for Engaging in Organized Criminal Activity ("EIOCA"), in violation of Texas Penal Code § 71.02. *See Terwilliger*, 4 F.4th at 277. And all were arrested pursuant to the same "form warrant affidavit" that was presented to the magistrate judge

as the basis for the arrest warrants. *See id.* at 278-79. But for the subject's name, which was to be inserted on a blank line, the affidavit was identical in every respect. *Id.* In total, 177 individuals were arrested using this identical "fill-in-the-name" affidavit. *Id.* at 279. Following their arrests, both the *Terwilliger* plaintiffs and the plaintiffs here filed multiple individual § 1983 actions asserting similar false arrest claims, which are premised on alleged defects in the form affidavit used to secure the arrest warrants. *See id.*

Unlike the *Terwilliger* plaintiffs, however, the individual plaintiffs here—in addition to being arrested pursuant to the magistrate's warrant—were all subsequently *indicted* by a grand jury for EIOCA. This difference proved crucial to the district court's resolution of the § 1983 actions brought by each set of plaintiffs. With respect to the *Terwilliger* plaintiffs, the district court held that their *Franks* false arrest claims *survived* the motion to dismiss stage, at least with respect to some defendants. *Id.* at 283-84 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). For the plaintiffs here, by contrast, the district court granted in full the defendants' motion to dismiss the false arrest claims. The district court held that, pursuant to the independent intermediary doctrine, the grand jury's indictment served to break the chain of causation for any false arrest claim pertaining to the form affidavit and the arrest warrant issued by the magistrate judge. *See McLin v. Ard*, 866 F.3d 682, 689 (5th Cir. 2017) (citation omitted).

Because the district court concluded that the independent intermediary doctrine applied, it did not discuss the merits of the plaintiffs' false arrest claims. But the nature of the plaintiffs' false arrest claims is relevant to our inquiry here because they argue, in essence, that the independent intermediary doctrine should not apply to the grand jury's indictment because the grand jury was misled *in the very same way* as the magistrate who issued the arrest warrants. We will thus begin by discussing, at a high level, the nature of the plaintiffs' false arrest claims.

II.

The false arrest claims asserted by the plaintiffs here largely mirror the claims asserted by the *Terwilliger* plaintiffs. Broadly, both sets of plaintiffs take aim at the form warrant affidavit and allege that defects in that affidavit led to them being arrested without particularized probable cause. *Terwilliger*, 4 F.4th at 279. More specifically, both sets of plaintiffs asserted two alternative false arrest claims, one premised on *Malley v. Briggs*, 475 U.S. 335 (1986) and the other premised on *Franks v. Delaware*, 438 U.S. 154 (1978). *See Terwilliger*, 4 F.4th at 279.

In *Malley*, the Supreme Court described that an officer can be held liable for a false arrest despite the issuance of an arrest warrant by a magistrate if the affidavit the officer presented to the magistrate was "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." 475 U.S. at

344-45 (citation omitted). "The *Malley* wrong is not the presentment of false evidence, but the obvious failure of accurately presented evidence to support the probable cause required for the issuance of a warrant." *Melton v. Phillips*, 875 F.3d 256, 264 (5th Cir. 2017) (en banc).

In other words, an officer can avoid liability under *Malley* if he presents a warrant affidavit that facially supplies probable cause to arrest the subject of the warrant. *See Blake v. Lambert*, 921 F.3d 215, 221-22 (5th Cir. 2019). But even if a warrant affidavit supplies probable cause on its face, an officer can still be liable under *Franks* if the apparent probable cause is the result of "material misstatements or material omissions." *Terwilliger*, 4 F.4th at 281 (citations omitted). Specifically, an officer is liable under *Franks* if he "deliberately or recklessly provides false, material information for use in an affidavit in support of [a warrant]" or "makes knowing and intentional omissions that result in a warrant being issued without probable cause" *Melton*, 875 F.3d at 264 (alteration in original) (emphasis removed) (first quoting *Hart v. O'Brien*, 127 F.3d 424, 448 (5th Cir. 1997); and then quoting *Michalik v. Hermann*, 422 F.3d 252, 258 n.5 (5th Cir. 2005)).

In *Terwilliger*, this court held that the challenged form warrant affidavit, on its face, "sufficiently alleged probable cause to arrest those to whom its facts applied" for the offense of EIOCA. 4 F.4th at 282. More precisely, the court described that the affidavit supplied probable cause to conclude that "members or associates of the Bandidos or Cossacks instigated and

were involved in the Twin Peaks shootout, and that their conduct rose to the level of violating the [offense of] EIOCA." *Id.* Correspondingly, the affidavit—in essence—represented that each individual subject that was arrested (the plaintiffs here among them) was a member or associate of the Bandidos or Cossacks who was involved in the shootout and the unlawful activity more generally described in the affidavit. *See id.* at 278-79, 282-83.

Furthermore, this court described that the *Terwilliger* plaintiffs had sufficiently *alleged* that this latter, particularized representation was based on materially false statements and omissions that were deliberately or recklessly made by the defendants. *See id.* at 282-83. For example, the plaintiffs "den[ied] affiliation with the Bandidos or Cossacks," denied "any involvement with or membership in a 'criminal street gang' " and, in some instances, denied wearing any signs or symbols that would identify them as associated with the Bandidos or Cossacks, or any other alleged criminal street gang. *Id.* at 282. They further denied engaging in any of the unlawful conduct generally described in the affidavit. *See id.* In addition, the plaintiffs alleged that the defendants had "deliberately excluded relevant information that would have weighed against individualized probable cause, such as video evidence, witness interviews, and membership in motorcycle clubs known to be independent and not affiliated with the Bandidos or Cossacks." *Id.* at 283.

Once the affidavit was "corrected" to account for these alleged false statements and omissions, this

court concluded that "the remaining particularized facts in the affidavit" were insufficient to establish probable cause to arrest any of the subjects for EIOCA. *Id.* As a result, the court held that the *Terwilliger* plaintiffs had sufficiently alleged a *Franks* claim at the pleading stage (but only against some of the named defendants). *Id.* at 283-84.

In sum, *Terwilliger* sets the lay of the land for analyzing the false arrest claims in this case. It does so in two ways. First, it construes the challenged form warrant affidavit as (1) generally alleging that members of the Bandidos and Cossacks engaged in violent activity at the Twin Peaks that amounted to EIOCA, *and* (2) linking each specific subject of the warrant to that general set of probable cause-establishing facts, thus creating particularized probable cause to arrest each subject. *See id.* at 282-83. Second, *Terwilliger* describes that the plaintiffs in that case successfully pleaded *Franks* claims by plausibly alleging in their complaints that (1) they were not associated with the Bandidos or Cossacks and that they had nothing to do with the violent activity that is described in the affidavit and (2) certain defendants recklessly or knowingly caused it to be stated otherwise in the affidavit (i.e., a material misstatement) and/or excluded from the affidavit information in their possession that would have materially undermined the aforementioned particularized probable cause (i.e., a material omission). *See id.*

III.

As discussed above, the district court pretermitted any discussion of whether the plaintiffs here had adequately alleged a *Franks* claim with respect to the form affidavit and their ensuing arrests pursuant to the magistrate-issued warrant. It did so because it concluded that any such claim must necessarily fail as a result of the plaintiffs' subsequent indictment by the grand jury and the application of the independent intermediary doctrine.

We review de novo the district court's grant of the defendants' motion to dismiss and its application of the independent intermediary doctrine. *McLin v. Ard*, 866 F.3d 682, 688 (5th Cir. 2017). We hold that the district court erred in its application of the independent intermediary doctrine and take this opportunity to clarify how the doctrine operates with respect to *Franks* (and *Malley*) claims, especially when two separate intermediaries are involved.

A.

"It is well settled that if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party." *McLin*, 866 F.3d at 689 (quoting *Deville v. Marcantel*, 567 F.3d 156, 170 (5th Cir. 2009)). Thus, a properly secured arrest warrant or grand jury indictment will shield a defendant who has committed or initiated a false arrest. *Buehler v. City of*

Austin/Austin Police Dep't, 824 F.3d 548, 553-54 (5th Cir. 2016). This is true even if the independent intermediary's action occurred after the arrest or if the arrestee was never convicted of a crime. *Id.* at 554.

But the intermediary must be truly independent. Thus, "the initiating party may be liable for false arrest if the plaintiff shows that 'the deliberations of that intermediary were in some way *tainted* by the actions of the defendant.'" *Deville v. Marcantel*, 567 F.3d 156, 170 (5th Cir. 2009) (emphasis added) (quoting *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988)). This court has sometimes referred to this principle as the "taint exception." *See*, *e.g.*, *McLin*, 866 F.3d at 689.

Regardless of label, this court has recognized *Franks* and *Malley* as functional exceptions to the independent intermediary doctrine. *See Mayfield v. Currie*, 976 F.3d 482, 487 (5th Cir. 2020) (describing *Franks* and *Malley* as "two ways to overcome the [independent intermediary] doctrine"); *Terwilliger*, 4 F.4th at 281 ("Functionally, the holding of *Franks* is an exception to the independent intermediary doctrine."); *Anokwuru v. City of Houston*, 990 F.3d 956, 963-64 (5th Cir. 2021) (discussing *Franks* as an exception to the independent intermediary doctrine); *Arizmendi v. Gabbert*, 919 F.3d 891, 897 (5th Cir. 2019) (same); *see also Blake v. Lambert*, 921 F.3d 215, 220 (5th Cir. 2019) (describing that a warrant affidavit suffering a *Malley* defect "does not provide any supporting facts from which a magistrate could independently determine probable cause").

Of course, it could not be otherwise. It would defy Supreme Court precedent to hold that, for example, a plaintiff had successfully pleaded a *Malley* claim by alleging that an officer had presented a facially deficient warrant affidavit to a magistrate but that the officer was nonetheless insulated from liability because the magistrate proceeded to issue a warrant based on that affidavit. *See Malley*, 475 U.S. at 345-46 (holding that an officer is liable for submitting a deficient warrant application even if a magistrate approves it). Thus, if a plaintiff adequately pleads that an officer has obtained an arrest warrant from a magistrate in violation of *Malley* or *Franks*, then nothing more is required to show that the independent intermediary doctrine does not apply with respect to that intermediary's decision. *See Mayfield*, 976 F.3d at 487.

That being the case, however, does not necessarily prevent a *second* intermediary's decision—such as a grand jury's subsequent indictment—from triggering the independent intermediary doctrine to ultimately insulate the officer from liability. *See Winfrey v. Rogers*, 901 F.3d 483, 489-90, 496-97 (5th Cir. 2018) (acknowledging that a grand jury's subsequent indictment, via the independent intermediary doctrine, could insulate an officer from a *Franks* violation committed before a magistrate). And that is the very situation that the district court held, and the defendants continue to argue, is presented here.

B.

The district court's holding—that the grand jury's indictment triggered the independent intermediary doctrine and that the plaintiffs failed to plead facts establishing an exception—turned on both the purported factual inadequacy of the plaintiffs' pleadings and legal conclusions about the nature of the independent intermediary doctrine and its exceptions. We address these legal conclusions first. To do so, we will temporarily make two assumptions related to the plaintiffs' pleadings.[1] First, we will assume that the plaintiffs have adequately alleged a *Franks* claim with respect to the magistrate's warrant in a manner identical to the plaintiffs in *Terwilliger*. Second, we will assume—as the plaintiffs argue—that they have adequately alleged that the grand jury was misled in the same way that the magistrate was misled. That is, that the original *Franks* violation was repeated before the grand jury. If so, the question is whether that suffices to render the independent intermediary doctrine inapplicable to the grand jury's indictment.

As a legal matter, the district court held that in order to show that the grand jury's deliberations were tainted, the plaintiffs had to adequately allege that (1) *each* defendant (2) *maliciously* omitted evidence or misled the jury. Because the defendants continue to press those purported requirements here, we address each in turn.

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[1] We return to the factual adequacy of the plaintiffs' pleadings below. *See infra* Section III.C.

1.

We begin first with the argument that "each" defendant must have tainted the grand jury. There is no such requirement. Fundamentally, the argument confuses the scope of liability for a false arrest with what is necessary to show that an intervening intermediary's actions were not truly independent. Consider the present circumstances. To be sure, the plaintiffs here must adequately plead (and ultimately prove) that each defendant falls within the scope of liability for the *Franks* violation allegedly committed in securing the arrest warrant from the magistrate. *See Terwilliger*, 4 F.4th at 283-84; *Melton*, 875 F.3d at 263 (holding that "an officer must have assisted in the preparation of, or otherwise presented or signed a warrant application in order to be subject to liability under *Franks*"). That is because the *Franks* violation with respect to the magistrate's warrant is the plaintiffs' cause of action. *See Hart v. O'Brien*, 127 F.3d 424, 442 (5th Cir. 1997) (describing that a *Franks* violation "states a valid cause of action under the Fourth Amendment"), *abrogated on other grounds as recognized in Anokwuru*, 990 F.3d at 964; *see also Blake*, 921 F.3d at 217-18 (discussing the plaintiff's *Malley* and *Franks* "claims" and making no mention of the independent intermediary doctrine).

By contrast, despite its conceptual overlap with *Franks*, the "taint exception" to the independent intermediary doctrine is not a cause of action—it is an exception to a doctrine that *insulates* an official who would otherwise be liable for a false arrest. *See McLin*, 866 F.3d at 689. In other words, no defendant is being

held liable for "tainting" the intermediary as that concept is deployed within the independent intermediary doctrine. As a practical matter, in cases involving only one intermediary, the allegations that prove a *Franks* claim will do double duty as the allegations that also establish the taint exception. That is why, in addition to being an independent cause of action, this court also describes *Franks* as a functional exception to the independent intermediary doctrine, as discussed above. *Terwilliger*, 4 F.4th at 281. But in a *Franks* case where a second intermediary is involved, a plaintiff need only show that the deliberations of the intermediary were tainted such that the second intermediary, like the first, did not have "all the facts" before it necessary to render an independent determination of probable cause. *Winfrey*, 901 F.3d at 497 (quoting *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010)).

To conclude otherwise would allow for scenarios that would render the independent intermediary doctrine meaningless. For example, assume that a police officer would be liable for a *Franks* violation for patently lying in a warrant affidavit submitted to a magistrate in order to arrest an individual innocent of a crime. And assume that after the individual is arrested, a prosecutor secures a separate witness to repeat identical lies in order to obtain a grand jury's indictment. In such a scenario, no one could describe that the grand jury acted independently to determine probable cause or that its deliberations were not tainted, even though the defendant police officer was

not presented as a witness to lie to the grand jury himself. *See Winfrey*, 901 F.3d at 497 (holding that the grand jury did not act as an independent intermediary because the "material information" that was omitted from the arrest warrant affidavit was not shown to have been submitted to the grand jury).[2]

In sum, while each defendant must fall within the scope of liability for the *Franks* violation alleged here (centering on the arrest warrant obtained from the magistrate),[3] there is no requirement to show that each and every defendant also tainted the secret grand jury deliberations.[4]

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[2] The cases cited by the defendants and the district court below do not hold otherwise. In *Shaw* and *McLin*, for example, it was true that the defendants who allegedly committed the false arrest also allegedly tainted the intermediary's decision, but neither case holds that the same actors *must* have tainted the intermediary. *See Shaw*, 918 F.3d at 417-18; *McLin*, 866 F.3d at 689-90. Likewise, in *Hand v. Gary*, this court simply did not confront the situation where a separate actor taints the intermediary—rather, in that case the grand jury had not been tainted at all. 838 F.2d 1420, 1428 (5th Cir. 1988).

[3] For example, this court in *Terwilliger* held that the plaintiffs there did not adequately allege that Chief Stroman or Assistant Chief Lanning, who are also defendants in this case, fell within the scope of the alleged *Franks* violation and thus affirmed the district court's decision to dismiss them from the case. *Terwilliger*, 4 F. 4th at 284 (citing *Melton*, 875 F.3d at 263). As explained below, we do not decide if that is also true here and instead leave that determination to the district court, in the first instance, on remand.

[4] This is, of course, also true for claims premised on *Malley* violations, as *Malley* violations are similarly a functional exception

2.

"At common law, in cases where probable cause to arrest was lacking, [an officer's] immunity turned on the issue of malice, which was a jury question." *Malley*, 475 U.S. at 341. Although that is no longer the case,[5] this court's jurisprudence on the independent intermediary doctrine developed when an officer's malice was still the central inquiry for immunity. *See Rodriguez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977) (en banc); *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982). Thus, in describing the doctrine, this court emphasized that an independent intermediary's decision would insulate an officer who had acted with malice in making an arrest without probable cause—i.e., an officer who would otherwise be liable for false arrest. *See Thomas v. Sams*, 734 F.2d 185, 191 (5th Cir. 1984) (citing *Smith*, 670 F.2d at 526). But recognizing that an officer's malice could lead him to undermine the intermediary's independence, this court clarified that "the chain of causation is broken only where all the facts are presented to the grand jury, or other independent intermediary, where the *malicious motive* of the law enforcement officials does not lead them to withhold any relevant information from the independent intermediary." *Hand*, 838 F.2d at 1427-28 (emphasis

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to the independent intermediary doctrine. *See Mayfield*, 976 F.3d at 487.

[5] *See Malley*, 475 U.S. at 341 ("Under the *Harlow* standard, on the other hand, an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982))).

added).[6] In short, our cases establishing the independent intermediary doctrine and the taint exception were concerned about the typical false arrest scenario of the era—an officer who maliciously sought to arrest someone without probable cause.

Now that the Supreme Court has subsequently made clear that there are false arrest claims for which an officer can be liable that do not turn on the officer's malice—e.g., *Malley* and *Franks* claims—it is unclear why an actor's "malice" in tainting the intermediary is relevant in such cases. But regardless of its provenance, this court has continued to quote the "malicious motive" language in modern cases when describing the independent intermediary doctrine and the taint exception. *See*, *e.g.*, *McLin*, 866 F.3d at 689; *Buehler*, 824 F.3d at 554; *Cuadra*, 626 F.3d at 813. And although our independent intermediary cases rarely turn on the *mens rea* requirements of the taint exception, in cases where *mens rea* has been relevant, this court has held

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[6] This court often credits *Hand* as the foundational case setting forth the independent intermediary doctrine and the taint exception. *See Murray v. Earle*, 405 F.3d 278, 292 (5th Cir. 2005) ("The rule of *Hand v. Gary* has since prevailed in this circuit for almost two decades."). *Hand* does not cite the Supreme Court's decision in *Malley* (or any other modern qualified immunity caselaw) despite being issued over two years after *Malley*. This is notable because *Malley* appeared to cast doubt on the "break the causal chain" theory later enshrined in *Hand*. *See Malley*, 475 U.S. at 345 n.7 (describing that the "break the causal chain" theory "is inconsistent with [the Supreme Court's] interpretation of § 1983"). However, this court has since described *Malley*'s critique of the "break the causal chain" theory as dictum. *See Murray*, 405 F.3d at 290-92.

that "[t]o satisfy the taint exception, omissions of exculpatory information must be 'knowing[ ].'" *Buehler*, 824 F.3d at 555 (second alteration in original) (quoting *Cuadra*, 626 F.3d at 813-14).

However, no case has applied this "knowing" requirement when the underlying claim is premised on *Malley* or *Franks*. *See generally Buehler*, 824 F.3d 548 (making no mention of *Malley* or *Franks*); *Cuadra*, 626 F.3d 808 (same). As we have explained above, the reason why should be obvious: to do so would conflict with Supreme Court precedent. Again, the Supreme Court held in *Malley* that an officer who is objectively unreasonable in presenting a warrant application that facially lacks probable cause can be held liable for false arrest even if a magistrate approves it. 475 U.S. at 345-46. Nowhere does the Court describe that the officer must also "knowingly" misdirect the magistrate. Similarly, an officer can be liable under *Franks* for "deliberately *or recklessly*" including a material false statement or omission in a warrant application submitted to a magistrate. *Melton*, 875 F.3d at 264 (emphasis added). To superimpose a stricter threshold of liability would supplant Supreme Court law.

And although the grand jury here acts as a second intermediary, following the magistrate, nothing in this court's precedent suggests that the *mens rea* requirement with respect to the taint exception increases when a second intermediary is involved, or that magistrates and grand juries are treated differently. *See Hand*, 838 F.2d at 1427 (describing that an official will not be liable "if the facts supporting the warrant or

indictment are put before an impartial intermediary such as a magistrate or a grand jury" (emphasis removed) (quoting *Sams*, 734 F.2d at 191)). Thus, just as an adequately pled *Malley* or *Franks* claim will also suffice to functionally apply the taint exception to the magistrate's decision, *ante* at 208-09, if a plaintiff adequately pleads that a second intermediary, such as a grand jury, has been misled in similar fashion, then the taint exception will apply to that intermediary's decision as well.

C.

Having clarified what the plaintiffs here must allege in order to satisfy the taint exception with respect to both the magistrate and the grand jury, the question remains whether their complaints have adequately done so.

This court has squarely addressed a plaintiff's burden at the pleading stage with respect to the taint exception. At the pleading stage, "'mere allegations of "taint"' . . . may be adequate to survive a motion to dismiss where the complaint alleges other facts supporting the inference." *McLin*, 866 F.3d at 690 (quoting *Cuadra*, 626 F.3d at 813). As always, the court must accept all factual allegations as true, evaluating whether the complaint states a plausible claim. *Id.*; *Shaw v. Villanueva*, 918 F.3d 414, 418 (5th Cir. 2019).

Given that "a general rule of secrecy shrouds the proceedings of grand juries," *Shields v. Twiss*, 389 F.3d 142, 147 (5th Cir. 2004), it is understandably difficult

for a plaintiff to know what was said—or wasn't said—to the grand jury absent any form of discovery. While that reality doesn't excuse pleading requirements, it does mean that allegations about what was presented or omitted in the grand jury room will in some sense be speculative, which is why plaintiffs like the ones here will need to allege "other facts supporting the inference" of what they allege to have occurred in the grand jury room. *See McLin*, 866 F.3d at 690.[7]

Here, the plaintiffs allege that some of the same officials alleged to have participated in preparing the challenged warrant affidavit testified before the grand jury. They further allege that these officials made similar representations and omissions to the grand jury as they made to the magistrate. To further support such an inference, they allege that these same officials testified during public "examining trials" related to the Twin Peaks arrests and allege that this testimony also resembled the representations made to the magistrate.

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[7] The district court appeared to hold that the plaintiffs could not use a grand jury witness's testimony as evidence (or as the basis of an allegation) that the grand jury's deliberations had been tainted, citing *Rehberg v. Paulk*, 566 U.S. 356, 369-70 (2012). That conclusion is erroneous. *Rehberg* held only that grand jury witnesses, like witnesses at trial, enjoy absolute immunity for their testimony to the grand jury. *Id.* at 369. Here, none of the plaintiffs asserts any cause of action that seeks to hold a defendant liable for his testimony to the grand jury. Rather, their claims seek to hold the defendants liable for their actions in securing an arrest warrant from a magistrate. As already explained, the taint exception is not a cause of action, *ante* at 209; relying on a grand jury witness's testimony to prove that the grand jury deliberations were tainted is not the same as bringing a claim against a witness for such testimony.

The plaintiffs also claim that video evidence which materially undermined probable cause was withheld from the grand jury, similar to how the defendants allegedly withheld exculpatory video evidence from the magistrate. *See Terwilliger*, 4 F.4th at 283. Finally, the plaintiffs allege that they have attempted to gain lawful access to records of the grand jury proceedings but were told that no transcript of the proceedings exists, nor any other recording from which a transcript could be made.

In sum, plaintiffs allege that specific representations and omissions that were made to the magistrate were also made to the grand jury and they allege "other facts" that support that inference. The only remaining question is whether those representations were *false* and whether the omitted information was material to probable cause *with respect to these plaintiffs*. That question, as explained above, overlaps with whether plaintiffs have adequately alleged a *Franks* violation with respect to the warrant application presented to the magistrate.[8]

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[8] It is not necessarily the case that the representations made to the magistrate that were false with respect to the *Terwilliger* plaintiffs are false with respect to the plaintiffs here. For example, notably absent from many of the plaintiffs' complaints are any specific statements denying affiliation with the Bandidos or Cossacks or denying that they were wearing the "signs and symbols" of either group (and that the defendants recklessly or deliberately misrepresented otherwise). *See ante* at 207. Moreover, it does not get the plaintiffs very far to generally deny membership in a "criminal street gang." Indeed, it does not seem far-fetched that many members of the Bandidos or Cossacks would also deny

We decline to decide whether the plaintiffs here have adequately pleaded a *Franks* violation with respect to any of the named defendants. This consolidated case comprises five separate appeals that in turn encompass close to twenty separate district court cause numbers and nearly 100 individual plaintiffs. While it may be the case that the plaintiffs' theories are similar, individual pleadings may make the difference. More fundamentally, the district court did not reach the question below, instead resting its holding on a legally erroneous application of the independent intermediary doctrine. With the benefit of this court's decision in *Terwilliger* and the present decision clarifying our law with respect to the independent intermediary doctrine, the district court is best suited to decide in the first instance whether each plaintiff here has adequately alleged a *Franks* violation with respect to the arrest warrant, and, if so, whether each plaintiff has also adequately alleged that the taint exception should apply to the grand jury's subsequent indictment. *See Montano v. Texas*, 867 F.3d 540, 546 (5th Cir. 2017) ("[A] court of appeals sits as a court of review, not of first view." (citation omitted)).

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being members of a criminal street gang, as that term is understood within the meaning of the offense of EIOCA. If the plaintiffs wish to establish a *Franks* violation, or, similarly, wish to establish the taint exception to the independent intermediary doctrine, they must point to omitted or misrepresented *facts*, not legal conclusions. *See Terwilliger*, 4 F.4th at 281-82.

We REVERSE and REMAND for further proceedings consistent with this opinion.

United States Court of Appeals
for the Fifth Circuit

No. 20-50769

WILLIAM BRENT REDDING; THOMAS PAUL LANDERS; GILBERT ZAMORA,

Plaintiffs—Appellants,

versus

PATRICK SWANTON, *in his individual capacity*;
STEVEN SCHWARTZ, *in his individual capacity*;
CHRISTOPHER FROST, *in his individual capacity*;
JEFFREY ROGERS, *in his individual capacity*;
BRENT STROMAN, *Chief of Police for the Waco Police Department*, *in his individual capacity*;
ABELINO REYNA, *Elected District Attorney for McLennan County, Texas*, *in his individual capacity*;
MANUEL CHAVEZ, *Waco Police Department Detective*, *in his individual capacity*,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC Nos. 1:17-CV-470; 1:17-CV-468;
1:17-CV-469; 1:16-CV-1153; 1:16-CV-1154

(Filed Apr. 29, 2022)

Before RICHMAN, *Chief Judge*, and CLEMENT and HIGGINSON, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:*

The Plaintiffs-Appellants here are almost identically situated to the plaintiffs in this court's recent decision in *Wilson v. Stroman*, ___ F.4th ___, No. 20-50367, 2022 WL 1261660 (5th Cir. Apr. 28 2022). Like the plaintiffs in *Wilson*, the Plaintiffs-Appellants here were also arrested following the Twin Peaks shootout[1] pursuant to the same challenged form warrant affidavit, and they were subsequently indicted by a grand jury for the offense of Engaging in Organized Criminal Activity ("EIOCA") in violation of Texas Penal Code § 71.02. *See Wilson*, slip op. at 2. Their Fourth Amendment false arrest claims also suffered the same fate below: the district court dismissed the claims because it held the grand jury's indictment triggered the independent intermediary doctrine. *See id.* at 3. The district court also dismissed Plaintiffs-Appellants' First Amendment and Equal Protection claims.

We AFFIRM the district court's dismissal of Plaintiffs-Appellants' First Amendment and Equal Protection claims. We REVERSE the district court's decision dismissing the false arrest claims and REMAND for

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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.

[1] For background on the Twin Peaks incident, see *Terwilliger v. Reyna*, 4 F.4th 270, 277-79 (5th Cir. 2021).

further proceedings consistent with this court's decision in *Wilson*.

I.

We review a district court's grant of a motion to dismiss de novo, accepting all well-pleaded facts as true and viewing them in the light most favorable to the plaintiffs. *Lindsay v. United States*, 4 F.4th 292, 294 (5th Cir. 2021).

Plaintiffs-Appellants appear to claim that their First Amendment rights were violated because they were allegedly arrested in retaliation for their association with a political group (i.e., their motorcycle clubs) and in retaliation for exercising their right to assemble and listen to political speech (i.e., participating in the meeting of the Texas Confederation of Clubs & Independents at the Twin Peaks restaurant). We agree with the district court that these conclusory claims fail.

Principally, Plaintiffs-Appellants fail to state a First Amendment retaliation claim because they fail to adequately allege that the defendants' "adverse actions were substantially motivated by . . . constitutionally protected [First Amendment] conduct." *Cass v. City of Abilene*, 814 F.3d 721, 729 (5th Cir. 2016). Assuming *arguendo* that the Plaintiff-Appellants were engaged in protected First Amendment activity, the only allegation supporting their assertion that the defendants arrested them in retaliation for such activity is the allegation that certain bikers who were members of Christian motorcycle clubs were not arrested even

though they behaved similarly. And their only explanation for this alleged difference in treatment is the wholly conclusory allegation that the defendants approved of the Christian clubs, but not the Plaintiffs-Appellants' clubs. These allegations are insufficient. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))).

Moreover, nowhere do Plaintiffs-Appellants allege that the defendants had any plan to arrest them prior to the occurrence of a shootout that left nine people dead, despite the defendants' alleged advance knowledge of the gathering. Regardless of the ultimate propriety of these arrests under the Fourth Amendment, Plaintiffs-Appellants have not plausibly alleged that the defendants were substantially motivated to arrest them in retaliation for protected First Amendment activity rather than because of their proximity to an incident of mass violence. *See id.* at 680 (describing that a plaintiff's claims must cross the line "from conceivable to plausible" in order to survive the pleading stage (quoting *Twombly*, 550 U.S. at 570)).

Plaintiffs-Appellants' Equal Protection claim fails for similar reasons. This separate claim again relies on the alleged disparate treatment between them and members of the Christian motorcycle clubs. As just discussed, the allegation that defendants "favored" Christian clubs is wholly conclusory. Thus, Plaintiffs-Appellants' Equal Protection claim fails because,

among other reasons, they fail to adequately allege that the defendants' decision to arrest them was motivated by a discriminatory purpose. *See Johnson v. Rodriguez*, 110 F.3d 299, 306-07 (5th Cir. 1997).

II.

The district court below is the same court assigned to handle *Wilson*. And the portion of its order applying the independent intermediary doctrine to dismiss Plaintiffs-Appellants' Fourth Amendment false arrest claims is identical to its order that dismissed the *Wilson* plaintiffs' false arrest claims. It thus contains the same legal flaws identified by our court in *Wilson*. *See Wilson*, slip op. at 8-14. Thus, for the same reasons stated in *Wilson*, we REVERSE and REMAND the district court's decision applying the independent intermediary doctrine to dismiss the Plaintiffs-Appellants' Fourth Amendment false arrest claims. We note, however, that although we have remanded both this case and *Wilson* on equal footing, we make no comment on whether the district court should reach the same outcome with respect to both sets of consolidated cases on remand - it is possible that differences in individual pleadings may prove material in outcome. *See id.* at 17.

* * *

We AFFIRM in part, REVERSE in part, and REMAND for further proceedings consistent with this opinion and consistent with this court's decision in *Wilson*.

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

JOHN WILSON, JOHN ARNOLD, ROY COVEY, JAMES BRENT ENSEY, EDGAR KELLEHER, BRIAN LOGAN, TERRY S. MARTIN, ROBERT ROBERTSON, JACOB WILSON, MITCHELL BRADFORD, RICHARD LUTHER, JOHN CRAFT, DANIEL JOHNSON, JASON DILLARD, RONALD ATTERBURY, ***Plaintiffs,***	§	**LEAD CASE:** **CIVIL NO. 1-17-CV-00453-ADA** **MEMBER CASES:** **CIVIL NO. 1-18-CV-01050-ADA** **CIVIL NO. 1-18-CV-01051-ADA** **CIVIL NO. 1-18-CV-01052-ADA** **CIVIL NO. 1-17-CV-00471-ADA** **CIVIL NO. 1:15-CV-01040-ADA** **CIVIL NO. 1:15-CV-01041-ADA** **CIVIL NO. 1:15-CV-01044-ADA** **CIVIL NO. 1:17-CV-00479-ADA**
v.		
BRENT STROMAN, CHIEF OF POLICE FOR THE WACO POLICE DEPARTMENT, IN HIS INDIVIDUAL CAPACITY; MANUEL CHAVEZ, WACO POLICE DEPARTMENT DETECTIVE, IN HIS INDIVIDUAL CAPACITY; ABELINO REYNA, ELECTED DISTRICT ATTORNEY FOR MCLENNAN COUNTY, TEXAS, IN HIS INDIVIDUAL CAPACITY;	§	

CITY OF WACO, TEXAS,	§
MCLENNAN COUNTY,	§
TEXAS, ROBERT	§
LANNING, IN HIS	§
INDIVIDUAL CAPACITY;	§
JEFFREY ROGERS,	§
IN HIS INDIVIDUAL	§
CAPACITY; SERGEANT	§
PATRICK SWANTON,	§
IN HIS INDIVIDUAL	§
CAPACITY; STEVEN	§
SCHWARTZ, IN HIS	§
INDIVIDUAL CAPACITY;	§
AND CHRISTOPHER	§
FROST, IN HIS	§
INDIVIDUAL CAPACITY;	§
Defendants.	§

ORDER

(Filed Apr. 6, 2020)

Before the Court are: Defendants Frost and Schwartz's Motions to Dismiss (ECF Nos. 26, 43, 46, 49, 52, 55); the City Defendants' Joint Motions to Dismiss (ECF Nos. 28, 45, 48, 51, 54, 57); Defendants Reyna and McLennan County's Motions to Dismiss (ECF Nos. 27, 44, 47, 50, 53, 56); and the respective responses, replies, and sur-replies thereto. The Court, having considered the Motions and the applicable law, finds that the Motions should be **GRANTED** as discussed below.

I. INTRODUCTION

This case stems from the Twin Peaks restaurant incident on May 17, 2015. Members of the Bandidos and Cossacks Motorcycle Clubs, along with hundreds of other motorcycling enthusiasts, converged on the restaurant. Tensions between the Bandidos and Cossacks erupted in a shootout that left nine dead and many injured. In the aftermath of the incident, police arrested 177 individuals on charges of Engaging in Organized Criminal Activity. The probable cause affidavit in support of the arrest warrants was the same for each of the 177 arrestees, and a justice of the peace set bond for each of the arrestees at one million dollars. Only one of the criminal cases ever went to trial (the defendant in that case is not a party to the instant action), and those proceedings ended in a mistrial. The state eventually dropped all remaining charges against the arrestees. The plaintiffs in this case, John Wilson and others similarly situated, were arrested pursuant to the same probable cause affidavit as the other arrestees. Significantly, these Plaintiffs were also indicted. *See* Compl. ¶ 125, ECF No. 23. The indictment was later dismissed during the pendency of this lawsuit.

Plaintiffs bring this case pursuant to 42 U.S.C. § 1983. They allege that the defendants violated their Fourth Amendment rights by obtaining arrest warrants based on a fill-in-the-name affidavit that lacked probable cause. Plaintiffs also allege that the defendants violated their Fourteenth Amendment due process right to be free from unlawful arrest. Plaintiffs

allege that the defendants conspired to commit these violations.

There are three groups of defendants in this case. The first group consists of: the City of Waco, Texas; Brent Stroman, Chief of Police; Robert Lanning, Assistant Chief of Police; detective Jeffrey Rogers; and police officers Manuel Chavez, Patrick Swanton. The second group is McLennan County, Texas and former McLennan County District Attorney Abelino "Abel" Reyna. The third group is Steven Schwartz and Christopher Frost, both of whom are special agents of the Texas Department of Public Safety. The plaintiffs bring suit against the City of Waco ("the City") and McLennan County ("the County") as municipalities and the other defendants in their individual capacities. The individual defendants all assert qualified immunity.

II. LEGAL STANDARD

Title 42 U.S.C. § 1983 creates a cause of action against any person who, under color of law, causes another to be deprived of a federally protected constitutional right. Two allegations are required to state a cause of action under 42 U.S.C. § 1983. "First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Manax v. McNamara*, 842 F.2d 808, 812 (5th Cir. 1988).

Upon motion or sua sponte, a court may dismiss an action that fails to state a claim upon which relief may be granted. FED. R. CIV. P. 12(b)(6); *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006). To survive Rule 8, a nonmovant must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The court's task is to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of success." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). The court begins by identifying which allegations are well-pleaded facts and which are legal conclusions or elemental recitations; accepting as true the former and rejecting the latter. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court need not blindly accept every allegation of fact; properly pleaded allegations of fact amount to more than just conclusory allegations or legal conclusions "masquerading as factual conclusions." *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002). The court then determines whether the accepted allegations state a plausible claim to relief. *Id.* at 379.

"Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555. "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the [nonmovant]." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quotation marks omitted). "A

claim has facial plausibility when the [nonmovant] pleads factual content that allows the court to draw the reasonable inference that the [movant] is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678. "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* For purposes of Rule 12(b)(6), "pleadings" include the complaint, its attachments, and documents referred to in the complaint and central to a plaintiff's claims. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–499 (5th Cir. 2000).

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss an action barred by qualified immunity. *See Bustillos v. El Paso Cnty. Hosp. Dist.*, 226 F. Supp. 3d 778, 793 (W.D. Tex. 2016) (Martinez, J.) (dismissing a plaintiff's claim based on qualified immunity). Qualified immunity shields government officials from civil liability for claims under federal law unless their conduct "violates a clearly established constitutional right." *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003). Qualified immunity balances "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Because qualified immunity shields "all but the plainly incompetent or those who knowingly violate the law," the Fifth Circuit considers qualified immunity the norm and admonishes courts to deny a defendant immunity only in rare circumstances. *Romero v. City of*

Grapevine, 888 F.3d 170, 176 (5th Cir. 2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (internal quotation marks omitted).

Courts use a two-prong analysis to determine whether an officer is entitled to qualified immunity. *Cole v. Carson*, No. 14-10228, 2019 WL 3928715, at *5 (5th Cir. Aug. 20, 2019), *as revised* (Aug. 21, 2019). A plaintiff must show (1) the official violated a constitutional right; and (2) the constitutional right was "clearly established" at the time of the defendant's alleged misconduct. *Reed v. Taylor*, 923 F.3d 411, 414 (5th Cir. 2019). The Supreme Court held in *Pearson* that "the judges of the district courts . . . should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." 555 U.S. at 236. Although qualified immunity is an affirmative defense, the plaintiff bears the burden to rebut the defense and assert facts to satisfy both prongs of the analysis. *Brumfield*, 551 F.3d at 326. If a plaintiff fails to establish either prong, the public official is immune from suit. *Zarnow v. City of Wichita Falls*, 500 F.3d 401, 407 (5th Cir. 2007).

A heightened pleading requirement is imposed on a civil rights plaintiff suing a state actor in his individual capacity. *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985). To satisfy the heightened pleading requirement and maintain a § 1983 action against an official who raises a qualified immunity defense, a complaint must allege with particularity all material facts establishing a plaintiff's right of recovery, including

"detailed facts supporting the contention that [a] plea of immunity cannot be sustained." *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054, 1055 (5th Cir. 1992). Mere conclusory allegations are insufficient to meet this heightened pleading requirement. *Elliott*, 751 F.2d at 1479.

III. ANALYSIS

A. Fourth and Fourteenth Amendments

At the outset, the Court notes that Plaintiffs bring their claims against the defendants under both the Fourth and Fourteenth Amendments. But "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (internal punctuation omitted). A citizen has a right under the Fourth Amendment to be free from arrest unless the arrest is supported by either a properly issued arrest warrant or probable cause. *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004). "The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Albright*, 510 U.S. at 274. Because the Fourth Amendment covers unlawful arrest, Plaintiffs cannot also seek relief under the Fourteenth Amendment. *Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 814 (5th Cir. 2010). Accordingly, Plaintiffs' Fourteenth Amendment claims are

DISMISSED, and the Court will address their claims in the context of the Fourth Amendment.

The Court also notes that Plaintiffs attempt to invoke an exception to the general rule described above, citing *Cole v. Carson*, 802 F.3d 752 (5th Cir. 2015), *vacated sub nom. Hunter v. Cole*, 137 S. Ct. 497 (2016). In *Cole*, the Fifth Circuit recognized deliberate fabrication of evidence by police may create a Fourteenth Amendment claim if such a claim may not be pursued under the Fourth Amendment. *Id.* First, Plaintiffs have a Fourth Amendment claim in this case. Second, the Fifth Circuit issued this decision on September 25, 2015, over four months *after* the shootout at Twin Peaks. Again, to overcome a defendant's qualified immunity, a plaintiff must show that the constitutional right was "clearly established" at the time of the defendant's alleged misconduct. *Reed*, 923 F.3d at 414. The exception that Plaintiffs seek to invoke had not yet been recognized in this Circuit at the time their cause of action arose, and as such, any right recognized in *Cole* was not clearly established.

There are two claims against government agents for alleged Fourth Amendment violations in connection with a search or arrest warrant: **(1)** claims under *Malley*, 475 U.S. at 335, for which the agent may be liable if he "fil[es] an application for an arrest warrant without probable cause" and "a reasonable well-trained officer . . . would have known that [the] affidavit failed to establish probable cause," *Michalik v. Hermann*, 422 F.3d 252, 259–60 (5th Cir. 2005) (citations and internal quotation marks omitted); and

(2) claims under *Franks v. Delaware*, 438 U.S. 154 (1978), for which the agent may be liable if he "makes a false statement knowingly and intentionally, or with reckless disregard for the truth that results in a warrant being issued without probable cause," *Michalik*, 422 F.3d at 258 n.5. In the instant case, Plaintiffs bring claims under both theories.

However, because Plaintiffs in these cases were indicted by a McLennan County grand jury, Defendants argue Plaintiffs' Fourth Amendment claims should be dismissed. Thus, before the Court can address the substance of the alleged violations, the Court must first address whether the independent intermediary doctrine applies in this case.

B. Independent Intermediary Doctrine

The City and County Defendants argue Plaintiffs' Fourth Amendment claims should be dismissed under the independent intermediary doctrine, which insulates from a false arrest claim the initiating party if an intermediary presented with the facts finds that probable cause for the arrest exists.[1] Each plaintiff in these consolidated cases was indicted by a grand jury. Defendants argue, correctly, that those indictments break the chain of causation between the defendants and the alleged constitutional harms unless an exception applies. Plaintiffs contend the exception does apply such

[1] Defendant Schwartz argues he is entitled to absolute immunity from any claim based upon his purported testimony to the grand jury. ECF No. 26 at 25.

that plaintiffs have stated a plausible claim for relief. The Court finds the doctrine applies, but the exception does not.

"It is well settled that if facts supporting an arrest are placed before any independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party." *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1994), *overruled on other grounds by Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en Banc). The Fifth Circuit has repeatedly "applied this rule even if the independent intermediary's action occurred after the arrest, and even if the arrestee was never convicted of any *crime." Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016). Thus, unless an exception to the independent intermediary rule applies, Plaintiffs' grand jury indictments dooms their Fourth Amendment claims.

Under the taint exception to the independent intermediary rule, a plaintiff may plead a plausible false arrest claim despite the findings of an intermediary "if the plaintiff shows that 'the deliberations of that intermediary were in some way tainted by the actions of the defendant.'" *Curtis v. Sowell*, 761 Fed. App'x 302, 304 (5th Cir. 2019) (quoting *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988)). Because the intermediary's discussions protect even individuals with malicious intent, a plaintiff must show that the state actor's malicious motive led the actor to withhold relevant information or otherwise misdirect the independent intermediary by omission or commission. *McLin v. Ard*,

866 F.3d 682, 689 (5th Cir. 2019). The Fifth Circuit recently held that when analyzing allegations of taint at the motion to dismiss stage, mere allegations of taint "may be adequate to survive a motion to dismiss where the complaint alleges other facts supporting the inference." *Id.* at 690. Thus, to survive Defendants' Motions to Dismiss, Plaintiffs must provide sufficient facts supporting the inference that each Defendant maliciously tainted the grand jury proceedings. *See Shaw v. Villanueva*, 918 F.3d 414, 417 (holding a plaintiff must show that the defendant maliciously withheld relevant information or otherwise misdirected the intermediary). Plaintiffs have failed to do so in this case.

"The Supreme Court is no-nonsense about pleading specificity requirements." *Shaw*, 918 F.3d at 415. Here, Plaintiffs cannot satisfy the requirement in *Iqbal* to plead facts rising above the speculative level demonstrating how *each* Defendant tainted the grand jury proceedings by either omitting evidence or misleading the jury. *See Iqbal*, 556 U.S. at 679; *Shaw*, 918 F.3d at 415. A majority of Plaintiffs allegations are that a defendant, grouping of defendants, or sometimes simply, "Defendants," knew that [a particular fact] did not [e.g., establish probable cause as to them or support the charge]; or that the defendants knew that the plaintiffs were not involved in gang violence. However, such threadbare allegations are not sufficient to meet the taint exception. *See Glaster v. City of Mansfield*, 2015 WL 8512, *7 (W.D. La. 2015) (plaintiff did not plead involvement of defendant officer in the grand jury proceedings or factually how he tainted the grand

jury's deliberations; officer dismissed on qualified immunity grounds).

In *Curtis v. Sowell*, the Fifth Circuit recognized that during the motion to dismiss stage, mere allegations of taint may be adequate to survive a motion to dismiss where the complaint alleges other facts supporting the inference. *See* 761 Fed. App'x at 304–05. However, the Fifth Circuit affirmed the district court's decision to dismiss the plaintiff's complaint because the plaintiff did not adequately allege how the defendants, or anyone else, deceived or withheld material information from the grand jury. *Id.* at 305. The plaintiff's allegation that the district attorney "persuaded the grand jury to indict [the plaintiff] even though the district attorney knew that there was no factual or legal basis for the charge" was insufficient to invoke the exception to the independent intermediary doctrine. *Id.*

Similarly, Plaintiffs argue Defendants knew they were not in a criminal gang and knew that they did not participate in the criminal conduct at the Twin Peaks restaurant. Despite this knowledge, Defendants still pursued an indictment. However, these conclusory allegations, as they were in *Curtis*, are not sufficient to survive a motion to dismiss. Plaintiffs admit that they do not know what testimony was given before the grand jury; they don't know who testified before the grand jury; and there is no transcript of the grand jury proceedings. In other words, Plaintiffs are simply guessing at what took place before the grand jury and

who testified before the grand jury.[2] Such allegations are no more than rank speculation. *See Rothstein v. Corriere* 373 F.3d 275, 284 (2nd Cir. 2004) (holding where a person's alleged grand jury testimony is unknown, an "argument that [defendant] must have testified falsely to the grand jury amounts to rank speculation."). Because Plaintiffs' conclusions and guesses as to who possibly testified before the grand jury, and what their testimony could have possibly been are the type of formulaic, threadbare allegations that are insufficient under the Supreme Court's *Twombly/Iqbal* standard, the Court must dismiss Plaintiffs' complaint.

As previously mentioned, grand jury proceedings are not generally discoverable. *See Shields v. Twiss*, 389 F.3d 142, 147 (5th Cir. 2004) ("[t]he court notes that under both federal and state law, a general rule of secrecy shrouds the proceedings of grand juries."). However, both federal and Texas law permit discovery of grand jury material when the party seeking discovery demonstrates a "particularized need" for the material. *Id.* at 147–48 (citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682–83 (1958); *In re Byrd*

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[2] The Court is not requiring Plaintiffs to prove the impossible—what occurred inside the secret proceedings of a grand jury. *See McLin v. Ard*, F.3d at 690. However, Plaintiffs' allegations amount to no more than "defendants 'knew of or 'condoned' the alleged violations of the plaintiffs' constitutional rights. Thus, Plaintiffs have failed to plead adequate factual allegations to support the taint exception. *See Shaw*, 918 F.3d at 418 (noting that a plaintiff's allegation that the defendant knew of or condoned some falsity or omission was insufficient to state a claim).

Enters., 980 S.W.2d 542, 543 (Tex. App.–Beaumont 1998, no pet.)). "A party claiming a particularized need for grand jury material under Rule 6(e) has the burden of showing "that the material [it] seek[s] is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that [its] request is structured to cover only material so needed." *Id.* at 147. In the present case, Plaintiffs have failed to even mention, let alone attempt to articulate reasons why they might meet the standard for such discovery. Even if Plaintiffs did so, the Court believes, under the facts alleged by Plaintiffs, Plaintiffs could not identify a "particularized need" for grand jury material.

Additionally, Plaintiffs have failed to allege that *each* Defendant (or Defendants generally) *maliciously* omitted evidence or mislead the grand jury. *See Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988); *see also Scott v. White*, 2018 WL 2014093, *4 (W.D. Tex. 2018). To invoke the exception to the independent intermediary doctrine, it is not enough that the plaintiff plead that misrepresentations were made to the intermediary or that the defendant omitted to provide material information to the intermediary. The plaintiff must also plead that such conduct was done maliciously. *McLin*, 866 F.3d at 689; *Shaw*, 918 F.3d at 417; *Curtis*, 761 Fed. App'x at 304. Moreover, a plaintiff must plead sufficient factual allegations that *each defendant* maliciously withheld or mislead the grand jury. *Id.* In this case, Plaintiff provides no such factual allegations, let

alone allegations concerning *each* defendant.[3] *See generally* Pls.' Compl.

Because the Court finds the independent intermediary doctrine applies in this case, Plaintiffs' Fourth Amendment claims against the City and County Defendants must fail. Therefore, the Court **GRANTS** the City and County Defendants' motions to dismiss.

C. Defendants Schwartz and Frost are Entitled to Qualified Immunity from any Claim Based Upon His Purported Testimony to the Grand Jury

Although the DPS Defendants did not address the independent intermediary doctrine directly, the Court finds the doctrine nonetheless applies to bar Plaintiffs' claims against them.[4] First, whatever conduct the DPS Defendants engaged in prior to the grand jury indicting plaintiffs is inconsequential and is simply not relevant in this case. Previously, the Court ruled in several related cases that Plaintiffs' alleged enough to

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[3] Moreover, as Defendants correctly point out, grand jury witnesses have absolute immunity from any § 1983 claim based on the witness' testimony, as well as related investigation or preparation for such testimony. *See Rehberg v. Paulk*, 566 U.S. 356, 369–70 (2012). The Supreme Court in *Rehberg* further stated that such testimony before the grand jury cannot be used to support a § 1983 action. *Rehberg*, 566 U.S. at 369. Therefore, Plaintiffs cannot use any Defendants' alleged grand jury testimony to rebut the presumption of probable cause arising from the indictment.

[4] The independent intermediary doctrine does not need to be raised as an affirmative defense. *Holcomb v. McCraw*, 262 F.Supp.3d 437, 452 (W.D. Texas June 27, 2017).

survive a motion to dismiss. However, the present case is markedly different—Plaintiffs in this case were, in fact, indicted by an independent intermediary, a McLennan County grand jury. Thus, regardless of the DPS Defendants' prior conduct leading up to the indictment, even if their conduct was malicious, the independent intermediary destroys any casual connection between the alleged harm and any constitutional violation by Defendants. Accordingly, for the same reasons discussed above, *supra section B*, Plaintiffs fail to overcome Defendants' qualified immunity and dismissal is appropriate. *Buehler*, 824 F.3d at 555 ("[T]he plaintiff must affirmatively show that the defendants tainted the intermediary's decision.").

IV. CONCLUSION

Based on the foregoing, the Court **GRANTS** Defendants' Motions to Dismiss. Accordingly, Defendants Frost and Schwartz's Motions to Dismiss (ECF Nos. 26, 43, 46, 49, 52, 55); the City Defendants' Joint Motions to Dismiss (ECF Nos. 28, 45, 48, 51, 54, 57); and Defendants Reyna and McLennan County's Motions to Dismiss (ECF Nos. 27, 44, 47, 50, 53, 56) are **GRANTED**.

SIGNED this 6th day of April 2020.

/s/ Alan D Albright
ALAN D ALBRIGHT
UNITED STATES
DISTRICT JUDGE

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

MARTIN D.C. LEWIS,	§	
RICKY WYCOUGH,	§	
GREGORY WINGO,	§	**LEAD CASE:**
DUSTY OEHLERT,	§	**CIVIL NO.**
JAMES MICHAEL	§	**1-17-CV-00448-ADA**
DEVOLL, JAMES DAVID,	§	**MEMBER CASES:**
JARRON HERNANDEZ,	§	
ANDREW SANDOVAL,	§	**CIVIL NO.**
JASON MORENO, JOHN	§	**1-17-CV-00474**
MARTINEZ, NOBLE	§	**CIVIL NO.**
MALLARD, SALVADOR	§	**1:15-CV-01042**
CAMPOS, MICHAEL	§	**CIVIL NO.**
THOMAS, SERGIO REYES,	§	**1:15-CV-01043**
MARIO GONZALEZ,	§	**CIVIL NO.**
ANDRES RAMIREZ,	§	**1:15-CV-01045**
EDWARD KELLER, JR.,	§	**CIVIL NO.**
GREGORY SALAZAR,	§	**1:16-CV-00575**
JOSE VALLE, DET.	§	
JAMES ROSAS, IN HIS	§	
INDIVIDUAL CAPACITY;	§	
RICHARD CANTU, JR.,	§	
DANIEL PESINA,	§	
JUSTIN GARCIA, MARCO	§	
DEJONG, ANDREW	§	
STROER, KENNETH	§	
CARLISLE, ROLANDO	§	
REYES, JAMES HARDIN,	§	
MICHAEL S. HERRING,	§	
VALDEMAR	§	
GUARJARDO, JR., et al,,	§	
Plaintiffs,	§	

v.	§
CHIEF BRENT STROMAN, IN HIS INDIVIDUAL CAPACITY; DET. MANUEL CHAVEZ, IN HIS INDIVIDUAL CAPACITY; ABELINO "ABEL" REYNA, IN HIS INDIVIDUAL CAPACITY; CITY OF WACO, TEXAS, MCLENNAN COUNTY, TEXAS, ROBERT LANNING, IN HIS INDIVIDUAL CAPACITY; DET. JEFFREY ROGERS, IN HIS INDIVIDUAL CAPACITY; PATRICK SWANTON, IN HIS INDIVIDUAL CAPACITY; STEVEN SCHWARTZ, IN HIS INDIVIDUAL CAPACITY; AND CHRISTOPHER FROST, IN HIS INDIVIDUAL CAPACITY;	§
Defendants.	§

ORDER

(Filed Apr. 6, 2020)

Before the Court are: Defendant Frost and Schwartz's Motions to Dismiss (ECF Nos. 24, 41, 44, 47, 50, 53); the City Defendants' Joint Motion to Dismiss (ECF Nos. 26, 43, 46, 49, 52, 55); Defendant Reyna and McLennan County's Motions to Dismiss (ECF Nos.

25, 42, 45, 48, 51, 54); and the respective responses, replies, and sur-replies thereto. The Court, having considered the Motions and the applicable law, finds that the Motions should be **GRANTED** as discussed below.

I. INTRODUCTION

This case stems from the Twin Peaks restaurant incident on May 17, 2015. Members of the Bandidos and Cossacks Motorcycle Clubs, along with hundreds of other motorcycling enthusiasts, converged on the restaurant. Tensions between the Bandidos and Cossacks erupted in a shootout that left nine dead and many injured. In the aftermath of the incident, police arrested 177 individuals on charges of Engaging in Organized Criminal Activity. The probable cause affidavit in support of the arrest warrants was the same for each of the 177 arrestees, and a justice of the peace set bond for each of the arrestees at one million dollars. Only one of the criminal cases ever went to trial (the defendant in that case is not a party to the instant action), and those proceedings ended in a mistrial. The state eventually dropped all remaining charges against the arrestees. The plaintiffs in this case, John Wilson and others similarly situated, were arrested pursuant to the same probable cause affidavit as the other arrestees. Significantly, these Plaintiffs were also indicted. *See* Compl. ¶ 125, ECF No. 21. The indictment was later dismissed during the pendency of this lawsuit.

Plaintiffs bring this case pursuant to 42 U.S.C. § 1983. They allege that the defendants violated their Fourth Amendment rights by obtaining arrest warrants based on a fill-in-the-name affidavit that lacked probable cause. Plaintiffs also allege that the defendants violated their Fourteenth Amendment due process right to be free from unlawful arrest. Plaintiffs allege that the defendants conspired to commit these violations.

There are three groups of defendants in this case. The first group consists of: the City of Waco, Texas; Brent Stroman, Chief of Police; Robert Lanning, Assistant Chief of Police; detective Jeffrey Rogers; and police officers Manuel Chavez, Patrick Swanton. The second group is McLennan County, Texas and former McLennan County District Attorney Abelino "Abel" Reyna. The third group is Steven Schwartz and Christopher Frost, both of whom are special agents of the Texas Department of Public Safety. The plaintiffs bring suit against the City of Waco ("the City") and McLennan County ("the County") as municipalities and the other defendants in their individual capacities. The individual defendants all assert qualified immunity.

II. LEGAL STANDARD

Title 42 U.S.C. § 1983 creates a cause of action against any person who, under color of law, causes another to be deprived of a federally protected constitutional right. Two allegations are required to state a cause of action under 42 U.S.C. § 1983. "First, the

plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Manax v. McNamara*, 842 F.2d 808, 812 (5th Cir. 1988).

Upon motion or sua sponte, a court may dismiss an action that fails to state a claim upon which relief may be granted. FED. R. CIV. P. 12(b)(6); *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006). To survive Rule 8, a nonmovant must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The court's task is to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of success." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). The court begins by identifying which allegations are well-pleaded facts and which are legal conclusions or elemental recitations; accepting as true the former and rejecting the latter. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court need not blindly accept every allegation of fact; properly pleaded allegations of fact amount to more than just conclusory allegations or legal conclusions "masquerading as factual conclusions." *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002). The court then determines whether the accepted allegations state a plausible claim to relief. *Id.* at 379.

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assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555. "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the [nonmovant]." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quotation marks omitted). "A claim has facial plausibility when the [nonmovant] pleads factual content that allows the court to draw the reasonable inference that the [movant] is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678. "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* For purposes of Rule 12(b)(6), "pleadings" include the complaint, its attachments, and documents referred to in the complaint and central to a plaintiff's claims. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–499 (5th Cir. 2000).

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss an action barred by qualified immunity. *See Bustillos v. El Paso Cnty. Hosp. Dist.*, 226 F. Supp. 3d 778, 793 (W.D. Tex. 2016) (Martinez, J.) (dismissing a plaintiff's claim based on qualified immunity). Qualified immunity shields government officials from civil liability for claims under federal law unless their conduct "violates a clearly established constitutional right." *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003). Qualified immunity balances "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."

Pearson v. Callahan, 555 U.S. 223, 231 (2009). Because qualified immunity shields "all but the plainly incompetent or those who knowingly violate the law," the Fifth Circuit considers qualified immunity the norm and admonishes courts to deny a defendant immunity only in rare circumstances. *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (internal quotation marks omitted).

Courts use a two-prong analysis to determine whether an officer is entitled to qualified immunity. *Cole v. Carson*, No. 14-10228, 2019 WL 3928715, at *5 (5th Cir. Aug. 20, 2019), *as revised* (Aug. 21, 2019). A plaintiff must show (1) the official violated a constitutional right; and (2) the constitutional right was "clearly established" at the time of the defendant's alleged misconduct. *Reed v. Taylor*, 923 F.3d 411, 414 (5th Cir. 2019). The Supreme Court held in *Pearson* that "the judges of the district courts . . . should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." 555 U.S. at 236. Although qualified immunity is an affirmative defense, the plaintiff bears the burden to rebut the defense and assert facts to satisfy both prongs of the analysis. *Brumfield*, 551 F.3d at 326. If a plaintiff fails to establish either prong, the public official is immune from suit. *Zarnow v. City of Wichita Falls*, 500 F.3d 401, 407 (5th Cir. 2007).

A heightened pleading requirement is imposed on a civil rights plaintiff suing a state actor in his

individual capacity. *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985). To satisfy the heightened pleading requirement and maintain a § 1983 action against an official who raises a qualified immunity defense, a complaint must allege with particularity all material facts establishing a plaintiff's right of recovery, including "detailed facts supporting the contention that [a] plea of immunity cannot be sustained." *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054, 1055 (5th Cir. 1992). Mere conclusory allegations are insufficient to meet this heightened pleading requirement. *Elliott*, 751 F.2d at 1479.

III. ANALYSIS

A. Fourth and Fourteenth Amendments

At the outset, the Court notes that Plaintiffs bring their claims against the defendants under both the Fourth and Fourteenth Amendments. But "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (internal punctuation omitted). A citizen has a right under the Fourth Amendment to be free from arrest unless the arrest is supported by either a properly issued arrest warrant or probable cause. *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004). "The Framers considered the matter of pretrial deprivations of liberty and drafted

the Fourth Amendment to address it." *Albright*, 510 U.S. at 274. Because the Fourth Amendment covers unlawful arrest, Plaintiffs cannot also seek relief under the Fourteenth Amendment. *Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 814 (5th Cir. 2010). Accordingly, Plaintiffs' Fourteenth Amendment claims are **DISMISSED**, and the Court will address their claims in the context of the Fourth Amendment.

The Court also notes that Plaintiffs attempt to invoke an exception to the general rule described above, citing *Cole v. Carson*, 802 F.3d 752 (5th Cir. 2015), *vacated sub nom. Hunter v. Cole*, 137 S. Ct. 497 (2016). In *Cole*, the Fifth Circuit recognized deliberate fabrication of evidence by police may create a Fourteenth Amendment claim if such a claim may not be pursued under the Fourth Amendment. *Id.* First, Plaintiffs have a Fourth Amendment claim in this case. Second, the Fifth Circuit issued this decision on September 25, 2015, over four months *after* the shootout at Twin Peaks. Again, to overcome a defendant's qualified immunity, a plaintiff must show that the constitutional right was "clearly established" at the time of the defendant's alleged misconduct. *Reed*, 923 F.3d at 414. The exception that Plaintiffs seek to invoke had not yet been recognized in this Circuit at the time their cause of action arose, and as such, any right recognized in *Cole* was not clearly established.

There are two claims against government agents for alleged Fourth Amendment violations in connection with a search or arrest warrant: **(1)** claims under *Malley*, 475 U.S. at 335, for which the agent may be

liable if he "fil[es] an application for an arrest warrant without probable cause" and "a reasonable well-trained officer . . . would have known that [the] affidavit failed to establish probable cause," *Michalik v. Hermann*, 422 F.3d 252, 259–60 (5th Cir. 2005) (citations and internal quotation marks omitted); and **(2)** claims under *Franks v. Delaware*, 438 U.S. 154 (1978), for which the agent may be liable if he "makes a false statement knowingly and intentionally, or with reckless disregard for the truth that results in a warrant being issued without probable cause," *Michalik*, 422 F.3d at 258 n.5. In the instant case, Plaintiffs bring claims under both theories.

However, because Plaintiffs in these cases were indicted by a McLennan County grand jury, Defendants argue Plaintiffs' Fourth Amendment claims should be dismissed. Thus, before the Court can address the substance of the alleged violations, the Court must first address whether the independent intermediary doctrine applies in this case.

B. Independent Intermediary Doctrine

The City and County Defendants argue Plaintiff's Fourth Amendment claims should be dismissed under the independent intermediary doctrine, which insulates from a false arrest claim the initiating party if an intermediary presented with the facts finds that

probable cause for the arrest exists.[1] Each plaintiff in these consolidated cases was indicted by a grand jury. Defendants argue, correctly, that those indictments break the chain of causation between the defendants and the alleged constitutional harms unless an exception applies. Plaintiffs contend the exception does apply such that plaintiffs have stated a plausible claim for relief. The Court finds the doctrine applies, but the exception does not.

"It is well settled that if facts supporting an arrest are placed before any independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party." *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1994), *overruled on other grounds by Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en Banc). The Fifth Circuit has repeatedly "applied this rule even if the independent intermediary's action occurred after the arrest, and even if the arrestee was never convicted of any *crime." Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016). Thus, unless an exception to the independent intermediary rule applies, Plaintiffs' grand jury indictments dooms their Fourth Amendment claims.

Under the taint exception to the independent intermediary rule, a plaintiff may plead a plausible false

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[1] Defendant Schwartz argues he is entitled to absolute immunity from any claim based upon his purported testimony to the grand jury. ECF No. 26 at 25.

arrest claim despite the findings of an intermediary "if the plaintiff shows that 'the deliberations of that intermediary were in some way tainted by the actions of the defendant.'" *Curtis v. Sowell*, 761 Fed. App'x 302, 304 (5th Cir. 2019) (quoting *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988)). Because the intermediary's discussions protect even individuals with malicious intent, a plaintiff must show that the state actor's malicious motive led the actor to withhold relevant information or otherwise misdirect the independent intermediary by omission or commission. *McLin v. Ard*, 866 F.3d 682, 689 (5th Cir. 2019). The Fifth Circuit recently held that when analyzing allegations of taint at the motion to dismiss stage, mere allegations of taint "may be adequate to survive a motion to dismiss where the complaint alleges other facts supporting the inference." *Id.* at 690. Thus, to survive Defendants' Motions to Dismiss, Plaintiffs must provide sufficient facts supporting the inference that each Defendant maliciously tainted the grand jury proceedings. *See Shaw v. Villanueva*, 918 F.3d 414, 417 (holding a plaintiff must show that the defendant maliciously withheld relevant information or otherwise misdirected the intermediary). Plaintiffs have failed to do so in this case.

"The Supreme Court is no-nonsense about pleading specificity requirements." *Shaw*, 918 F.3d at 415. Here, Plaintiffs cannot satisfy the requirement in *Iqbal* to plead facts rising above the speculative level demonstrating how *each* Defendant tainted the grand jury proceedings by either omitting evidence or misleading the jury. *See Iqbal*, 556 U.S. at 679; *Shaw*, 918

F.3d at 415. A majority of Plaintiffs allegations are that a defendant, grouping of defendants, or sometimes simply, "Defendants," knew that [a particular fact] did not [e.g., establish probable cause as to them or support the charge]; or that the defendants knew that the plaintiffs were not involved in gang violence. However, such threadbare allegations are not sufficient to meet the taint exception. *See Glaster v. City of Mansfield*, 2015 WL 8512, *7 (W.D. La. 2015) (plaintiff did not plead involvement of defendant officer in the grand jury proceedings or factually how he tainted the grand jury's deliberations; officer dismissed on qualified immunity grounds). Plaintiffs' inability to provide articulate allegations against specific individual defendants is fatal.

In *Curtis v. Sowell*, the Fifth Circuit recognized that during the motion to dismiss stage, mere allegations of taint may be adequate to survive a motion to dismiss where the complaint alleges other facts supporting the inference. *See* 761 Fed. App'x at 304–05. However, the Fifth Circuit affirmed the district court's decision to dismiss the plaintiff's complaint because the plaintiff did not adequately allege how the defendants, or anyone else, deceived or withheld material information from the grand jury. *Id.* at 305. The plaintiff's allegation that the district attorney "persuaded the grand jury to indict [the plaintiff] even though the district attorney knew that there was no factual or legal basis for the charge" was insufficient to invoke the exception to the independent intermediary doctrine. *Id.*

Similarly, Plaintiffs argue Defendants knew they were not in a criminal gang and knew that they did not participate in the criminal conduct at the Twin Peaks restaurant. Despite this knowledge, Defendants still pursued an indictment. However, these conclusory allegations, as they were in *Curtis*, are not sufficient to survive a motion to dismiss. Plaintiffs admit that they do not know what testimony was given before the grand jury; they don't know who testified before the grand jury; and there is no transcript of the grand jury proceedings. In other words, Plaintiffs are simply guessing at what took place before the grand jury and who testified before the grand jury.[2] Such allegations are no more than rank speculation. *See Rothstein v. Corriere* 373 F.3d 275, 284 (2nd Cir. 2004) (holding where a person's alleged grand jury testimony is unknown, an "argument that [defendant] must have testified falsely to the grand jury amounts to rank speculation."). Because Plaintiffs' conclusions and guesses as to who possibly testified before the grand jury, and what their testimony could have possibly been are the type of formulaic, threadbare allegations that are insufficient under the Supreme Court's

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[2] The Court is not requiring Plaintiffs to prove the impossible—what occurred inside the secret proceedings of a grand jury. *See McLin v. Ard*, F.3d at 690. However, Plaintiffs' allegations amount to no more than "defendants 'knew of or 'condoned' the alleged violations of the plaintiffs' constitutional rights. Thus, Plaintiffs have failed to plead adequate factual allegations to support the taint exception. *See Shaw*, 918 F.3d at 418 (noting that a plaintiff's allegation that the defendant knew of or condoned some falsity or omission was insufficient to state a claim).

Twombly/Iqbal standard, the Court must dismiss Plaintiffs' complaint.

As previously mentioned, grand jury proceedings are not generally discoverable. *See Shields v. Twiss*, 389 F.3d 142, 147 (5th Cir. 2004) ("[t]he court notes that under both federal and state law, a general rule of secrecy shrouds the proceedings of grand juries."). However, both federal and Texas law permit discovery of grand jury material when the party seeking discovery demonstrates a "particularized need" for the material. *Id.* at 147–48 (citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682–83 (1958); *In re Byrd Enters.*, 980 S.W.2d 542, 543 (Tex. App.–Beaumont 1998, no pet.)). "A party claiming a particularized need for grand jury material under Rule 6(e) has the burden of showing "that the material [it] seek[s] is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that [its] request is structured to cover only material so needed." *Id.* at 147. In the present case, Plaintiffs have failed to even mention, let alone attempt to articulate reasons why they might meet the standard for such discovery. Even if Plaintiffs did so, the Court believes, under the facts alleged by Plaintiffs, Plaintiffs could not identify a "particularized need" for grand jury material.

Additionally, Plaintiffs have failed to allege that *each* Defendant (or Defendants generally) *maliciously* omitted evidence or mislead the grand jury. *See Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988); *see also Scott v. White*, 2018 WL 2014093, *4 (W.D. Tex. 2018).

To invoke the exception to the independent intermediary doctrine, it is not enough that the plaintiff plead that misrepresentations were made to the intermediary or that the defendant omitted to provide material information to the intermediary. The plaintiff must also plead that such conduct was done maliciously. *McLin*, 866 F.3d at 689; *Shaw*, 918 F.3d at 417; *Curtis*, 761 Fed. App'x at 304. Moreover, a plaintiff must plead sufficient factual allegations that *each defendant* maliciously withheld or mislead the grand jury. *Id.* In this case, Plaintiff provides no such factual allegations, let alone allegations concerning *each* defendant.[3] *See generally* Pls.' Compl.

Because the Court finds the independent intermediary doctrine applies in this case, Plaintiffs' Fourth Amendment claims against the City and County Defendants must fail. Therefore, the Court **GRANTS** the City and County Defendants' motions to dismiss.

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[3] Moreover, as Defendants correctly point out, grand jury witnesses have absolute immunity from any § 1983 claim based on the witness' testimony, as well as related investigation or preparation for such testimony. *See Rehberg v. Paulk*, 566 U.S. 356, 369–70 (2012). The Supreme Court in *Rehberg* further stated that such testimony before the grand jury cannot be used to support a § 1983 action. *Rehberg*, 566 U.S. at 369. Therefore, Plaintiffs cannot use any Defendants' alleged grand jury testimony to rebut the presumption of probable cause arising from the indictment.

C. Defendants Schwartz and Frost are Entitled to Qualified Immunity from any Claim Based Upon His Purported Testimony to the Grand Jury

Although the DPS Defendants did not address the independent intermediary doctrine directly, the Court finds the doctrine nonetheless applies to bar Plaintiffs' claims against them.[4] First, whatever conduct the DPS Defendants engaged in prior to the grand jury indicting plaintiffs is inconsequential and is simply not relevant in this case. Previously, the Court ruled in several related cases that Plaintiffs' alleged enough to survive a motion to dismiss. However, the present case is markedly different—Plaintiffs in this case were, in fact, indicted by an independent intermediary, a McLennan County grand jury. Thus, regardless of the DPS Defendants' prior conduct leading up to the indictment, even if their conduct was malicious, the independent intermediary destroys any casual connection between the alleged harm and any constitutional violation by Defendants. Accordingly, for the same reasons discussed above, *supra section B*, Plaintiffs fail to overcome Defendants' qualified immunity and dismissal is appropriate. *Buehler*, 824 F.3d at 555 ("[T]he plaintiff must affirmatively show that the defendants tainted the intermediary's decision.").

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[4] The independent intermediary doctrine does not need to be raised as an affirmative defense. *Holcomb v. McCraw*, 262 F.Supp.3d 437, 452 (W.D. Texas June 27, 2017).

IV. CONCLUSION

Based on the foregoing, the Court **GRANTS** Defendants' Motions to Dismiss. Accordingly, Defendant Frost and Schwartz's Motions to Dismiss (ECF Nos. 24, 41, 44, 47, 50, 53); the City Defendants' Joint Motion to Dismiss (ECF Nos. 26, 43, 46, 49, 52, 55); Defendant Reyna and McLennan County's Motions to Dismiss (ECF Nos. 25, 42, 45, 48, 51, 54) are **GRANTED**.

SIGNED this 6th day of April 2020.

/s/ Alan D Albright
ALAN D ALBRIGHT
UNITED STATES
DISTRICT JUDGE

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

MARSHALL MITCHELL,	§	
BLAKE TAYLOR,	§	
CHRISTOPHER ROGERS,	§	**LEAD CASE:**
RICHARD BENAVIDES,	§	**CIVIL NO.**
BRIAN BRINCKS, RENE	§	**1-17-CV-00457-ADA**
CAVAZOS, JUVENTINO	§	**MEMBER CASE:**
MONTELLO, JASON	§	
CAVAZOS, JOHN GUER-	§	**CIVIL NO.**
RERO, LINDELL	§	**1-17-CV-00480-ADA**
COPELAND, RUDY	§	
MERCADO, RICHARD	§	
SMITH, LAWRENCE	§	
GARCIA, ANTHONY SHANE	§	
PALMER, PHILLIP	§	
SAMPSON, CLAYTON REED,	§	
JAMES GRAY, CORY	§	
MCALISTER, TOMMY	§	
JENNINGS, LARRY PINA,	§	
RICHARD LOCKHART,	§	
GLENN WALKER,	§	
RONALD WARREN et al.,	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
CHIEF BRENT STROMAN,	§	
IN HIS INDIVIDUAL	§	
CAPACITY; DET. MANUEL	§	
CHAVEZ, IN HIS	§	
INDIVIDUAL CAPACITY;	§	
ABELINO "ABEL" REYNA,	§	
IN HIS INDIVIDUAL	§	

CAPACITY; CITY OF WACO,	§
TEXAS, MCLENNAN	§
COUNTY, TEXAS, ROBERT	§
LANNING, IN HIS	§
INDIVIDUAL CAPACITY;	§
DET. JEFFREY ROGERS,	§
IN HIS INDIVIDUAL	§
CAPACITY; PATRICK	§
SWANTON, IN HIS	§
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STEVEN SCHWARTZ,	§
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CHRISTOPHER FROST, IN	§
HIS INDIVIDUAL CAPACITY;	§
Defendants.	§

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A heightened pleading requirement is imposed on a civil rights plaintiff suing a state actor in his individual capacity. *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985). To satisfy the heightened pleading requirement and maintain a § 1983 action against an official who raises a qualified immunity defense, a complaint must allege with particularity all material facts establishing a plaintiff's right of recovery, including "detailed facts supporting the contention that [a] plea of immunity cannot be sustained." *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*,

954 F.2d 1054, 1055 (5th Cir. 1992). Mere conclusory allegations are insufficient to meet this heightened pleading requirement. *Elliott*, 751 F.2d at 1479.

III. ANALYSIS

A. Fourth and Fourteenth Amendments

At the outset, the Court notes that Plaintiffs bring their claims against the defendants under both the Fourth and Fourteenth Amendments. But "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (internal punctuation omitted). A citizen has a right under the Fourth Amendment to be free from arrest unless the arrest is supported by either a properly issued arrest warrant or probable cause. *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004). "The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Albright*, 510 U.S. at 274. Because the Fourth Amendment covers unlawful arrest, Plaintiffs cannot also seek relief under the Fourteenth Amendment. *Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 814 (5th Cir. 2010). Accordingly, Plaintiffs' Fourteenth Amendment claims are **DISMISSED**, and the Court will address their claims in the context of the Fourth Amendment.

The Court also notes that Plaintiffs attempt to invoke an exception to the general rule described above, citing *Cole v. Carson*, 802 F.3d 752 (5th Cir. 2015), *vacated sub nom. Hunter v. Cole*, 137 S. Ct. 497 (2016). In *Cole*, the Fifth Circuit recognized deliberate fabrication of evidence by police may create a Fourteenth Amendment claim if such a claim may not be pursued under the Fourth Amendment. *Id.* First, Plaintiffs have a Fourth Amendment claim in this case. Second, the Fifth Circuit issued this decision on September 25, 2015, over four months *after* the shootout at Twin Peaks. Again, to overcome a defendant's qualified immunity, a plaintiff must show that the constitutional right was "clearly established" at the time of the defendant's alleged misconduct. *Reed*, 923 F.3d at 414. The exception that Plaintiffs seek to invoke had not yet been recognized in this Circuit at the time their cause of action arose, and as such, any right recognized in *Cole* was not clearly established.

There are two claims against government agents for alleged Fourth Amendment violations in connection with a search or arrest warrant: **(1)** claims under *Malley*, 475 U.S. at 335, for which the agent may be liable if he "fil[es] an application for an arrest warrant without probable cause" and "a reasonable well-trained officer . . . would have known that [the] affidavit failed to establish probable cause," *Michalik v. Hermann*, 422 F.3d 252, 259-60 (5th Cir. 2005) (citations and internal quotation marks omitted); and **(2)** claims under *Franks v. Delaware*, 438 U.S. 154 (1978), for which the agent may be liable if he "makes a false

statement knowingly and intentionally, or with reckless disregard for the truth that results in a warrant being issued without probable cause," *Michalik*, 422 F.3d at 258 n.5. In the instant case, Plaintiffs bring claims under both theories.

However, because Plaintiffs in these cases were indicted by a McLennan County grand jury, Defendants argue Plaintiffs' Fourth Amendment claims should be dismissed. Thus, before the Court can address the substance of the alleged violations, the Court must first address whether the independent intermediary doctrine applies in this case.

B. Independent Intermediary Doctrine

The City and County Defendants argue Plaintiff's Fourth Amendment claims should be dismissed under the independent intermediary doctrine, which insulates from a false arrest claim the initiating party if an intermediary presented with the facts finds that probable cause for the arrest exists.[1] Each plaintiff in these consolidated cases was indicted by a grand jury. Defendants argue, correctly, that those indictments break the chain of causation between the defendants and the alleged constitutional harms unless an exception applies. Plaintiffs contend the exception does apply such that plaintiffs have stated a plausible claim for relief.

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[1] Defendant Schwartz argues he is entitled to absolute immunity from any claim based upon his purported testimony to the grand jury. ECF No. 26 at 25.

The Court finds the doctrine applies, but the exception does not.

"It is well settled that if facts supporting an arrest are placed before any independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party." *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1994), *overruled on other grounds by Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en banc). The Fifth Circuit has repeatedly "applied this rule even if the independent intermediary's action occurred after the arrest, and even if the arrestee was never convicted of any crime." *Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016). Thus, unless an exception to the independent intermediary rule applies, Plaintiffs' grand jury indictments dooms their Fourth Amendment claims.

Under the taint exception to the independent intermediary rule, a plaintiff may plead a plausible false arrest claim despite the findings of an intermediary "if the plaintiff shows that 'the deliberations of that intermediary were in some way tainted by the actions of the defendant.'" *Curtis v. Sowell*, 761 Fed. App'x 302, 304 (5th Cir. 2019) (quoting *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988)). Because the intermediary's discussions protect even individuals with malicious intent, a plaintiff must show that the state actor's malicious motive led the actor to withhold relevant information or otherwise misdirect the independent intermediary by omission or commission. *McLin v. Ard*, 866 F.3d 682, 689 (5th Cir. 2019). The Fifth Circuit

recently held that when analyzing allegations of taint at the motion to dismiss stage, mere allegations of taint "may be adequate to survive a motion to dismiss where the complaint alleges other facts supporting the inference." *Id.* at 690. Thus, to survive Defendants' Motions to Dismiss, Plaintiffs must provide sufficient facts supporting the inference that each Defendant maliciously tainted the grand jury proceedings. *See Shaw v. Villanueva*, 918 F.3d 414, 417 (holding a plaintiff must show that the defendant maliciously withheld relevant information or otherwise misdirected the intermediary). Plaintiffs have failed to do so in this case.

"The Supreme Court is no-nonsense about pleading specificity requirements." *Shaw*, 918 F.3d at 415. Here, Plaintiffs cannot satisfy the requirement in *Iqbal* to plead facts rising above the speculative level demonstrating how *each* Defendant tainted the grand jury proceedings by either omitting evidence or misleading the jury. *See Iqbal*, 556 U.S. at 679*; Shaw*, 918 F.3d at 415. A majority of Plaintiff's allegations are that a defendant, grouping of defendants, or sometimes simply, "Defendants," knew that [a particular fact] did not [e.g., establish probable cause as to them or support the charge]; or that the defendants knew that the plaintiffs were not involved in gang violence. However, such threadbare allegations are not sufficient to meet the taint exception. *See Glaster v. City of Mansfield*, 2015 WL 8512, *7 (W.D. La. 2015) (plaintiff did not plead involvement of defendant officer in the grand jury proceedings or factually how he tainted the grand jury's deliberations; officer dismissed on qualified

immunity grounds). Plaintiffs' inability to provide articulate allegations against specific individual defendants is fatal.

In *Curtis v. Sowell*, the Fifth Circuit recognized that during the motion to dismiss stage, mere allegations of taint may be adequate to survive a motion to dismiss where the complaint alleges other facts supporting the inference. *See* 761 Fed. App'x at 304-05. However, the Fifth Circuit affirmed the district court's decision to dismiss the plaintiff's complaint because the plaintiff did not adequately allege how the defendants, or anyone else, deceived or withheld material information from the grand jury. *Id.* at 305. The plaintiff's allegation that the district attorney "persuaded the grand jury to indict [the plaintiff] even though the district attorney knew that there was no factual or legal basis for the charge" was insufficient to invoke the exception to the independent intermediary doctrine. *Id.*

Similarly, Plaintiffs argue Defendants knew they were not in a criminal gang and knew that they did not participate in the criminal conduct at the Twin Peaks restaurant. Despite this knowledge, Defendants still pursued an indictment. However, these conclusory allegations, as they were in *Curtis*, are not sufficient to survive a motion to dismiss. Plaintiffs admit that they do not know what testimony was given before the grand jury; they don't know who testified before the grand jury; and there is no transcript of the grand jury proceedings. In other words, Plaintiffs are simply guessing at what took place before the grand jury and

who testified before the grand jury.[2] Such allegations are no more than rank speculation. *See Rothstein v. Carriere* 373 F.3d 275, 284 (2nd Cir. 2004) (holding where a person's alleged grand jury testimony is unknown, an "argument that [defendant] must have testified falsely to the grand jury amounts to rank speculation."). Because Plaintiffs' conclusions and guesses as to who possibly testified before the grand jury, and what their testimony could have possibly been are the type of formulaic, threadbare allegations that are insufficient under the Supreme Court's *Twombly/ Iqbal* standard, the Court must dismiss Plaintiffs' complaint.

As previously mentioned, grand jury proceedings are not generally discoverable. *See Shields v. Twiss*, 389 F.3d 142, 147 (5th Cir. 2004) ("[t]he court notes that under both federal and state law, a general rule of secrecy shrouds the proceedings of grand juries."). However, both federal and Texas law permit discovery of grand jury material when the party seeking discovery demonstrates a "particularized need" for the material. *Id.* at 147-48 (citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682-83 (1958); *In re Byrd*

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[2] The Court is not requiring Plaintiffs to prove the impossible – what occurred inside the secret proceedings of a grand jury. *See McLin v. Ard*, F.3d at 690. However, Plaintiffs' allegations amount to no more than "defendants 'knew of' or 'condoned' the alleged violations of the plaintiffs' constitutional rights. Thus, Plaintiffs have failed to plead adequate factual allegations to support the taint exception. *See Shaw*, 918 F.3d at 418 (noting that a plaintiff's allegation that the defendant knew of or condoned some falsity or omission was insufficient to state a claim).

Enters., 980 S.W.2d 542, 543 (Tex. App.-Beaumont 1998, no pet.)). "A party claiming a particularized need for grand jury material under Rule 6(e) has the burden of showing "that the material [it] seek[s] is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that [its] request is structured to cover only material so needed." *Id.* at 147. In the present case, Plaintiffs have failed to even mention, let alone attempt to articulate reasons why they might meet the standard for such discovery. Even if Plaintiffs did so, the Court believes, under the facts alleged by Plaintiffs, Plaintiffs could not identify a "particularized need" for grand jury material.

Additionally, Plaintiffs have failed to allege that *each* Defendant (or Defendants generally) *maliciously* omitted evidence or mislead the grand jury. *See Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988); *see also Scott v. White*, 2018 WL 2014093, *4 (W.D. Tex. 2018). To invoke the exception to the independent intermediary doctrine, it is not enough that the plaintiff plead that misrepresentations were made to the intermediary or that the defendant omitted to provide material information to the intermediary. The plaintiff must also plead that such conduct was done maliciously. *McLin*, 866 F.3d at 689; *Shaw*, 918 F.3d at 417; *Curtis*, 761 Fed. App'x at 304. Moreover, a plaintiff must plead sufficient factual allegations that *each defendant* maliciously withheld or mislead the grand jury. *Id.* In this case, Plaintiff provides no such factual allegations, let

alone allegations concerning *each* defendant.[3] *See generally* Pls.' Compl.

Because the Court finds the independent intermediary doctrine applies in this case, Plaintiffs' Fourth Amendment claims against the City and County Defendants must fail. Therefore, the Court **GRANTS** the City and County Defendants' motions to dismiss.

C. Defendants Schwartz and Frost are Entitled to Qualified Immunity from any Claim Based Upon His Purported Testimony to the Grand Jury

Although the DPS Defendants did not address the independent intermediary doctrine directly, the Court finds the doctrine nonetheless applies to bar Plaintiffs' claims against them.[4] First, whatever conduct the DPS Defendants engaged in prior to the grand jury indicting plaintiffs is inconsequential and is simply not relevant in this case. Previously, the Court ruled in several related cases that Plaintiffs' alleged enough to

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[3] Moreover, as Defendants correctly point out, grand jury witnesses have absolute immunity from any § 1983 claim based on the witness' testimony, as well as related investigation or preparation for such testimony. *See Rehberg v. Paulk*, 566 U.S. 356, 369-70 (2012). The Supreme Court in *Rehberg* further stated that such testimony before the grand jury cannot be used to support a § 1983 action. *Rehberg*, 566 U.S. at 369. Therefore, Plaintiffs cannot use any Defendants' alleged grand jury testimony to rebut the presumption of probable cause arising from the indictment.

[4] The independent intermediary doctrine does not need to be raised as an affirmative defense. *Holcomb v. McCraw*, 262 F.Supp.3d 437, 452 (W.D. Texas June 27, 2017).

survive a motion to dismiss. However, the present case is markedly different – Plaintiffs in this case were, in fact, indicted by an independent intermediary, a McLennan County grand jury. Thus, regardless of the DPS Defendants' prior conduct leading up to the indictment, even if their conduct was malicious, the independent intermediary destroys any casual connection between the alleged harm and any constitutional violation by Defendants. Accordingly, for the same reasons discussed above, *supra section B*, Plaintiffs fail to overcome Defendants' qualified immunity and dismissal is appropriate. *Buehler*, 824 F.3d at 555 ("[T]he plaintiff must affirmatively show that the defendants tainted the intermediary's decision.").

IV. CONCLUSION

Based on the foregoing, the Court **GRANTS** Defendants' Motions to Dismiss. Accordingly, Defendant Frost and Schwartz's Motions to Dismiss (ECF Nos. 25, 43); the City Defendants' Joint Motion to Dismiss (ECF Nos. 27, 45); Defendant Reyna and McLennan County's Motions to Dismiss (ECF Nos. 26, 44) are **GRANTED**.

SIGNED this 27th day of April 2020.

/s/ Alan D. Albright
ALAN D. ALBRIGHT
UNITED STATES
DISTRICT JUDGE

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

WILLIAM BRENT REDDING et al.,	§	
Plaintiffs,	§	**LEAD CASE:**
	§	**CIVIL NO. 1-17-CV-00470-ADA**
v.	§	
SERGEANT PATRICK SWANTON, IN HIS INDIVIDUAL CAPACITY; STEVEN SCHWARTZ, IN HIS INDIVIDUAL CAPACITY; CHRISTOPHER FROST, IN HIS INDIVIDUAL CAPACITY; JEFFREY ROGERS, IN HIS INDIVIDUAL CAPACITY; BRENT STROMAN, CHIEF OF POLICE FOR THE WACO POLICE DEPARTMENT, IN HIS INDIVIDUAL CAPACITY; ABELINO REYNA, ELECTED DISTRICT ATTORNEY FOR MCLENNAN COUNTY, TEXAS, IN HIS INDIVIDUAL CAPACITY; AND MANUEL CHAVEZ, WACO POLICE DEPARTMENT DETECTIVE, IN HIS INDIVIDUAL CAPACITY;	§	**MEMBER CASES:**
	§	**CIVIL NO. 1-16-CV-01153-ADA**
	§	**CIVIL NO. 1-17-CV-00468-ADA**
	§	**CIVIL NO. 1-16-CV-01154-ADA**
	§	**CIVIL NO. 1-17-CV-00469-ADA**
Defendants.	§	

ORDER

(Filed Aug. 7, 2020)

Before the Court are: Defendants Frost and Schwartz's Motions to Dismiss (ECF Nos. 25, 37, 41); the City Defendants' Joint Motions to Dismiss (ECF Nos. 26, 36, 38, 40, 43); Defendant Reyna's Motions to Dismiss (ECF Nos. 35, 39, 42); and the respective responses, replies, and sur-replies thereto. The Court, having considered the Motions and the applicable law, finds that the Motions should be **GRANTED** as discussed below.

I. INTRODUCTION

This case stems from the Twin Peaks restaurant incident on May 17, 2015. Members of the Bandidos and Cossacks Motorcycle Clubs, along with hundreds of other motorcycling enthusiasts, converged on the restaurant. Tensions between the Bandidos and Cossacks erupted in a shootout that left nine dead and many injured. In the aftermath of the incident, police arrested 177 individuals on charges of Engaging in Organized Criminal Activity. The probable cause affidavit in support of the arrest warrants was the same for each of the 177 arrestees, and a justice of the peace set bond for each of the arrestees at one million dollars. Only one of the criminal cases ever went to trial (the defendant in that case is not a party to the instant action), and those proceedings ended in a mistrial. The state eventually dropped all remaining charges against the arrestees. The plaintiffs in this case, William Brent

Redding and others similarly situated, were arrested pursuant to the same probable cause affidavit as the other arrestees. Significantly, these Plaintiffs were also indicted.[1]

Plaintiffs bring this case pursuant to 42 U.S.C. § 1983. They allege that Defendants violated their First Amendment rights to associate with political groups and to express that affiliation with clothing. Plaintiffs also allege that Defendants violated their Fourth Amendment rights by obtaining arrest warrants based on a fill-in-the-name affidavit that lacked probable cause. Additionally, Plaintiffs allege that Defendants violated their equal protection rights under the Fifth Amendment. Lastly, Plaintiffs contend that the defendants violated their Fourteenth Amendment due process right to be free from unlawful arrest. Plaintiffs allege that the defendants conspired to commit these violations.

There are three groups of defendants in this case. The first group consists of: Brent Stroman, Chief of Police; detective Jeffrey Rogers; and police officers Manuel Chavez, Patrick Swanton. The second group is former McLennan County District Attorney Abelino "Abel" Reyna. The third group is Steven Schwartz and Christopher Frost, both of whom are special agents of the Texas Department of Public Safety. The plaintiffs bring suit against the defendants in their individual

[1] *See* ECF No. 9 at 1; ECF No. 35 at 9; ECF No. 42 at 9. The Court notes Plaintiffs' amended complaints omit statements previously acknowledging Plaintiffs' indictments in the original complaint.

capacities. The individual defendants all assert qualified immunity.

II. LEGAL STANDARD

Title 42 U.S.C. § 1983 creates a cause of action against any person who, under color of law, causes another to be deprived of a federally protected constitutional right. Two allegations are required to state a cause of action under 42 U.S.C. § 1983. "First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Manax v. McNamara*, 842 F.2d 808, 812 (5th Cir. 1988).

Upon motion or sua sponte, a court may dismiss an action that fails to state a claim upon which relief may be granted. FED. R. CIV. P. 12(b)(6); *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006). To survive Rule 8, a nonmovant must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The court's task is to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of success." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). The court begins by identifying which allegations are well-pleaded facts and which are legal conclusions or elemental recitations; accepting as true the former and rejecting the

latter. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court need not blindly accept every allegation of fact; properly pleaded allegations of fact amount to more than just conclusory allegations or legal conclusions "masquerading as factual conclusions." *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002). The court then determines whether the accepted allegations state a plausible claim to relief. *Id.* at 379.

"Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555. "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the [nonmovant]." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quotation marks omitted). "A claim has facial plausibility when the [nonmovant] pleads factual content that allows the court to draw the reasonable inference that the [movant] is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678. "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* For purposes of Rule 12(b)(6), "pleadings" include the complaint, its attachments, and documents referred to in the complaint and central to a plaintiff's claims. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-499 (5th Cir. 2000).

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss an action barred by qualified immunity. *See Bustillos v. El Paso Cnty. Hosp. Dist.*, 226 F. Supp. 3d 778, 793 (W.D. Tex. 2016) (Martinez, J.)

(dismissing a plaintiff's claim based on qualified immunity). Qualified immunity shields government officials from civil liability for claims under federal law unless their conduct "violates a clearly established constitutional right." *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003). Qualified immunity balances "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Because qualified immunity shields "all but the plainly incompetent or those who knowingly violate the law," the Fifth Circuit considers qualified immunity the norm and admonishes courts to deny a defendant immunity only in rare circumstances. *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (internal quotation marks omitted).

Courts use a two-prong analysis to determine whether an officer is entitled to qualified immunity. *Cole v. Carson*, No. 14-10228, 2019 WL 3928715, at *5 (5th Cir. Aug. 20, 2019), *as revised* (Aug. 21, 2019). A plaintiff must show (1) the official violated a constitutional right; and (2) the constitutional right was "clearly established" at the time of the defendant's alleged misconduct. *Reed v. Taylor*, 923 F.3d 411, 414 (5th Cir. 2019). The Supreme Court held in *Pearson* that "the judges of the district courts . . . should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis

should be addressed first." 555 U.S. at 236. Although qualified immunity is an affirmative defense, the plaintiff bears the burden to rebut the defense and assert facts to satisfy both prongs of the analysis. *Brumfield*, 551 F.3d at 326. If a plaintiff fails to establish either prong, the public official is immune from suit. *Zarnow v. City of Wichita Falls*, 500 F.3d 401, 407 (5th Cir. 2007).

A heightened pleading requirement is imposed on a civil rights plaintiff suing a state actor in his individual capacity. *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985). To satisfy the heightened pleading requirement and maintain a § 1983 action against an official who raises a qualified immunity defense, a complaint must allege with particularity all material facts establishing a plaintiff's right of recovery, including "detailed facts supporting the contention that [a] plea of immunity cannot be sustained." *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054, 1055 (5th Cir. 1992). Mere conclusory allegations are insufficient to meet this heightened pleading requirement. *Elliott*, 751 F.2d at 1479.

III. ANALYSIS

A. Fifth and First Amendments

Plaintiffs claim Defendants deprived Plaintiffs of equal protection under the Due Process Clause of the Fifth Amendment because "Defendants arbitrarily arrested people from some motorcycle clubs, but not from club [sic] of which they approved (Christian clubs,

e.g.)." ECF No. 22 at 26. However, as alleged, Plaintiffs have not stated a valid claim. The Fifth Amendment applies "only to violations of constitutional rights by the United States or a federal actor." *See Morin v. Caire*, 77 F.3d 116, 120 (5th Circ. 1996). The Fourteenth Amendment, not the Fifth, is the correct vehicle in which to assert any violations of Plaintiffs' equal protection rights.

Out of an abundance of caution, the Court will consider the equal protection allegations under the Fourteenth Amendment, despite it not being properly pled. To allege an equal protection claim, Plaintiffs must allege "that a state actor intentionally discriminated against the plaintiff because of membership in a protected class." *Williams v. Bramer*, 180 F3d 699, 705 (5th Cir. 1999). Plaintiffs must allege and show that an act was undertaken with an express discriminatory purpose. *Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997). Disparate impact alone is not sufficient. *Id.* at 307. "Discriminatory purpose in an equal protection context implies that the decisionmaker selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group." *Id.* (*quoting Woods v. Edwards*, 51 F.3d 577, 580 (5th Cir. 1995)).

In this case, Plaintiffs' complaints do not sufficiently allege that similarly situated persons outside their class[2] were treated differently by Defendants, nor

[2] Even assuming the Plaintiff is part of a "class," the Court finds no equal protection violation in this case.

do they allege that Defendants' actions were motivated by direct, discriminatory animosity. ECF No. 22 at 26. Plaintiffs' allegations are insufficient to state a claim for an equal protection violation. Thus, Plaintiffs' equal protection under the Due Process Clause of the Fourteenth Amendment claims are **DISMISSED**.

The Court also finds that Plaintiffs' First Amendment claims are merely a conclusory re-casting of Plaintiffs' Fourth Amendment claims. *See generally* ECF No. 22 at 26. Plaintiffs have made no specific factual allegations of any Defendants' involvement in any abridgment of their First Amendment rights. *Id.* Additionally, any claim for abridgment of Plaintiffs' First Amendment rights to freely assemble or associate that might have resulted from Plaintiffs' arrests is defeated by the existence of probable cause. *See Mesa v. Prejean*, 543 F.3d 264, 273 (5th Cir. 2008) ("Probable cause is an objective standard. If it exists, any argument that the arrestee's speech . . . was the motivation for her arrest must fail. . . ."). Beyond the existence of probable cause, which the Court finds did exist in this case, the criminal statute under which Plaintiffs were arrested does not criminalize mere association. *See* Tex. Penal Code § 71.01. The statute criminalizes participation in a combination of persons to commit or conspire to commit a criminal offense. *Id.* Defendants' motivation for arresting and charging Plaintiffs was the suspicion of Plaintiffs' involvement in the commission of criminal conduct. Plaintiffs' suspected association with a motorcycle club is simply a fact that contributes to establishing that involvement. *See Brosky v. State*, 915 S.W.2d

120, 131 (Tex. App. – Ft. Worth 1996, pet. ref'd). The scope of Plaintiffs' right to assembly "does not encompass a right to associate with active members of a criminal street gang for the purpose of engaging in crime." *See Ta v. Pliler*, No. CV 03-00076RSWL, 2009 WL 322251, at *33 (C.D. Cal. Feb. 6, 2009). For the aforementioned reasons, Plaintiffs' First Amendment claims are **DISMISSED**.

B. Fourteenth and Fourth Amendments

The Court notes that Plaintiffs bring their claims against the defendants under both the Fourth and Fourteenth Amendments. But "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (internal punctuation omitted). A citizen has a right under the Fourth Amendment to be free from arrest unless the arrest is supported by either a properly issued arrest warrant or probable cause. *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004). "The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Albright*, 510 U.S. at 274. Because the Fourth Amendment covers unlawful arrest, Plaintiffs cannot also seek relief under the Fourteenth Amendment. *Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 814 (5th Cir. 2010). Accordingly, Plaintiffs' Fourteenth Amendment claims are

DISMISSED, and the Court will address their claims in the context of the Fourth Amendment.

The Court also notes that Plaintiffs attempt to invoke an exception to the general rule described above, citing *Cole v. Carson*, 802 F.3d 752 (5th Cir. 2015), *vacated sub nom. Hunter v. Cole*, 137 S. Ct. 497 (2016). In *Cole*, the Fifth Circuit recognized deliberate fabrication of evidence by police may create a Fourteenth Amendment claim if such a claim may not be pursued under the Fourth Amendment. *Id.* First, Plaintiffs have a Fourth Amendment claim in this case. Second, the Fifth Circuit issued this decision on September 25, 2015, over four months *after* the shootout at Twin Peaks. Again, to overcome a defendant's qualified immunity, a plaintiff must show that the constitutional right was "clearly established" at the time of the defendant's alleged misconduct. *Reed*, 923 F.3d at 414. The exception that Plaintiffs seek to invoke had not yet been recognized in this Circuit at the time their cause of action arose, and as such, any right recognized in *Cole* was not clearly established.

There are two claims against government agents for alleged Fourth Amendment violations in connection with a search or arrest warrant: **(1)** claims under *Malley*, 475 U.S. at 335, for which the agent may be liable if he "fil[es] an application for an arrest warrant without probable cause" and "a reasonable well-trained officer . . . would have known that [the] affidavit failed to establish probable cause," *Michalik v. Hermann*, 422 F.3d 252, 259-60 (5th Cir. 2005) (citations and internal quotation marks omitted); and **(2)** claims under

Franks v. Delaware, 438 U.S. 154 (1978), for which the agent may be liable if he "makes a false statement knowingly and intentionally, or with reckless disregard for the truth that results in a warrant being issued

C. Independent Intermediary Doctrine

The City and County Defendants argue Plaintiffs' Fourth Amendment claims should be dismissed under the independent intermediary doctrine, which insulates from a false arrest claim the initiating party if an intermediary presented with the facts finds that probable cause for the arrest exists.[3] Each plaintiff in these consolidated cases was indicted by a grand jury. Defendants argue, correctly, that those indictments break the chain of causation between the defendants and the alleged constitutional harms unless an exception applies. Plaintiffs contend the exception does apply such that plaintiffs have stated a plausible claim for relief. The Court finds the doctrine applies, but the exception does not.

"It is well settled that if facts supporting an arrest are placed before any independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party." *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1994), *overruled on other grounds by*

[3] Defendant Schwartz argues he is entitled to absolute immunity from any claim based upon his purported testimony to the grand jury. ECF No. 13 at 3.

Castellano v. Fragozo, 352 F.3d 939 (5th Cir. 2003) (en banc). The Fifth Circuit has repeatedly "applied this rule even if the independent intermediary's action occurred after the arrest, and even if the arrestee was never convicted of any crime." *Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016). Thus, unless an exception to the independent intermediary rule applies, Plaintiffs' grand jury indictments dooms their Fourth Amendment claims.

Under the taint exception to the independent intermediary rule, a plaintiff may plead a plausible false arrest claim despite the findings of an intermediary "if the plaintiff shows that 'the deliberations of that intermediary were in some way tainted by the actions of the defendant.'" *Curtis v. Sowell*, 761 Fed. App'x 302, 304 (5th Cir. 2019) (quoting *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988)). Because the intermediary's discussions protect even individuals with malicious intent, a plaintiff must show that the state actor's malicious motive led the actor to withhold relevant information or otherwise misdirect the independent intermediary by omission or commission. *McLin v. Ard*, 866 F.3d 682, 689 (5th Cir. 2019). The Fifth Circuit recently held that when analyzing allegations of taint at the motion to dismiss stage, mere allegations of taint "may be adequate to survive a motion to dismiss where the complaint alleges other facts supporting the inference." *Id.* at 690. Thus, to survive Defendants' Motions to Dismiss, Plaintiffs must provide sufficient facts supporting the inference that each Defendant maliciously tainted the grand jury proceedings. *See Shaw*

v. Villanueva, 918 F.3d 414, 417 (holding a plaintiff must show that the defendant maliciously withheld relevant information or otherwise misdirected the intermediary). Plaintiffs have failed to do so in this case.

"The Supreme Court is no-nonsense about pleading specificity requirements." *Shaw*, 918 F.3d at 415. Here, Plaintiffs cannot satisfy the requirement in *Iqbal* to plead facts rising above the speculative level demonstrating how *each* Defendant tainted the grand jury proceedings by either omitting evidence or misleading the jury. *See Iqbal*, 556 U.S. at 679*; Shaw*, 918 F.3d at 415. A majority of Plaintiff's allegations are that a defendant, grouping of defendants, or sometimes simply, "Defendants," knew that [a particular fact] did not [e.g., establish probable cause as to them or support the charge]; or that the defendants knew that the plaintiffs were not involved in gang violence. However, such threadbare allegations are not sufficient to meet the taint exception. *See Glaster v. City of Mansfield*, 2015 WL 8512, *7 (W.D. La. 2015) (plaintiff did not plead involvement of defendant officer in the grand jury proceedings or factually how he tainted the grand jury's deliberations; officer dismissed on qualified immunity grounds).

In *Curtis v. Sowell*, the Fifth Circuit recognized that during the motion to dismiss stage, mere allegations of taint may be adequate to survive a motion to dismiss where the complaint alleges other facts supporting the inference. *See* 761 Fed. App'x at 304-05. However, the Fifth Circuit affirmed the district court's decision to dismiss the plaintiff's complaint because

the plaintiff did not adequately allege how the defendants, or anyone else, deceived or withheld material information from the grand jury. *Id.* at 305. The plaintiff's allegation that the district attorney "persuaded the grand jury to indict [the plaintiff] even though the district attorney knew that there was no factual or legal basis for the charge" was insufficient to invoke the exception to the independent intermediary doctrine. *Id.*

Similarly, Plaintiffs argue Defendants knew they were not in a criminal gang and knew that they did not participate in the criminal conduct at the Twin Peaks restaurant. Despite this knowledge, Defendants still pursued an indictment. However, these conclusory allegations, as they were in *Curtis*, are not sufficient to survive a motion to dismiss. Plaintiffs admit that they do not know what testimony was given before the grand jury; they don't know who testified before the grand jury; and there is no transcript of the grand jury proceedings. In other words, Plaintiffs are simply guessing at what took place before the grand jury and who testified before the grand jury.[4] Such allegations are no more than rank speculation. *See Rothstein v.*

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[4] The Court is not requiring Plaintiffs to prove the impossible – what occurred inside the secret proceedings of a grand jury. *See McLin v. Ard*, F.3d at 690. However, Plaintiffs' allegations amount to no more than "defendants 'knew of' or 'condoned' the alleged violations of the plaintiffs' constitutional rights. Thus, Plaintiffs have failed to plead adequate factual allegations to support the taint exception. *See Shaw*, 918 F.3d at 418 (noting that a plaintiff's allegation that the defendant knew of or condoned some falsity or omission was insufficient to state a claim).

Carriere 373 F.3d 275, 284 (2nd Cir. 2004) (holding where a person's alleged grand jury testimony is unknown, an "argument that [defendant] must have testified falsely to the grand jury amounts to rank speculation."). Because Plaintiffs' conclusions and guesses as to who possibly testified before the grand jury, and what their testimony could have possibly been are the type of formulaic, threadbare allegations that are insufficient under the Supreme Court's *Twombly/Iqbal* standard, the Court must dismiss Plaintiffs' complaint.

As previously mentioned, grand jury proceedings are not generally discoverable. *See Shields v. Twiss*, 389 F.3d 142, 147 (5th Cir. 2004) ("[t]he court notes that under both federal and state law, a general rule of secrecy shrouds the proceedings of grand juries."). However, both federal and Texas law permit discovery of grand jury material when the party seeking discovery demonstrates a "particularized need" for the material. *Id.* at 147-48 (citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682-83 (1958); *In re Byrd Enters.*, 980 S.W.2d 542, 543 (Tex. App.-Beaumont 1998, no pet.)). "A party claiming a particularized need for grand jury material under Rule 6(e) has the burden of showing "that the material [it] seek[s] is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that [its] request is structured to cover only material so needed." *Id.* at 147. In the present case, Plaintiffs have failed to even mention, let alone attempt to articulate reasons why they might meet the standard for such discovery. Even if

Plaintiffs did so, the Court believes, under the facts alleged by Plaintiffs, Plaintiffs could not identify a "particularized need" for grand jury material.

Additionally, Plaintiffs have failed to allege that *each* Defendant (or Defendants generally) *maliciously* omitted evidence or mislead the grand jury. *See Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988); *see also Scott v. White*, 2018 WL 2014093, *4 (W.D. Tex. 2018). To invoke the exception to the independent intermediary doctrine, it is not enough that the plaintiff plead that misrepresentations were made to the intermediary or that the defendant omitted to provide material information to the intermediary. The plaintiff must also plead that such conduct was done maliciously. *McLin*, 866 F.3d at 689; *Shaw*, 918 F.3d at 417; *Curtis*, 761 Fed. App'x at 304. Moreover, a plaintiff must plead sufficient factual allegations that *each defendant* maliciously withheld or mislead the grand jury. *Id.* In this case, Plaintiff provides no such factual allegations, let alone allegations concerning *each* defendant.[5] *See generally* ECF No. 22 at 21-22.

Because the Court finds the independent intermediary doctrine applies in this case, Plaintiffs' Fourth

[5] Moreover, as Defendants correctly point out, grand jury witnesses have absolute immunity from any § 1983 claim based on the witness' testimony, as well as related investigation or preparation for such testimony. *See Rehberg v. Paulk*, 566 U.S. 356, 369-70 (2012). The Supreme Court in *Rehberg* further stated that such testimony before the grand jury cannot be used to support a § 1983 action. *Rehberg*, 566 U.S. at 369. Therefore, Plaintiffs cannot use any Defendants' alleged grand jury testimony to rebut the presumption of probable cause arising from the indictment.

Amendment claims against the City and County Defendants must fail. Therefore, the Court **GRANTS** the City and County Defendants' motions to dismiss.

D. Conspiracy

To state a claim for conspiracy under § 1983, a plaintiff must allege the existence of (1) an agreement to do an illegal act; and (2) an actual constitutional deprivation. *Cinel v. Cannock*, 15 F.3d 1338, 1343 (5th Cir. 1994). A claim of conspiracy is not actionable without an actual violation of § 1983. *Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995). If each alleged state action fails to overcome the qualified immunity protection, the court does not need to reach the issue of conspiracy for those actions. *Id.* at 920-21.

In this case, Plaintiffs allege that Defendants entered into a conspiracy to violate Plaintiffs' Fourth Amendment rights. ECF No. 22 at 27. The claim is dependent upon the existence of that constitutional violation. Thus, the conspiracy claim is inherently contingent upon Plaintiffs' *Franks* and *Malley* claims. Because the Court has already found that the Plaintiffs failed to overcome Defendants' qualified immunity, the conspiracy claim is not actionable.

However, even assuming the *Franks* and *Malley* claims were not dismissed, the Court still finds that Plaintiffs' conspiracy claim fails to meet the pleading requirements of *Twombly* and *Iqbal*. In Plaintiffs' amended complaint, Plaintiffs allege that Defendants "entered into a conspiracy" and "conspired to cause a

warrant to be issued." ECF No. 22 at 27. These allegations fail to provide any attributable actions to any particular person and do not establish an agreement between Defendants. Plaintiffs assert conclusory allegations of an agreement between Defendants, and Plaintiffs do not supply facts adequate to show illegality. Therefore, the conspiracy claim fails on independent grounds, and dismissal is appropriate.

E. Defendants Schwartz and Frost are Entitled to Qualified Immunity from any Claim Based Upon His Purported Testimony to the Grand Jury

Although the DPS Defendants did not address the independent intermediary doctrine directly, the Court finds the doctrine nonetheless applies to bar Plaintiffs' claims against them.[6] First, whatever conduct the DPS Defendants engaged in prior to the grand jury indicting plaintiffs is inconsequential and is simply not relevant in this case. Previously, the Court ruled in several related cases that Plaintiffs' alleged enough to survive a motion to dismiss. However, the present case is markedly different – Plaintiffs in this case were, in fact, indicted by an independent intermediary, a McLennan County grand jury. Thus, regardless of the DPS Defendants' prior conduct leading up to the indictment, even if their conduct was malicious, the independent intermediary destroys any casual

[6] The independent intermediary doctrine does not need to be raised as an affirmative defense. *Holcomb v. McCraw*, 262 F.Supp.3d 437, 452 (W.D. Texas June 27, 2017).

connection between the alleged harm and any constitutional violation by Defendants. Accordingly, for the same reasons discussed above, *supra section C*, Plaintiffs fail to overcome Defendants' qualified immunity and dismissal is appropriate. *Buehler*, 824 F.3d at 555 ("[T]he plaintiff must affirmatively show that the defendants tainted the intermediary's decision.")

IV. CONCLUSION

Based on the foregoing, the Court **GRANTS** Defendants' Motions to Dismiss. Accordingly, Defendants Frost and Schwartz's Motions to Dismiss (ECF Nos. 25, 37, 41); the City Defendants' Joint Motions to Dismiss (ECF Nos. 26, 36, 38, 40, 43); and Defendants Reyna's Motions to Dismiss (35, 39, 42) are **GRANTED**.

SIGNED this 7th day of August, 2020.

/s/ Alan D. Albright
ALAN D. ALBRIGHT
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 20-50367

JOHN WILSON; JOHN ARNOLD; ROY COVEY; JAMES BRENT ENSEY; EDGER KELLEHER, *et al*

Plaintiffs—Appellants,

versus

BRENT STROMAN, CHIEF OF POLICE FOR THE WACO POLICE DEPARTMENT, IN HIS INDIVIDUAL CAPACITY; MANUEL CHAVEZ, *Waco Police Department Detective, in his individual capacity*; ABELINO "ABEL" REYNA, *Elected District Attorney for McLennan County, Texas, in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *in his Individual Capacity*; JEFFREY ROGERS, *in his Individual Capacity*; SERGEANT PATRICK SWANTON, *in his Individual Capacity*; STEVEN SCHWARTZ, *in his Individual Capacity*; CHRISTOPHER FROST, *in his Individual Capacity,*

Defendants—Appellees,

BOYCE ROCKETT, *Joshua Martin*; MICHAEL KENES; DUSTIN MCCANN; MICHAEL BAXLEY; DOSS MURPHY; WES MCALISTER; NATHAN GRINDSTAFF; MICHAEL CHANEY; NATHAN CHAMPEAU; BILLY MCREE; LANCE GENEVA; DALTON DAVIS; WILLIAM AIKEN,

Plaintiffs—Appellants,

versus

BRENT STROMAN, *Chief of Police of the Waco Police Department, in his individual capacity*; MANUEL CHAVEZ, *Waco Police Department Detective, in his individual capacity*; ABELINO "ABEL" REYNA, *Elected District Attorney for McLennan County, Texas, in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *Assistant Chief of Police, in his Individual Capacity*; JEFFREY ROGERS, *Police Officer with the Waco Police Department, in his Individual Capacity*; PATRICK SWANTON, *Police Officer with the Waco Police Department, in his Individual Capacity*; STEVEN SCHWARTZ, *Special Agent with the Texas Department of Public Safety, in his Individual Capacity*; CHRISTOPHER FROST, *Special Agent with the Texas Department of Public Safety, in his Individual Capacity,*

Defendants—Appellees,

ROBERT CLINTON BUCY,

Plaintiff—Appellant,

versus

BRENT STROMAN, *in his individual capacity*; MANUEL CHAVEZ, *in his individual capacity*; ABELINO REYNA, *in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *in his individual capacity*; JEFFREY ROGERS, *in his individual capacity*; PATRICK SWANTON, *in his individual capacity*; STEVEN SCHWARTZ, *in his individual capacity*; CHRISTOPHER FROST, *in his individual capacity,*

Defendants—Appellees,

MATTHEW ALAN CLENDENNEN,

Plaintiff—Appellant,

versus

CHIEF BRENT STROMAN, *in his individual capacity*; DETECTIVE MANUEL CHAVEZ, *in his individual capacity*; ABELINO "ABEL" REYNA, *in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ASSISTANT CHIEF ROBERT LANNING, *in his individual capacity*; DETECTIVE JEFFREY ROGERS, *in his individual capacity*; PATRICK SWANTON, *in his individual capacity*; STEVEN SCHWARTZ, *in his individual capacity*; CHRISTOPHER FROST, *in his individual capacity,*

Defendants—Appellees,

JORGE SALINAS,

Plaintiff—Appellant,

versus

BRENT STROMAN, *in his individual capacity*; MANUEL CHAVEZ, *in his individual capacity*; ABELINO REYNA, *in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *Assistant Chief of Police*; DETECTIVE JEFFREY ROGERS, *Waco Police Department*; PATRICK SWANTON, *Police Officer, Waco Police Department*; STEVEN SCHWARTZ, *Special Agent, Waco Police Department*; CHRISTOPHER FROST, *Special Agent, Waco Police Department,*

Defendants—Appellees,

CODY LEDBETTER,

Plaintiff—Appellant,

versus

BRENT STROMAN, *Chief of Police of the Waco Police Department, in his individual capacity*; MANUEL CHAVEZ, *Waco Police Department Detective, in his individual capacity*; ABELINO "ABEL" REYNA, *Elected District Attorney for McLennan County, Texas, in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *Assistant Chief of Police in his Individual Capacity*; JEFFREY ROGERS, *Police Officer with the Waco Police Department, in his individual capacity*; SERGEANT PATRICK SWANTON, *Police Officer with the Waco Police Department, in his individual capacity*; STEVEN SCHWARTZ, *Special Agent with the Texas Department of Public Safety, in his Individual Capacity*; CHRISTOPHER FROST, *Special Agent with the Texas Department of Public Safety, in his Individual Capacity,*

Defendants—Appellees,

WES MCALISTER,

Plaintiff—Appellant,

versus

BRENT STROMAN, *Chief of Police of the Waco Police Department, in his individual capacity*; MANUEL CHAVEZ, *Waco Police Department Detective, in his individual capacity*; ABELINO "ABEL" REYNA, *Elected District Attorney for McLennan County, Texas, in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *Assistant Chief of*

Police, in his Individual Capacity; JEFFREY ROGERS, *Police Officer with the Waco Police Department, in his Individual Capacity*; PATRICK SWANTON, *Police Officer with the Waco Police Department, in his Individual Capacity*; STEVEN SCHWARTZ, *Special Agent with the Texas Department of Public Safety, in his Individual Capacity*; CHRISTOPHER FROST, *Special Agent with the Texas Department of Public Safety, in his Individual Capacity,*

Defendants—Appellees,

NATHAN CHAMPEAU,

Plaintiff—Appellant,

versus

BRENT STROMAN, *Chief of Police of the Waco Police Department, in his individual capacity*; MANUEL CHAVEZ, *Waco Police Department Detective, in his individual capacity*; ABELINO "ABEL" REYNA, *Elected District Attorney for McLennan County, Texas, in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *Assistant Chief of Police, in his Individual Capacity*; JEFFREY ROGERS, *Police Officer with the Waco Police Department, in his Individual Capacity*; PATRICK SWANTON, *Police Officer with the Waco Police Department, in his Individual Capacity*; STEVEN SCHWARTZ, *Special Agent with the Texas Department of Public Safety, in his Individual Capacity*; CHRISTOPHER FROST, *Special Agent with the Texas Department of Public Safety, in his Individual Capacity,*

Defendants—Appellees,

BILLY MCREE,

Plaintiff—Appellant,

versus

BRENT STROMAN, *Chief of Police of the Waco Police Department, in his individual capacity*; MANUEL CHAVEZ, *Waco Police Department Detective, in his individual capacity*; ABELINO "ABEL" REYNA, *Elected District Attorney for McLennan County, Texas, in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *Assistant Chief of Police, in his Individual Capacity*; JEFFREY ROGERS, *Police Officer with the Waco Police Department, in his Individual Capacity*; PATRICK SWANTON, *Police Officer with the Waco Police Department, in his Individual Capacity*; STEVEN SCHWARTZ, *Special Agent with the Texas Department of Public Safety, in his Individual Capacity*; CHRISTOPHER FROST, *Special Agent with the Texas Department of Public Safety, in his Individual Capacity,*

Defendants—Appellees,

WILLIAM AIKEN,

Plaintiff—Appellant,

versus

BRENT STROMAN, *Chief of Police of the Waco Police Department, in his individual capacity*; MANUEL CHAVEZ, *Waco Police Department Detective, in his individual capacity*; ABELINO "ABEL" REYNA, *Elected District Attorney for McLennan County, Texas, in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *Assistant Chief of*

Police, in his Individual Capacity; JEFFREY ROGERS, *Police Officer with the Waco Police Department, in his Individual Capacity*; PATRICK SWANTON, *Police Officer with the Waco Police Department, in his Individual Capacity*; STEVEN SCHWARTZ, *Special Agent with the Texas Department of Public Safety, in his Individual Capacity*; CHRISTOPHER FROST, *Special Agent with the Texas Department of Public Safety, in his Individual Capacity,*

Defendants—Appellees,

CONSOLIDATED WITH

No. 20-50372

MARTIN D.C. LEWIS; RICKY WYCOUGH; GREGORY WINGO; DUSTY OEHLERT; JAMES MICHAEL DEVOLL, *Et Al,*

Plaintiffs—Appellants,

versus

CHIEF BRENT STROMAN, *in his individual capacity*; DETECTIVE MANUEL CHAVEZ, *in his individual capacity*; ABELINO "ABEL" REYNA, *in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *in his individual capacity*; DETECTIVE JEFFREY ROGERS, *in his individual capacity*; PATRICK SWANTON, *in his individual capacity*; STEVEN SCHWARTZ, *in his individual capacity*; CHRISTOPHER FROST, *in his individual capacity,*

Defendants—Appellees,

SETH TYLER SMITH; KEITH MCCALLUM; MATTHEW FOLSE; JOSEPH ORTIZ,

Plaintiffs—Appellants,

versus

CHIEF BRENT STROMAN, *in his individual capacity*; DETECTIVE MANUEL CHAVEZ, *in his individual capacity*; ABELINO "ABEL" REYNA, *in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *in his individual capacity*; DETECTIVE JEFFREY ROGERS, *in his individual capacity*; PATRICK SWANTON, *in his individual capacity*; STEVEN SCHWARTZ, *in his individual capacity*; CHRISTOPHER FROST, *in his individual capacity,*

Defendants—Appellees,

BURTON GEORGE BERGMAN;

Plaintiff—Appellant,

versus

CHIEF BRENT STROMAN, *in his individual capacity*; DETECTIVE MANUEL CHAVEZ, *in his individual capacity*; ABELINO "ABEL" REYNA, *in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ASSISTANT CHIEF ROBERT LANNING, *in his individual capacity*; DETECTIVE JEFFREY ROGERS, *in his individual capacity*; PATRICK SWANTON, *in his individual capacity*; STEVEN SCHWARTZ, *in his individual capacity*; CHRISTOPHER FROST, *in his individual capacity,*

Defendants—Appellees,

NOE ADAME;

Plaintiff—Appellant,

versus

CHIEF BRENT STROMAN, *in his individual capacity*; DETECTIVE MANUEL CHAVEZ, *in his individual capacity*; ABELINO REYNA, *in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *Assistant Chief of Police*; DETECTIVE JEFFREY ROGERS, *Police Officer, Waco Police Department*; PATRICK SWANTON, *Police Officer, Waco Police Department*; STEVEN SCHWARTZ, *Special Agent, Texas Department of Public Safety*; CHRISTOPHER FROST, *Special Agent, Texas Department of Public Safety,*

Defendants—Appellees,

JOHN VENSEL;

Plaintiff—Appellant,

versus

CHIEF BRENT STROMAN, *in his individual capacity*; DETECTIVE MANUEL CHAVEZ, *in his individual capacity*; ABELINO REYNA, *in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *in his individual capacity*; DETECTIVE JEFFREY ROGERS, *in his individual capacity*; PATRICK SWANTON, *in his individual capacity*; STEVEN SCHWARTZ, *in his individual capacity*; CHRISTOPHER FROST, *in his individual capacity,*

Defendants—Appellees,

DIEGO OBLEDO,

Plaintiff—Appellant,

versus

BRENT STROMAN, *in his individual capacity*; MANUEL CHAVEZ, *in his individual capacity*; ABELINO REYNA, *in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *Assistant Chief of Police, Waco Police Department*; DETECTIVE JEFFREY ROGERS, *in his individual capacity*; PATRICK SWANTON, *in his individual capacity*; STEVEN SCHWARTZ, *in his individual capacity*; CHRISTOPHER FROST, *in his individual capacity,*

Defendants Appellees,

CONSOLIDATED WITH

No. 20-50380

MARSHALL MITCHELL; BLAKE TAYLOR; CHRISTOPHER ROGERS, *in his Individual Capacity*; RICHARD BENAVIDES; BRIAN BRINCKS; RENE CAVAZOS; JUVENTINO MONTELLANO; JASON CAVAZOS; JOHN GUERRERO; LINDELL COPELAND; RUDY MERCADO; RICHARD SMITH; LAWRENCE GARCIA; ANTHONY SHANE PALMER; PHILLIP SAMPSON; CLAYTON REED; JAMES GRAY; CORY MCALISTER; TOMMY JENNINGS; LARRY PINA; RICHARD LOCKHART; GLENN WALKER; RONALD WARREN,

Plaintiffs—Appellants,

versus

BRENT STROMAN, *Chief of Police of the Waco Police Department, in his individual capacity*; MANUEL CHAVEZ, *Waco Police Department Detective, in his individual capacity*; ABELINO "ABEL" REYNA, *Elected District Attorney for McLennan County, Texas, in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *Assistant Chief of Police, in his Individual Capacity*; JEFFREY ROGERS, *Police Officer with the Waco Police Department, in his Individual Capacity*; PATRICK SWANTON, *Police Officer with the Waco Police Department, in his Individual Capacity*; STEVEN SCHWARTZ, *Special Agent with the Texas Department of Public Safety, in his Individual Capacity*; CHRISTOPHER FROST, *Special Agent with the Texas Department of Public Safety, in his Individual Capacity,*

Defendants—Appellees,

RICHARD LOCKHART; GLENN WALKER; RONALD WARREN;

Plaintiffs—Appellants,

versus

CHIEF BRENT STROMAN, *in his individual capacity*; DETECTIVE MANUEL CHAVEZ, *in his individual capacity*; ABELINO "ABEL" REYNA, *in his individual capacity*; CITY OF WACO, TEXAS; MCLENNAN COUNTY, TEXAS; ROBERT LANNING, *in his individual capacity*; DETECTIVE JEFFREY ROGERS, *in his individual capacity*; PATRICK SWANTON, *in his individual capacity*; STEVEN SCHWARTZ, *in his individual capacity*; CHRISTOPHER FROST, *in his individual capacity,*

Defendants-Appellees,

CONSOLIDATED WITH

No. 20-50408

PAUL MILLER; JAMES CAFFEY; NATHAN PARISH; ROBERT NICHOLS; GEORGE ROGERS,

Plaintiffs-Appellants,

versus

BRENT STROMAN, *Former Chief, Waco Police Department*; MANUEL CHAVEZ, *Police Officer, Waco Police Department*; ROBERT LANNING, *Assistant Chief, Waco Police Department*; JEFFREY ROGERS, *Detective, Waco Police Department*; PATRICK SWANTON, *Sergeant, Waco Police Department*; ABELINO REYNA, *Former District Attorney, McLennan County, Texas*; CHRISTOPHER FROST, *Special Agent, Texas Department of Public Safety*; STEVEN SCHWARTZ, *Special Agent, Texas Department of Public Safety*; CITY OF WACO; MCLENNAN COUNTY,

Defendants—Appellees,

CONSOLIDATED WITH

No. 20-50453

JADE HARPER, *as representative of the estate of Bryan Harper,*

Plaintiff—Appellant,

versus

BRENT STROMAN, *Chief of Police for the Waco Police Department, in his individual capacity*; MANUEL CHAVEZ, *Waco Police Department Detective, in his individual capacity*; MCLENNAN COUNTY; CITY OF WACO; ABELINO REYNA; ROBERT LANNING; SERGEANT W. PATRICK SWANTON; STEVEN SWARTZ; CHRISTOPHER FROST; JEFFREY ROGERS,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-453
USDC No. 1:17-CV-471
USDC No. 1:15-CV-1040
USDC No. 1:15-CV-1041
USDC No. 1:15-CV-1044
USDC No. 1:17-CV-479
USDC No. 1:18-CV-1044
USDC No. 1:18-CV-1045
USDC No. 1:18-CV-1046
USDC No. 1:18-CV-1047
USDC No. 1:17-CV-448
USDC No. 1:17-CV-474
USDC No. 1:15-CV-1042
USDC No. 1:15-CV-1043
USDC No. 1:15-CV-1045
USDC No. 1:16-CV-575
USDC No. 1:17-CV-457
USDC No. 1:17-CV-480
USDC No. 1:19-CV-475
USDC No. 1:17-CV-465

ON PETITION FOR REHEARING EN BANC

(Filed Jun. 9, 2022)

Before RICHMAN, *Chief Judge*, and CLEMENT and HIGGINSON, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

United States Court of Appeals
for the Fifth Circuit

No. 20-50769

WILLIAM BRENT REDDING; THOMAS PAUL LANDERS; GILBERT ZAMORA,

Plaintiffs—Appellants,

versus

PATRICK SWANTON, *in his individual capacity*; STEVEN SCHWARTZ, *in his individual capacity*; CHRISTOPHER FROST, *in his individual capacity*; JEFFREY ROGERS, *in his individual capacity*; BRENT STROMAN, *Chief of Police for the Waco Police Department, in his individual capacity*; ABELINO REYNA, *Elected District Attorney for McLennan County, Texas, in his individual capacity*; MANUEL CHAVEZ, *Waco Police Department Detective, in his individual capacity,*

Defendants—Appellees,

****

THOMAS PAUL LANDERS,

Plaintiff—Appellant,

versus

STEVEN SCHWARTZ, *in his official capacity*; JEFFREY ROGERS, *in his individual capacity*; PATRICK SWANTON, *in his official capacity*; CHRISTOPHER FROST, *in his individual capacity,*

Defendants—Appellees,

****

GILBERT ZAMORA,

Plaintiff—Appellant,

versus

ABELINO "ABEL" REYNA, *Elected District Attorney for McLennan County, Texas, in his individual capacity*; MANUEL CHAVEZ, *Waco Police Department Detective, in his individual capacity*; BRENT STROMAN, *Chief of Police for the Waco Police Department, in his official capacity*; SERGEANT PATRICK SWANTON, *Police Officer with the Waco Police Department, in his official capacity*; JEFFREY ROGERS, *Police Officer with the Waco Police Department, in his official capacity*; CHRISTOPHER FROST, *Special Agent with the Texas Department of Public Safety, in his individual capacity*; STEVEN SCHWARTZ, *Special Agent with the Texas Department of Public Safety, in his individual capacity*

Defendants—Appellees,

****

THOMAS PAUL LANDERS,

Plaintiff—Appellant,

versus

BRENT STROMAN, *Chief of Police for the Waco Police Department, in his individual capacity*; ABELINO REYNA, *Elected District Attorney for McLennan County, Texas, in his individual capacity*; MANUEL CHAVEZ, *Waco Police Department Detective, in his individual capacity,*

Defendants—Appellees,

****

WILLIAM BRENT REDDING,

Plaintiff—Appellant,

versus

BRENT STROMAN, *Chief of Police for the Waco Police Department, in his individual capacity*; MANUEL CHAVEZ, *Waco Police Department Detective, in his individual capacity*; ABELINO REYNA, *Elected District Attorney for McLennan County, Texas, in his individual capacity,*

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC Nos. 1:17-CV-470; 1:17-CV-468;
1:17-CV-469; 1:16-CV-1153; 1:16-CV-1154

ON PETITION FOR REHEARING EN BANC

(Filed Jun. 9, 2022)

Before RICHMAN, *Chief Judge*, and CLEMENT and HIGGINSON, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc

(FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

United States Court of Appeals
for the Fifth Circuit

No. 19-50888

BRADLEY TERWILLIGER; BENJAMIN MATCEK;
JIMMY DAN SMITH,

Plaintiffs—Appellees,

versus

ABELINO REYNA, IN HIS INDIVIDUAL CAPACITY;
BRENT STROMAN, IN HIS INDIVIDUAL CAPACITY;
MANUEL CHAVEZ, IN HIS INDIVIDUAL CAPACITY;
ROBERT LANNING, IN HIS INDIVIDUAL CAPACITY;
JEFFREY ROGERS, IN HIS INDIVIDUAL CAPACITY,

Defendants—Appellants.

CONSOLIDATED WITH

No. 19-50909

ESTER WEAVER; WALTER WEAVER; SANDRA LYNCH;
MICHAEL LYNCH; JULIE PERKINS; JUSTIN WADDINGTON,

Plaintiffs—Appellees,

versus

ABELINO REYNA, ELECTED DISTRICT ATTORNEY FOR
MCLENNAN COUNTY, TEXAS, IN HIS INDIVIDUAL CAPACITY;
BRENT STROMAN, CHIEF OF POLICE FOR THE WACO
POLICE DEPARTMENT, IN HIS INDIVIDUAL CAPACITY;
MANUEL CHAVEZ, WACO POLICE DEPARTMENT
DETECTIVE, IN HIS INDIVIDUAL CAPACITY; ROBERT

LANNING, IN HIS INDIVIDUAL CAPACITY; DET. JEFFREY ROGERS, IN HIS INDIVIDUAL CAPACITY,

Defendants—Appellants.

CONSOLIDATED WITH

No. 19-50910

DARYLE WALKER; MICHAEL WOODS; DON FOWLER; DAVID CEPEDA; KEVIN RASH; RICHARD KREDER; GREG CORRALES; BOBBY JOE SAMFORD; JIMMY SPENCER, JR.; CRAIG RODAHL; ARLEY HARRIS, III; RICHARD DAULEY,

Plaintiffs—Appellees,

versus

ABELINO "ABEL" REYNA, ELECTED DISTRICT ATTORNEY FOR MCLENNAN COUNTY, TEXAS, IN HIS INDIVIDUAL CAPACITY,

Defendants—Appellants.

CONSOLIDATED WITH

No. 19-51029

DARYLE WALKER; MICHAEL WOODS; DON FOWLER; DAVID CEPEDA; KEVIN RASH; RICHARD KREDER; GREG CORRALES; BOBBY JOE SAMFORD; JIMMY SPENCER, JR.; CRAIG RODAHL; ARLEY HARRIS, III; RICHARD DAULEY,

Plaintiffs—Appellees,

versus

BRENT STROMAN, CHIEF OF POLICE FOR THE WACO POLICE DEPARTMENT, IN HIS INDIVIDUAL CAPACITY; MANUEL CHAVEZ, WACO POLICE DEPARTMENT DETECTIVE, IN HIS INDIVIDUAL CAPACITY; ROBERT LANNING, IN HIS INDIVIDUAL CAPACITY; JEFFREY ROGERS, IN HIS INDIVIDUAL CAPACITY,

Defendants—Appellants.

CONSOLIDATED WITH

No. 19-50032

CHRISTOPHER EATON; OWEN BARTLETT; JAMES VENABLE,

Plaintiffs—Appellees,

versus

CHIEF BRENT STROMAN, IN HIS INDIVIDUAL CAPACITY; DETECTIVE MANUEL CHAVEZ, IN HIS INDIVIDUAL CAPACITY; ASSISTANT CHIEF ROBERT LANNING, IN HIS INDIVIDUAL CAPACITY; DETECTIVE JEFFREY ROGERS, IN HIS INDIVIDUAL CAPACITY; ABELINO "ABEL" REYNA,

Defendants—Appellants.

CONSOLIDATED WITH

No. 20-50276

THERON RHOTEN; JONATHAN LOPEZ; RYAN WILLIAM CRAFT; JIM ALBERT HARRIS; BONAR CRUMP, JR.; JUAN CARLOS GARCIA; DREW KING,

Plaintiffs—Appellees,

versus

CHIEF BRENT STROMAN, IN HIS INDIVIDUAL CAPACITY; DETECTIVE MANUEL CHAVEZ, IN HIS INDIVIDUAL CAPACITY; ASSISTANT CHIEF ROBERT LANNING, IN HIS INDIVIDUAL CAPACITY; DETECTIVE JEFFREY ROGERS, IN HIS INDIVIDUAL CAPACITY; DISTRICT ATTORNEY ABELINO REYNA, IN HIS INDIVIDUAL CAPACITY,

Defendants—Appellants.

JIM ALBERT HARRIS; BONAR CRUMP, JR; JUAN CARLOS GARCIA; DREW KING,

Plaintiffs—Appellees,

versus

MANUAL CHAVEZ, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; CHIEF BRENT STROMAN, IN HIS INDIVIDUAL CAPACITY; ROBERT LANNING, IN HIS INDIVIDUAL CAPACITY; JEFFREY ROGERS, IN HIS INDIVIDUAL CAPACITY; ABELINO REYNA, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY

Defendants—Appellants.

Appeals from the United States District Court
for the Western District of Texas
USDC 1:16-CV-599; 1:16-CV-1195; 1:17-CV-235;
1:16-CV-871; 1:16-CV-648; 1:17-CV-426

(Filed Jul. 8, 2021)

Before HIGGINBOTHAM, JONES, and HIGGINSON, Circuit Judges.

EDITH H. JONES, *Circuit Judge*:

A deadly shootout occurred at the Twin Peaks restaurant in Waco, Texas, at a gathering of hundreds of motorcyclists, including gang members. The Plaintiffs here filed several lawsuits against Waco public officials based on their arrests and detentions following the rampage. The series of § 1983 suits alleged Fourth Amendment violations against Abelino Reyna, the then-District Attorney of McLennan County; Brent Stroman, Chief of the Waco Police Department; Robert Lanning, the Assistant Waco Police Chief; Manuel Chavez and Jeffrey Rogers, both Waco Police Department detectives.[1] The Defendants moved to dismiss asserting their qualified immunity and have appealed because the district court denied the motion in part. Since the specific facts lodged in each case against the Defendants are largely identical and the appellate briefing nearly verbatim alike by both sides, this court consolidated the appeals.

Having considered the facts and arguments, we REVERSE and RENDER as to Defendants Stroman and Lanning, AFFIRM in part and REVERSE in part as to Defendants Reyna, Chavez, and Rogers, and REMAND for further proceedings consistent with this opinion.

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[1] Other defendants were included in the lawsuits, but only these particular appellants pursued an interlocutory appeal.

I. BACKGROUND

The thirty-one plaintiffs were arrested after the Twin Peaks shooting for the felony charge of Engaging in Organized Criminal Activity ("EIOCA"). Tex. Penal Code § 71.02. Some are members of "independent motorcycle clubs" and others unaffiliated with clubs. They were detained at the scene immediately after the bloodbath or off premises later that day.

Hundreds of bikers representing numerous motorcycle clubs gathered for a meeting of the Texas Confederation of Clubs & Independents ("COC") on May 17, 2015 at the Twin Peaks restaurant in Waco, Texas. Members of both the Bandidos Motorcycle Club and Cossacks Motorcycle Club were present. Local law enforcement, aware of animosity between the Bandidos and Cossacks, monitored the meeting from the perimeter of the restaurant. Uniformed and undercover agents were present in an intelligence gathering capacity but had no evidence of planned violence. Nonetheless, violence erupted around noon. The ensuing shootout left nine victims dead and at least another twenty injured. Law enforcement officers, who had been forced to engage in defensive shooting, took control of the scene immediately after the violence and began investigating. Defendant Chavez was the detective in charge of the investigation.

After several hours, all COC attendees were transferred to the Waco Convention Center for questioning by law enforcement. Individual interviews continued well into the evening until the decision was made to

arrest the motorcyclists who fit predetermined criteria—specifically, whether their support for or affiliation with the Bandidos or Cossacks was indicated by motorcycle club association and/or clothing, patches, key chains or other items.

Detective Chavez prepared and signed a form warrant affidavit which stated that:

> [O]n or about May 17, 2015, in McLennan County, Texas, the said _____ did then and there, as a member of a criminal street gang, commit or conspire to commit murder, capital murder, or aggravated assault, against the laws of the State.
>
> My probable cause for said belief and accusation is as follows:
>
> Three or more members and associates of the Cossacks Motorcycle Club (Cossacks) were in the parking lot of the Twin Peaks restaurant in Waco, McLennan County Texas. Three or more members of the Bandidos Motorcycle clubs (Bandidos) arrived in the parking lot of the Twin Peaks restaurant and engaged in an altercation with the members and associates of the Cossacks. During the course of the altercation, members and associates of the Cossacks and Bandidos brandished and used firearms, knives or other unknown edged weapons, batons, clubs, brass knuckles, and other weapons. The weapons were used to threaten and/or assault the opposing factions. Cossacks and Bandidos discharged firearms at one another. Members of the Waco Police

Department attempted to stop the altercation and were fired upon by the Bandidos and/or Cossacks. Waco Police Officers returned fire, striking multiple gang members. During the exchange of gunfire, multiple persons where [sic] shot. Nine people died as a result of the shooting between the members of the biker gangs. Multiple other people were injured as a result of the altercation. The members and associates of the Cossacks and Bandidos were wearing common identifying distinctive signs or symbols and/or had an identifiable leadership and/or continuously or regularly associate in the commission of criminal activities. The Texas Department of Public Safety maintains a database containing information identifying the Cossacks and their associates as a criminal street gang and the Bandidos and their associates as a criminal street gang.

After the altercation, the subject was apprehended at the scene, while wearing common identifying distinct signs or symbols or had an identifiable leadership or continuously or regularly associate in the commission of criminal activities.

After the altercation, firearms, knives or other unknown edged weapons, batons, clubs, brass knuckles, and other weapons were recovered from members and associates of both criminal street gangs.

Multiple motorcycles with common identifying signs or symbols of the Cossacks and Bandidos and their associates were recovered at

> the scene. Additional weapons including: firearms, ammunition, knives, brass knuckles, and other weapons were found on the motorcycles.

The Plaintiffs were among 177 individuals arrested within the next several days using this form affidavit. Detective Chavez later testified that the names of those to be arrested pursuant to the warrant had been furnished to him. Eventually, only one case went to trial, a mistrial resulted, and the state dropped or reduced charges against the arrestees. No one has been prosecuted for the murders or injuries.

The Plaintiffs filed multiple § 1983 suits centering on their allegedly unlawful arrests without probable cause. Among others not covered here, one of their claims alleges that the Chavez affidavit facially failed to establish probable cause. *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092 (1986). A second claim asserted that intentional or reckless false statements in the affidavit resulted in a warrant lacking probable cause. *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978). The Plaintiffs also pled § 1983 conspiracy and bystander liability claims.[2] The Defendants moved to

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[2] For the first time on appeal, the Plaintiffs have raised a supervisory liability claim. We do not consider this untimely addition. Their argument that the complaint contained facts sufficient to put the Defendants on notice of the supervisory theory of liability is unpersuasive. An argument "not raised before the district court . . . is . . . 'waived and cannot be raised for the first time on appeal.'" *In re Deepwater Horizon*, 857 F.3d 246, 251 (5th Cir. 2017) (quoting *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007)).

dismiss on qualified immunity grounds, and District Attorney Reyna additionally claimed absolute prosecutorial immunity from suit. The district court dismissed the *Malley* claims as to all Defendants but denied the motion with respect to the *Franks*, conspiracy, and bystander claims. The Defendants then filed this interlocutory appeal based on the denial of qualified and absolute immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806 (1986).[3]

II. DISCUSSION

This court reviews *de novo* a district court's denial of a motion to dismiss on grounds of qualified or absolute immunity. *Morgan v. Chapman*, 969 F.3d 238, 244 (5th Cir. 2020). That ruling is a collateral order susceptible of immediate appellate review. *Behrens v. Pelletier*, 516 U.S. 299, 307, 116 S. Ct. 834, 839 (1996). Our review is "restricted to determinations 'of question[s] of law' and 'legal issues,' and . . . do[es] not consider 'the correctness of the plaintiff's version of the facts.'" *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 251-52 (5th Cir. 2005) (quoting *Mitchell*, 472 U.S. at 528, 105 S. Ct. at 2816). Further, all well-pleaded facts must be accepted as true and viewed in the light most favorable to the plaintiffs. *Anderson v. Valdez*, 845 F.3d 580, 589 (5th Cir. 2016).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"

[3] No cross-appeal was filed to preserve the *Malley* claims.

Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007)). "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*. These standards are the same when a motion to dismiss is based on qualified immunity. *Dyer v. Houston*, 964 F.3d 374, 379 (5th Cir. 2020). The crucial question is "whether the complaint pleads facts that, if true, would permit the inference that Defendants are liable under § 1983 . . . and would overcome their qualified immunity defense." *Hinojosa v. Livingston*, 807 F.3d 657, 664 (5th Cir. 2015). It is the plaintiff's burden to demonstrate that qualified immunity is inappropriate. *See Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009).

On appeal, D.A. Reyna asserts absolute prosecutorial immunity, and all Defendants claim qualified immunity from the Plaintiffs' *Franks* claim and other liability theories. We discuss each of these issues in turn.

A. Absolute Immunity

Prosecutors are shielded by absolute immunity for activities "intimately associated with the judicial phase of the criminal process," including "initiating a prosecution and [] presenting the State's case." *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S. Ct. 984, 995 (1976). Absolute immunity is premised on the nature

of the function performed by the prosecutor, not on the actor's title. *Forrester v. White*, 484 U.S. 219, 229, 108 S. Ct. 538, 545 (1988). Consequently, a prosecutor's absolute immunity does not extend to "advising the police in the investigative phase of a criminal case" where qualified immunity is sufficient. *Burns v. Reed*, 500 U.S. 478, 493, 111 S. Ct. 1934, 1943 (1991). Further, a prosecutor has no absolute immunity for personally attesting to the truth of evidence presented to the court or exercising judgment going to the truth or falsity of that evidence. *Spivey v. Robertson*, 197 F.3d 772, 775 (5th Cir. 1999) (discussing *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502 (1997)).

The Plaintiffs allege that Reyna was the driving force behind the mass arrests and told Asst. Chief Lanning that "'all bikers wearing colors' should be arrested." Further, the Plaintiffs allege, Reyna was present at the scene "investigating the shooting" and "publicly acknowledged that he took the unusual step of assisting law enforcement and was involved in the actual investigation of the incident." The complaint states that "Reyna investigated the scene within hours of the incident, took photographs of the scene, reviewed information as it became known, and in all respects inserted himself in the role of an investigator/detective." The Plaintiffs allege that Reyna was continuously updated on May 17 as to the status of the investigation. Moreover, Reyna had access to video footage corroborative of law enforcement interviews that revealed many COC attendees, including many of those

arrested, had no connection to the violence or parties involved in the violence.

Reyna acknowledges that he received information gleaned by Texas Department of Public Safety investigative interviews, which furnished the factual basis for the offense criteria used in the probable cause affidavits. He contends that in so doing, he was acting as an advocate supplying legal advice based on the investigators' facts. Were this the sum of his activities, it would fall comfortably within the protection of absolute immunity. *See Spivey*, 197 F.3d at 776 (discussing *Kalina*, 522 U.S. at 123-31, 118 S. Ct. at 505-10). Formulating factual criteria sufficient to satisfy probable cause from the investigative materials reflects a prosecutor's "suggesting legal conclusions on the facts already given." *Id.* Nor would this conclusion be contraindicated by the allegation that Reyna merely involved himself in the decision to arrest by informing Chief Stroman that there was "sufficient probable cause to arrest any biker who was present and appeared by virtue of clothing or personal effects to be affiliated with the Bandidos or Cossacks."

As shown by the preceding recitation, however, merely giving legal advice was not the sum of Reyna's alleged conduct in personally investigating the scene of the fracas and taking photographs. That he was allegedly "[c]reating or manufacturing new facts" distinguishes Reyna's actions at the scene from those of an advocate supplying legal advice. *Id*. Moreover, although the ultimate import of this is less clear, the fact that Reyna was constantly in touch as the investigation

proceeded and had access to allegedly exculpatory video and interview evidence, yet still decided to approve a global arrest warrant for EIOCA, implies that he "exercised judgement going to the truth or falsity of the evidence." *Id.* Taking the facts as pled in the light most favorable to the Plaintiffs, Reyna's conduct exceeded his prosecutorial function, and some of his actions were more akin to those of a law enforcement officer conducting an investigation. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S. Ct. 2606, 2616 (1993) ("When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." (internal quotations and citations omitted)). Based on the pleadings pertaining to his investigative activity, D.A. Reyna's immunity is limited to that of a law enforcement officer.

B. *Franks* Liability

The Plaintiffs assert that the warrant affidavit signed by Detective Chavez was woefully deficient and false with respect to each of them, causing their false arrests and extended detentions without probable cause. They contend that all of the Defendants can be held liable for the affidavits' shortcomings. Assessing these liability claims and the Defendants' responsive qualified immunity claims on the bare pleadings is difficult.

The Plaintiffs allege that these Defendants knowingly or with reckless disregard for the truth provided false information to secure the arrest warrants. *Franks*, 438 U.S. at 171, 98 S. Ct. at 2684; *Hart v. O'Brien*, 127 F.3d 424, 448 (5th Cir. 1997). The *Franks* case arose in the context of a search warrant, but its rationale extends to arrest warrants. *See Melton v. Phillips*, 875 F.3d 256, 262 (5th Cir. 2017) (en banc). Liability under *Franks* can arise from either material misstatements or material omissions in warrant affidavits. *Michalik v. Hermann*, 422 F.3d 252, 258 n.5 (5th Cir. 2005); *United States v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980) (citing cases). Functionally, the holding of *Franks* is an exception to the independent intermediary doctrine, which provides that "if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party." *Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010) (citation and internal quotation marks omitted). But "the chain of causation remains intact if it can be shown that the deliberations of that intermediary were in some way tainted by the actions of the defendant." *Id.* To determine taint, the essential inquiry is whether "there remains sufficient content in the warrant affidavit to support a finding of probable cause" *after* the "material that is the subject of the alleged falsity or reckless disregard is set to one side." *Franks*, 438 U.S. at 171-72, 98 S. Ct. at 2684.

The issues raised here by the Plaintiffs concern both the sufficiency of the affidavit signed by Chavez and the extent to which non-signer Defendants may be held responsible for any material false statements or omissions.

1. Sufficiency of the Affidavit

Probable cause is a "'practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Maryland v. Pringle*, 540 U.S. 366, 370, 124 S. Ct. 795, 799 (2003) (internal citations and quotations omitted). It turns "'on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.'" *Id*. at 371, 124 S. Ct. at 800 (quoting *Illinois v. Gates*, 462 U.S. 213, 232, 103 S. Ct. 2317, 2329 (1983)). Instead, courts must look to the "totality of the circumstances" and decide "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer" demonstrate "a probability or substantial chance of criminal activity." *District of Columbia v. Wesby*, 138 S. Ct. 577, 586, 588 (2018) (quotations and citations omitted). But while "[p]robable cause 'is not a high bar,'" *id*. at 586 (quotation and citation omitted), "the belief of guilt must be particularized with respect to the person to be searched or seized," *Pringle*, 540 U.S. at 371, 124 S. Ct. at 800.

We emphasize that standing alone, as the district court held, the warrant affidavit sufficiently alleged probable cause to arrest those to whom its facts applied.[4] That members or associates of the Bandidos and Cossacks instigated and were involved in the Twin Peaks shootout, and that their conduct rose to the level of violating the EIOCA were conclusions reasonably and objectively drawn from the events of the day. Against this backdrop, however, the issue raised by the Plaintiffs' allegations is whether the facts and resulting "belief of guilt" were sufficiently particularized as to each of them. *Id*.

Broadly, the Plaintiffs can be sorted into two groups: those detained at the Twin Peaks and those arrested elsewhere. The latter group includes Bradley Terwilliger, Benjamin Matcek, and Jimmy Dan Smith, who were initially arrested away from the scene, in the parking lot of a closed business, on separate charges[5] and were re-arrested several days later on the EIOCA charge pursuant to the form affidavit. The remaining twenty-eight Plaintiffs were all detained at the scene. All thirty-one Plaintiffs challenge the sufficiency of the affidavit on essentially similar grounds. First, they deny affiliation with the Bandidos or Cossacks,[6] and

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[4] This court reviews probable cause determinations *de novo*. *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005).

[5] Terwilliger was arrested for unlawfully carrying a weapon ("UCW"). Matcek was arrested for UCW and criminal trespass. Smith was arrested and charged with "Directing Activities of Criminal Street Gangs." TEX. PENAL CODE § 71.023.

[6] Many, however, are members of other allegedly independent motorcycle clubs.

any involvement with or membership in a "criminal street gang." They all claim that any jackets, vests, or insignia they were wearing were lawful and that their behavior before and during the incident was lawful.[7] Merely denying these facts is insufficient to establish colorable *Franks* liability, as is noted below. But the Plaintiffs go further in alleging that the Defendants deliberately excluded relevant information that would have weighed against individualized probable cause, such as video evidence, witness interviews, and membership in motorcycle clubs known to be independent and not affiliated with the Bandidos or Cossacks.

Assuming that the foregoing allegations constitute materially false statements or omissions in the warrant affidavit as to each Plaintiff, *Franks* requires the court to determine whether, excluding such errors and omissions, the remaining "corrected affidavit" establishes probable cause for the warrant's issuance. *Winfrey v. Rogers*, 901 F.3d 483, 495 (5th Cir. 2018) (citing *Franks*, 438 U.S. at 156, 98 S. Ct. at 2676). In this case, the remaining particularized facts in the affidavit are that "[a]fter the altercation, the subject was apprehended at the scene, while wearing common identifying distinct signs or symbols." And for the Plaintiffs not arrested on-scene, including Terwilliger who asserts he had no "common identifying distinct signs," the remaining uncontested facts are even slimmer. Taking

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[7] Terwilliger denies even having any patches, vest, jacket, or keychain indicating membership in a motorcycle club because he is not a member of any motorcycle club. Matcek claims he was not even present during the shootout.

these allegations as true and viewing in them in the light most favorable to the Plaintiffs, the "corrected" content of the affidavit is insufficient to establish particularized probable cause for arrest based on supposed violations of the EIOCA.

Franks, of course, requires more than bare assertions of falsehood. Instead, they "must be accompanied by an offer of proof . . . [and] point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons." *Franks*, 438 U.S. at 171, 98 S. Ct. at 2684. Evidence must be proffered and "[a]ffidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained." *Id*. While the Plaintiffs have met their burden of alleging a *Franks* violation sufficient to withstand the test of *Iqbal/Twombly*, if they press this litigation, they must offer tangible proof to overcome the "presumption of validity with respect to the affidavit supporting the . . . warrant." *Id*. Each Plaintiff must demonstrate that, as to him, the affidavit was deliberately or recklessly false.[8]

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[8] *Franks* counsels that every statement in a warrant affidavit need not be "truthful" in an absolute sense. 438 U.S. at 165, 98 S. Ct. at 2681. This is because "probable cause may be founded upon hearsay and upon information received from informants, as well as information within the affiant's own knowledge that sometimes must be garnered hastily . . . [b]ut surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." *Id.* Further, allegations of negligence or innocent mistake are insufficient. *Id.* at 171, 98 S. Ct. at 2684.

2. Extent of *Franks* Liability

In this circuit, a law enforcement officer "must have assisted in the preparation of, or otherwise presented or signed a warrant application in order to be subject to liability under *Franks*." *Melton*, 875 F.3d at 263. If an officer does not present or sign the affidavit, liability attaches only if "he helped prepare the complaint by providing information for use in it." *Id.* at 264. The analysis must consider the role played by each defendant.

Chavez, to begin, is within the compass of potential *Franks* liability because he signed the warrant affidavit and swore to the validity of the facts included in it. *Melton*, 875 F.3d at 263.[9]

Reyna, however, neither signed nor swore to the affidavit. Thus, *Franks* liability can only attach if he provided material information for use in the affidavit. The Plaintiffs plead generally that Reyna, among others, "caused an affidavit against each Plaintiff to be presented." Such conclusory language is insufficient standing alone. In more detail, the Plaintiffs plead that Reyna was provided with evidence both from the scene and interviews of attendees. But, acting contrary to the information provided to him, he stated that "all bikers wearing colors" should be arrested. Accordingly, and treating his function as that of an investigator, Reyna generated the basic facts set out in the probable cause

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[9] That Chavez may have received information from others when authoring the affidavit is not, contrary to the Plaintiffs' contention, material to his liability under *Franks*. *See supra* note 8.

affidavit. Thus, the Plaintiffs allege that Reyna "knew the exact wording of the affidavit" and knew or recklessly disregarded the fact that, based on the exculpatory evidence he had learned, probable cause did not exist to arrest some individuals potentially fitting the warrant's criteria. These allegations are sufficient to tie him to potential *Franks* liability.

Detective Rogers may also be implicated in potential *Franks* liability based on the pleadings. Taken in the light most favorable to their claim, the Plaintiffs allege he was a Waco Police Department gang detective who knowingly or with reckless disregard supplied false or materially misleading information identifying the Plaintiffs as members of or affiliated with "criminal street gangs."

Liability, however, is not sufficiently alleged as to Asst. Police Chief Lanning or Chief Stroman. Lanning was present at the Twin Peaks and, according to the pleadings, was "actively involved" in the investigation and aware of the entirety of the factual circumstances as well as the contents of the affidavit. But under *Melton*, "awareness" is not tantamount to "assisting" in the preparation of the warrant, much less the same as preparing or signing the affidavit. Further, the Plaintiffs fail to sufficiently allege that he "provided" material information. *Hart*, 127 F.3d at 448. Chief Stroman, as the pleadings acknowledge, was in touch with these events while out of town vacationing on the east coast. He was allegedly informed by Reyna that sufficient probable cause existed to arrest individuals fitting the established criteria and he subsequently approved the

arrests. Consequently, the Plaintiffs only allege generally that he "caused" the affidavit to be presented. This connection is insufficient under *Melton* and *Hart*.

C. Qualified Immunity

When a defendant invokes qualified immunity, the burden shifts to the plaintiff to plead specific facts to overcome the defense. *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc). To discharge this burden, plaintiffs must successfully allege that the defendants "violated a statutory or constitutional right, and . . . that the right was 'clearly established' at the time of the challenged conduct." *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011). "To be 'clearly established' for purposes of qualified immunity, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Kinney v. Weaver*, 367 F.3d 337, 349-50 (5th Cir. 2004) (en banc). The key purpose is to create "fair warning," thus the "clearly established" prong can be satisfied "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Hope v. Pelzer*, 536 U.S. 730, 740, 122 S. Ct. 2508, 2516 (2002).

The Plaintiffs here assert the clearly established right to be free from arrest without a good faith showing of probable cause. *Winfrey*, 901 F.3d at 494. Further, it is clearly established that a warrant is not

evidence of probable cause "if (1) the affiant, in support of the warrant, includes 'a false statement [made] knowingly and intentionally, or with reckless disregard for the truth' and (2) 'the allegedly false statement is necessary to the finding of probable cause.'"[10] *Id.* (quoting *Franks*, 438 U.S. at 155-56, 98 S. Ct. at 2676).

As described above, accepting the Plaintiffs' well-pleaded allegations as true, we agree with the district court that the Plaintiffs state a plausible *Franks* claim against Defendants Chavez, Reyna, and Rogers. We do not opine further on whether the Plaintiffs may ultimately adduce evidence of these Defendants' deliberate or reckless misstatements or omissions sufficient to prove the case and deprive the Defendants of qualified immunity.[11]

D. Alternate Theories of Liability

In addition to their *Franks* claim, the Plaintiffs also allege conspiracy and bystander claims. Neither survives. To support a conspiracy claim under § 1983, the plaintiff must allege facts that suggest "an agreement between the . . . defendants to commit an illegal

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[10] Since the Warrants Clause dictates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation," a warrant presumptively establishes probable cause. U.S. CONST. amend. IV, cl. 2. That presumption can be attacked, primarily through a claim under *Malley* or *Franks*.

[11] We also do not opine on whether, to the extent Chavez and Rogers each relied on legal advice supplied by D.A. Reyna, they may not have had the *mens rea* necessary for a *Franks* violation.

act" and "an actual deprivation of constitutional rights." *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994). The complaint states that the Defendants "entered into a conspiracy to deprive Plaintiffs of their right to be free from unlawful seizure" and "acted in concert either to orchestrate or to carry out the illegal seizure . . . when they knew there was no probable cause to arrest them." The complaint further states that the Defendants "caused a warrant to be issued" and were aware that Chavez was swearing to a false statement and "encouraged [him]." Absent from the complaint is any sufficiently pled agreement to violate the Plaintiffs' constitutional rights. "A conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly*, 550 U.S. at 557, 127 S. Ct. at 1966.

Regarding bystander liability, this court has held that "an officer who is present at the scene and does not take reasonable measures to protect a suspect from another officer's [constitutional violation] may be liable under section 1983." *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995). The Plaintiffs allege "that all of the individual Defendants (1) knew that a fellow officer was violating their rights by arresting them without probable cause; (2) had a reasonable opportunity to prevent the harm; and (3) chose not to act." When first asserting bystander liability in their response to the motion to dismiss, the Plaintiffs described in two paragraphs the Fifth Circuit case law and the enumerated elements of the claim, but nothing more. "A pleading that offers 'labels and conclusions' or 'a formulaic

recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1966). The district court erroneously allowed these claims to proceed.

III. CONCLUSION

For the foregoing reasons, the district court's judgment denying qualified immunity to Stroman and Laming is REVERSED and RENDERED. The judgment denying immunity to Reyna, Chavez and Rogers is AFFIRMED IN PART as to potential *Franks* liability but REVERSED IN PART as to conspiracy and bystander claims, and the case is REMANDED for further proceedings.

STEPHEN A. HIGGINSON, *Circuit Judge*, concurring in part and dissenting in part:

I agree with the majority that the Plaintiffs have done enough to survive the motion to dismiss stage. But I disagree as to the theory on which they should be permitted to proceed. I therefore respectfully dissent as to part II.B-C.

In my view, the warrant affidavit at the center of this case has a *Malley* defect, not a *Franks* defect. This court has held that a warrant affidavit that facially lacks probable cause can't trigger the *Franks* analysis. *Blake v. Lambert*, 921 F.3d 215, 222 (5th Cir. 2019) (citing *Kohler v. Englade*, 470 F.3d 1104, 1113-14 (5th Cir.

2006)). That is because if a warrant affidavit lacks probable cause on its face, any included false statement or omission can't be *material* to the existence of probable cause. *Kohler*, 470 F.3d at 1113 ("Th[e] materiality analysis presumes that the warrant affidavit, on its face, supports a finding of probable cause."). Thus, a facially deficient affidavit must be assessed under *Malley* rather than *Franks*. *Id.* at 1113-14.

The majority describes that "the warrant affidavit sufficiently alleged probable cause to arrest those *to whom its facts applied*." *Ante* at 15 (majority op.) (emphasis added). But therein lies the problem: the warrant affidavit does not tell us to whom the facts apply. I see no particularized probable cause on the face of the challenged warrant affidavit that connects the subject of the warrant to the crime of EIOCA that is alleged to have occurred. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (describing that probable cause "must be particularized with respect to the person to be searched or seized" (citation omitted)).

I agree with much of the majority's analysis. First, I agree with the majority that the warrant affidavit, on its face, supplies probable cause to conclude that unspecified members of the Bandidos and Cossacks committed EIOCA at the Twin Peaks shootout. *See ante* at 15 (majority op.). The affidavit is flush with general facts that describe the involvement of the Bandidos and Cossacks in the mayhem. However, the only statement in the affidavit that is specific to the subject of the warrant is the following: "After the altercation, the

subject was apprehended at the scene, while wearing common identifying distinct signs or symbols."[1] Second, I further agree with the majority that this statement alone does not provide particularized probable cause to arrest any of the Plaintiffs for EIOCA. *See id.* at 17. Crucially, the affidavit does not describe *what* "common identifying distinct signs or symbols" the subject was wearing, or even what group or association the signs or symbols purportedly identify. There is thus nothing in that statement that connects the subject to the Bandidos or Cossacks and the EIOCA that

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[1] This description is a slightly modified copy and paste of the definition of "criminal street gang" from the Texas penal code. *See* Tex. Penal Code § 71.01(d) (" 'Criminal street gang' means three or more persons having a common identifying sign or symbol or an identifiable leadership *who* continuously or regularly associate in the commission of criminal activities." (emphasis added)). Note that, in the warrant affidavit, the word "who" in the statute has been replaced with "or," rendering the full sentence grammatically nonsensical. *See ante* at 8 (majority op.).

Additionally, the warrant affidavit begins as follows:

> [O]n or about May 17, 2015, in McLennan County, Texas, the said _____ did then and there, as a member of a criminal street gang, commit or conspire to commit murder, capital murder, or aggravated assault, against the laws of the State.

Id. I understand this initial statement to be a description of the elements of the arresting offense—EIOCA—rather than a factual statement in support of probable cause. Indeed, the very next statement in the affidavit reads: "My probable cause for said belief and accusation is as follows." Thus, the description of the subject as "a member of a criminal street gang" is a legal conclusion rather than a factual statement that could form the basis of a *Franks* claim.

members of those groups were alleged to have committed at the Twin Peaks.

Given that the above statement is the *only* particularized statement about the subject of the warrant on the face of the affidavit, I am unable to find the particularized probable cause the majority says existed before it "correct[s]" the affidavit. *See id.* What materially false statement has been removed? Has a materially exculpatory fact been inserted that negates pre-existing probable cause? The majority does not say. If, for example, the affidavit had said that the subject of the warrant was a member of the Bandidos or Cossacks (or was wearing *their* signs and symbols), then that would be a material statement that Plaintiffs have plausibly alleged to be false. But there is no such statement. And without such a statement, particularized probable cause does not exist on the face of the warrant affidavit.

In fairness to the majority, the interlocutory nature of this appeal, which Defendants-Appellants have brought to challenge the district court's denial of qualified immunity with respect to a *Franks* theory of liability, does not afford the opportunity to squarely address the district court's dismissal of Plaintiffs' *Malley* claims, which, in my analysis, was erroneous. Neither party has briefed the issue of whether this panel could—or should—exercise pendant appellate jurisdiction over the dismissed *Malley* claims instead of

awaiting an appeal on any eventual final judgment.[2] But rather than send this case back to the district court to have it travel further down a conceptually flawed road, I would reverse its decision denying qualified immunity on the *Franks* theory, leaving the Plaintiffs free to appeal their dismissed *Malley* claims in due course.

[2] Nevertheless, Plaintiffs-Appellees make clear in their brief to us that they do not intend to abandon their *Malley* claims; instead, they await a final judgment to properly appeal the district court's dismissal of those claims. I understand the majority opinion to prefer that this court address the dismissed *Malley* claims in the first instance via any appeal following a final judgment.

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

JOHN WILSON, JOHN ARNOLD, JAMES BRENT ENSEY, EDGAR KELLEHER, BRIAN LOGAN, TERRY S. MARTIN, ROBERT ROBERTSON, JACOB WILSON, JOHN CRAFT, DANIEL JOHNSON, JASON DILLARD, and RONALD ATTERBURY,	§	
Plaintiffs,	§	CIVIL ACTION NO. 1:17-CV-453-ADA
v.	§	
BRENT STROMAN, MANUEL CHAVEZ, ABELINO "ABEL" REYNA, CITY OF WACO, TEXAS, ROBERT LANNING, JEFFREY ROGERS, PATRICK SWANTON, STEVEN SCHWARTZ, and CHRISTOPHER FROST,	§	
Defendants.	§	

PLAINTIFFS' FIRST AMENDED COMPLAINT AND JURY DEMAND

(Filed Feb. 19, 2019)

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs John Wilson, John Arnold, James Brent Ensey, Edgar Kelleher, Brian Logan, Terry S. Martin, Robert Robertson, Jacob Wilson, John Craft, Daniel Johnson, Jason Dillard, and Ronald Atterbury, (hereinafter "Plaintiffs") file this, their First Amended Complaint, and in support, respectfully show the Court as follows:

I. INTRODUCTION

1. This is a civil rights action brought pursuant to 42 U.S.C. § 1983 arising from the unlawful arrests that occurred in Waco, Texas on May 17, 2015. The mass arrests were unprecedented in both their scope and the complete absence of individual, particularized facts to establish probable cause. Plaintiffs are seeking damages against Defendants Brent Stroman, Manuel Chavez, Abelino "Abel" Reyna, Robert Lanning, Jeffrey Rogers, Patrick Swanton, Steven Schwartz, and Christopher Frost in their individual capacities, for committing acts under color of law, which deprived Plaintiffs, as well as many other persons, of rights secured under the Constitution and Laws of the United States. Plaintiffs are also seeking damages against the City of Waco, Texas and McLennan County, Texas for similar constitutional violations.

2. 177 individuals were arrested on May 17, 2015 for the identical charges of Engaging in Organized Criminal Activity—by committing or conspiring to commit murder, capital murder, and/or aggravated assault as a member of a criminal street gang. This was

done using a fill-in-the-name probable cause affidavit for each accused. Fifteen more were arrested for the same charge in subsequent months. These 192 people were arrested despite the fact that video evidence shows that the vast majority of those arrested, including Plaintiffs, immediately ran *away from the altercation* and towards cover when the fighting began. Furthermore, law enforcement possessed **no evidence** at the time—nor did they acquire any in the years that followed—that the vast majority of those arrested, including Plaintiffs, belonged to criminal street gangs.

3. Nonetheless, law enforcement arrested scores of innocent people based on nothing more than mere presence at the scene of a crime and a purely fictitious conspiracy theory. Doubling down on the absurdity of the situation, bond was set for each and every one of them at a staggering $1,000,000.

4. Nearly four years later, only one—***one***—of the 192 arrested has gone to trial. Many were never even presented to a grand jury, but were not officially cleared for almost three years after the event. To date, 168 of the 192 have been dismissed. The newly elected district attorney has expressed publicly that further dismissals are likely.

5. McLennan County Judge Ralph Strother has said he was "troubled by the whole Twin Peaks matter from its inception," and "very happy to sign the dismissals" of 42 criminal defendants in May 2018. A special prosecutor assigned to one defendant's case said,

> I don't think the case should have been filed in the first place based on all the facts and evidence that I saw. . . . In my opinion, that just wasn't a sufficient basis to charge someone without any evidence that they were involved in any wrongdoing that day. . . . There was just no evidence to show he was involved with anything that happened there, other than being present, and that ain't enough.

That man's story is nearly identical to those of the great majority of motorcyclists who were arrested that day, including Plaintiffs.

6. Although the damage to Plaintiffs and the United States Constitution can never be undone, an award under § 1983 would achieve some measure of compensation for the injustice perpetrated by Defendants in this case.

II. PARTIES

7. Plaintiff John Wilson is a resident of McLennan County, Texas

8. Plaintiff John Arnold is a resident of McLennan County, Texas.

9. Plaintiff James Brent Ensey is a resident of Stephens County, Texas.

10. Plaintiff Edgar Kelleher is a resident of Palo Pinto County, Texas.

11. Plaintiff Brian Logan is a resident of Maryland.

12. Plaintiff Terry S. Martin is a resident of Lubbock County, Texas.

13. Plaintiff Robert Robertson is a resident of Tarrant County, Texas.

14. Plaintiff Jacob Wilson is a resident of McLennan County, Texas.

15. Plaintiff John Craft is a resident of Bell County, Texas.

16. Plaintiff Daniel Johnson is McLennan County, Texas.

17. Plaintiff Jason Dillard is a resident of Smith County, Texas.

18. Plaintiff Ronald Atterbury is a resident of Coryell County, Texas.

19. Chief Brent Stroman ("the Chief" or "Stroman"), was the Chief of Police of the Waco Police Department at all relevant times and is sued in his individual capacity. He acted under the color of law of the statutes, ordinances, regulations, policies, customs, and usages of the State of Texas. Defendant Stroman has been served and has filed an appearance herein.

20. Det. Manuel Chavez ("Chavez"), is a police officer employed by the Waco Police Department. Chavez is sued in his individual capacity. He acted under the color of law of the statues, ordinances, regulations, policies, customs, and usages of the State of Texas and/or the City of Waco, Texas. Defendant Chavez has been served and has filed an appearance herein.

21. Abelino "Abel" Reyna ("Reyna"), was the elected District Attorney of McLennan County, Texas at all relevant times and is sued in his individual capacity. He acted under the color of law of the statues, ordinances, regulations, policies, customs, and usages of the State of Texas. Defendant Reyna has been served and has filed an appearance herein.

22. Defendant City of Waco, Texas is a municipality existing under the laws of the State of Texas, and has been served and has filed an appearance herein.

23. Defendant McLennan County, Texas is a governmental unit existing under the laws of the State of Texas, and has been served and has filed an appearance herein.

24. Robert Lanning ("Lanning"), is an Assistant Chief of Police and is employed by the Waco Police Department. Lanning is sued in his individual capacity. He acted under the color of law of the statues, ordinances, regulations, policies, customs, and usages of the State of Texas and/or the City of Waco, Texas. Defendant Lanning has been served and has filed an appearance herein.

25. Det. Jeffrey Rogers ("Rogers"), is a police officer employed by the Waco Police Department. Rogers is sued in his individual capacity. He acted under the color of law of the statues, ordinances, regulations, policies, customs, and usages of the State of Texas and/or the City of Waco, Texas. Defendant Rogers has been served and has filed an appearance herein.

26. Patrick Swanton ("Swanton"), is a police officer employed by the Waco Police Department. Swanton is sued in his individual capacity. He acted under the color of law of the statues, ordinances, regulations, policies, customs, and usages of the State of Texas and/or the City of Waco, Texas. Defendant Swanton has been served and has filed an appearance herein.

27. Steven Schwartz (hereinafter "Schwartz") is a special agent employed by the Texas Department of Public Safety (hereinafter "DPS"). Schwartz is sued in his individual capacity. He acted under the color of law of the statues, ordinances, regulations, policies, customs, and usages of the State of Texas and/or the City of Waco, Texas. Defendant Schwartz has been served and has filed an appearance herein.

28. Christopher Frost (hereinafter "Frost") is a special agent employed by the Texas Department of Public Safety. Frost is sued in his individual capacity. He acted under the color of law of the statues, ordinances, regulations, policies, customs, and usages of the State of Texas and/or the City of Waco, Texas. Defendant Frost has been served and has filed an appearance herein.

III. JURISDICTION

29. This action is brought pursuant to 42 U.S.C. § 1983. The Court has jurisdiction over this lawsuit pursuant to 28 U.S.C § 1331, as this lawsuit arises under the Constitution, laws, or treaties of the United States.

IV. VENUE

30. Venue is proper in this Court under 28 U.S.C. § 1391(b), as this is the judicial district in which a substantial part of the events or omissions giving rise to the claims occurred.

V. FACTUAL BACKGROUND

OVERVIEW

31. On May 17, 2015, hundreds of motorcycle enthusiasts from across the state gathered in Waco, Texas for a scheduled Texas Confederation of Clubs & Independents ("COC") meeting. As with any COC meeting, bikers expected to hear from speakers on topics ranging from state legislative updates to national motorcycle safety initiatives. The Waco COC meeting was also expected to be as much a social gathering as it was informative.

32. Because certain members of law enforcement had become aware of friction between some members of the Bandidos Motorcycle Club ("Bandidos") and some members of the Cossacks Motorcycle Club ("Cossacks"), undercover and uniformed officers were located around the perimeters of the Twin Peaks restaurant where the COC meeting was occurring.

33. It has been admitted by law enforcement that they were present in an intelligence-gathering capacity and had no evidence of planned violence.

34. Tragically, violence erupted and nine lives were lost, with others sustaining non-fatal injuries. It

is undisputed that a number of the casualties were a direct result of deadly use of force by law enforcement.

35. Regardless of the manner or cause of the deaths, the loss of life that occurred that day is, without question, tragic. Unfortunately, the actions of law enforcement, including members of the McLennan County District Attorney's Office, compounded the tragedy by causing the wrongful arrest and incarceration of countless innocent individuals.

36. The video evidence confirms that the vast majority of attendees did not participate in any violence that day.

37. This majority of non-violent attendees was ultimately arrested en masse despite Defendants' awareness that:

38. No evidence existed that these individuals participated in the violence;

39. No evidence existed that these individuals came to the COC meeting with any intention to commit violence; and

40. Notwithstanding law enforcement's claim that Plaintiffs' mere presence at Twin Peaks was somehow illegal, no evidence existed that these individuals committed any crimes at all.

41. Despite a total lack of particularized evidence relating to specific individuals, Defendants Stroman, Chavez, Reyna, Lanning, Rogers, Swanton, Schwartz, and Frost caused Plaintiffs and others who

were not involved in the violence to be arrested and charged with Engaging in Organized Criminal Activity based entirely on their presence at Twin Peaks and a pre-determined criteria that essentially asked investigators to use the motorcyclists' clothing and personal effects such as keychains and bumper stickers to determine their membership in or even the loosest alleged affiliation with the Bandidos or Cossacks.

42. Rather than investigating the incident and relying on actual facts to establish probable cause, Defendants fabricated a conspiracy of epic proportion between dozens of people, and willfully ignored the total absence of facts to support such fantastical allegations.

43. In the absence of particularized evidence to establish probable cause against Plaintiffs, the individual Defendants caused an affidavit to be issued and sworn to by Defendant Chavez that contained material misrepresentations. Specifically, the affidavit alleges that Plaintiffs were members of a criminal street gang, that they regularly associate in the commission of criminal activities, and that they conspired to commit murder, capital murder, or aggravated assault.

44. Plaintiffs categorically deny the truthfulness or accuracy of these statements.

45. As more fully set forth below, Plaintiffs are neither members of a criminal street gang, nor do they regularly associate in the commission of criminal activities. Perhaps most notably, the affidavit sets forth no particularized facts of anything resembling a common plot to commit these crimes.

46. The individual Defendants' conduct of alleging these "facts" against Plaintiffs when they, in fact, had no such evidence can only be construed as willful, intentional, and/or reckless.

SPECIFIC FACTUAL ALLEGATIONS

47. The COC is a non-profit organization of motorcyclists with a mission to lobby for motorcyclist rights and safety legislation in the State of Texas.

48. COC meetings are not held in any one specific city and are open to all motorcyclists.

49. The May 17, 2015 COC meeting in Waco had been scheduled several weeks in advance and was posted publicly on the COC website prior to the date of the event. Bikers from numerous motorcycle clubs from all over the state were expected to attend.

50. Numerous motorcycle clubs were represented at the May 17th COC gathering. No law of the State of Texas or the United States prohibits an individual's right to associate with a motorcycle club. In fact, an individual's right to associate is guaranteed by the First Amendment to the United States Constitution.

THE INCIDENT

51. At approximately noon on May 17, 2015—before the event was scheduled to start—an altercation occurred in the parking lot near the front entrance of

Twin Peaks between several individuals. Within moments, the situation escalated and shots were fired. At its conclusion, nine individuals were dead and at least twenty were injured. Autopsy and ballistics reports indicate that at least four of the deaths were the direct result of shots fired by law enforcement.

52. As the gunfire erupted, video evidence conclusively proves that the vast majority of the individuals present at the location—including Plaintiffs—did not participate in any violent activity, but instead ran away from the gunfire or ducked for cover.

53. Many of those ultimately arrested were never anywhere near the part of the property where the altercation occurred, and some had only just pulled up into the parking lot when it began.

54. Once the shooting ceased, law enforcement officers immediately took control of the premises. The individuals present were compliant and did not resist commands of law enforcement.

INVESTIGATION

55. Defendant Chavez is a detective in the Special Crimes Unit of the WPD. On May 17, 2015, he was the on-call investigator and as a result, was called to the scene as the lead investigator of the Twin Peaks incident.

56. Defendant Rogers is a WPD gang detective. On or about May 17, 2015, Defendant Rogers, along with DPS agents Schwartz and Frost provided false

and misleading information regarding Plaintiffs alleged affiliation with criminal street gangs, which ultimately was a primary factor in causing their false arrest.

57. On or about May 17, 2015, Defendant Swanton, a WPD officer, also provided false and misleading information during numerous press conferences to the public regarding Plaintiffs' alleged affiliation with criminal street gangs, notwithstanding the absence of any evidence supporting his statements.

58. Defendant Reyna, the elected McLennan County District Attorney, and First Assistant District Attorney Michael Jarrett were on scene after the incident investigating the shooting, along with law enforcement officials from numerous local and state agencies. Defendant Reyna has publicly acknowledged that he took the unusual step of assisting law enforcement officials and was involved in the actual investigation of the incident.

59. After several hours, all individuals in attendance at the COC meeting were transported to the Waco Convention Center for interviews. For the remainder of the day, WPD detectives, Texas Rangers, and DPS special agents conducted interviews of those in attendance.

60. Initially, the detained motorcyclists were being interviewed as witnesses and not being read

Miranda[1] warnings—since they were not under arrest—unless WPD was aware of outstanding warrants or had probable cause to believe they were directly involved in the altercation.

61. Throughout the interviews, a common theme became evident: the detained individuals were merely present for a meeting, to visit with friends, eat food, and enjoy socializing with other motorcycle enthusiasts. During the interviews, it was learned that most were nowhere near the shooting; many had just arrived at the restaurant, and none were aware of a prearranged plan of violence.

62. It was also learned that the vast majority of the individuals immediately took cover at the outset of the gunfire, and did not in any way participate in or encourage the violence. Video evidence in the possession of law enforcement, and reviewed within hours of the incident, clearly demonstrates that the vast majority of those present, including Plaintiffs, appeared surprised and confused upon hearing the initial gunfire.

63. Further, it clearly shows the vast majority of those present, including Plaintiffs, running away from the disturbance, not toward it. The video evidence clearly and unambiguously proves the complete lack of involvement in the disturbance of the vast majority present, including Plaintiffs.

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[1] *Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

64. Defendants Stroman, Chavez, Reyna, Lanning, Rogers, Swanton, Schwartz, and Frost possessed no evidence that these individuals, including Plaintiffs, participated in the violence that day. That Defendants possessed no evidence of this kind cannot seriously be disputed.

65. Investigators, many of whom were from the Austin division of DPS, were providing the information learned during interviews directly to Defendant Reyna, Defendant Lanning (who was the acting Chief of Police at the time of the incident), and Defendant Chavez, among others. As such, members of law enforcement responsible for the decision to arrest Plaintiffs were fully aware of their complete lack of any connection to the violence that occurred, based on the evidence gained from the interviews.

66. Any reasonable reading of documents related to this incident clearly demonstrates that law enforcement officers, including Defendants Lanning, Chavez, Schwartz, Swanton, Rogers and Frost, did NOT believe probable cause existed to arrest those not directly involved with the violence, including Plaintiffs.

67. Not only was a conscious decision made not to Mirandize those being interviewed (since they were not suspects), but documents related to this incident clearly establish that a very specific plan for the release of most individuals, including Plaintiffs, was in the works just prior to the decision to arrest everyone and charge each person with the first degree felony of Engaging in Organized Criminal Activity by

committing or conspiring to commit murder, capital murder, or aggravated assault.

68. In fact, by the time the decision to arrest everyone was made, several dozen motorcyclists had already been released. In court testimony, law enforcement has been unable to articulate a legally substantive reason why those motorcyclists were released while others in nearly identical circumstances were arrested.

DEFENDANTS' DECISION TO ARREST

69. From the outset, Reyna was fishing for reasons to arrest everyone under a mass conspiracy theory.

70. Reyna was alone in his belief that probable cause existed to justify a mass arrest, including the arrest of Plaintiffs.

71. At some point, after numerous motorcyclists had already been released, Defendant Reyna told Defendant Lanning that "all bikers wearing colors" should be arrested.[2]

72. Lanning consulted with the two other assistant chiefs and Sgt. V.R. Price regarding Reyna's desire to arrest everyone. Based on what they knew from the interviews and what they had observed at the scene,

[2] This was later slightly refined to bikers who were Cossacks, Bandidos, or "could be shown to be their affiliates." Nonetheless, motorcyclists wearing colors unassociated with either club were in fact arrested anyway.

all four disagreed with Reyna's recommendation that everyone should be arrested. Lanning's testimony in a Motion to Disqualify from August 8, 2016 is clear:

> A. His recommendation was that they should)e charged.
>
> Q. Okay.
>
> A. If they were wearing colors or – if they were either the Bandidos, Cossacks, or an affiliate support club.
>
> Q. And based on – based on him recommending that these bikers should be arrested, what took place?
>
> A. I originally consulted with the other two assistant chiefs and Sergeant Price to get their opinion.
>
> Q. And what was their opinion?
>
> A. They did not agree with the decision to arrest them.
>
> Q. Any law enforcement official agree with the decision to arrest them?
>
> A. I don't know.
>
> Q. Well, let's talk about you. Did you agree with the decision?
>
> A. Not in my position as acting chief.

73. When Lanning communicated this to Reyna, Reyna was unsatisfied with Lanning's decision and

told him to call Chief Stroman, who was on vacation on the east coast.

74. Ultimately, Reyna informed Stroman that he thought there was sufficient probable cause to arrest any biker who was present and appeared by virtue of clothing or personal effects to be affiliated with the Bandidos or Cossacks. Based on Reyna's representation alone and no specific facts linking each individual motorcyclist to any criminal activity, Stroman decided to approve Reyna's plan to arrest everyone.

75. Defendant Chavez ordered all of the investigators to stop their interviews at approximately 8:30 p.m. because Defendant Reyna had called a meeting. From approximately 9:00 p.m. to 10:30 p.m., Reyna met with members of WPD and Texas DPS regarding the incident. Soon thereafter, investigators were informed that Reyna, Lanning, and/or Stroman had agreed to arrest all motorcyclists that met certain criteria, and to charge each with the offense of Engaging in Organized Criminal Activity.

76. The "criteria," which represented the entire factual determination of probable cause, was decided completely by the DA's office and given to all detectives to follow in compiling the list of individuals to be arrested.[3]

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[3] Testimony of Sgt. V.R. Price, Motion to Disqualify, August 8, 2016, page 31:

77. Documents related to the mass arrests prove that the individual Defendants arrested Plaintiffs based on motorcycle club association and/or clothing, patches, key chains, etc. that allegedly reflected "support" for either the Bandidos or the Cossacks in the altercation that occurred that day. In fact, much of the clothing, patches, key chains, etc. that Defendants claim signifies "gang membership" was, and remains, available for public purchase over the internet, at motorcycle gatherings, and in some retail stores throughout Texas.

78. Defendant Stroman has publicly acknowledged in press conferences and testimony his responsibility in the decision to arrest the 177, including Plaintiffs, as described more fully below.

79. Documents related to the incident and testimony of numerous law enforcement witnesses (including Reyna himself) clearly establish that Defendant Reyna injected himself into the investigation and was primarily responsible for the determination that probable cause existed to arrest the 177—including Plaintiffs—based on nothing more than presence and affiliation with particular motorcycle clubs.

80. Defendants Lanning, Chavez, Swanton, Schwartz, Rogers, and Frost unlawfully acquiesced

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Q: Okay. So they—the District Attorney's office set the criteria and law enforcement applied the criteria, that's—

A: That's correct.

to what each knew was a mass arrest, including the arrest of Plaintiffs, unsupported by probable cause.

81. Lanning admitted that he kept the city manager and "anybody else legal that needed to be aware" apprised of the developments that day.

82. Despite possessing video from numerous angles showing the complete lack of involvement of most of those arrested, and hours and hours of interviews with the arrested individuals in which no evidence of a conspiracy was uncovered to support their "theory" of pre-planned violence, Defendants willfully, intentionally, and recklessly charged 177 individuals, including Plaintiffs, with the identical first degree felony of Engaging in Organized Criminal Activity by committing or conspiring to commit murder, capital murder, or aggravated assault.

83. To clarify, the decision to arrest and charge Plaintiffs and the other individuals with crimes despite video evidence, and statements from hundreds of witnesses that directly contradict the existence of probable cause, or any reasonable belief thereof, can only be characterized as willful, intentional, and/or reckless. Based on the very specific information known by Defendants at the time the decision was made to arrest, including CLEAR and UNAMBIGUOUS video evidence directly at odds with Defendants' theory of a mass criminal enterprise engaging in organized crime, it is impossible to believe Defendants' conduct and decisions were anything other than willful, intentional, and/or reckless. Defendants' decision to ignore

contrary and exculpatory evidence in favor of a theory unsupported by the facts or the law was consciously made and therefore willful, intentional, and/or reckless. Investigative reports and DPS witness summaries provide specific proof of the facts alleged herein.

84. Again, it is an indisputable fact that law enforcement possessed no evidence that Plaintiffs were involved in any way with the altercation, and no evidence that they had any intention—let alone a preconceived common plan—to commit, support, or encourage any violent acts that day.

THE AFFIDAVIT TO OBTAIN AN ARREST WARRANT

85. On or about May 18, 2015, or May 19, 2015, Defendants caused a general warrant—long known to be repugnant to the Fourth Amendment—to be used for the purpose of obtaining arrest warrants for each of the 177 individuals, including Plaintiffs.[4]

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[4] "'[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and the persons or *things to be seized.*'

"These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant. Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British

86. Despite the United States Constitution requiring a ***particularized*** showing of facts against an individual before a warrant can issue, an identical fill-in-the-name affidavit (hereinafter "affidavit" or "probable cause affidavit," attached as Exhibit 1) was used as the basis for establishing probable cause for each of the arrested individuals.

87. It is indisputable that the affidavit in question **does not set forth particularized facts against Plaintiffs** that would in any way establish probable cause. Assuming *arguendo* that the probable cause affidavit contains specific allegations of fact against each Plaintiff, each such allegation is false and untrue. Accordingly, the probable cause affidavit is completely false and misleading in material ways as it relates to these Plaintiffs.

88. The affidavit against each Plaintiff fails to set forth any specific facts that, if believed, would constitute probable cause. Even if the claim that each Plaintiff is "a member of a criminal street gang" was true, and it is not, the affidavits lack any factual assertions specific to each Plaintiff upon which a finding of probable cause could be based. Namely, it fails to assert any facts showing that Plaintiffs committed or

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tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer." *Stanford v. Texas*, 379 U.S. 476, 481 (1965).

conspired to commit any of the crimes enumerated in § 71.02, or any other specific violations, for that matter.

89. Defendant Chavez has acknowledged that he read the template affidavit and inserted names of individuals based on a list he was provided. Chavez has testified in examining trials that he did not, in fact, possess personal knowledge of all the assertions made in the affidavit. He has further testified to a lack of knowledge concerning individual arrestees' involvement in the incident.

90. Defendant Chavez did not question the template affidavit or the basis of the criminal charge despite the fact that he had already begun the process of overseeing arrangements to release all of the detainees.

91. Furthermore, he had no input into what was set forth in the affidavit and made no changes to it before signing it. Even worse, he signed off on an affidavit *that he himself did not even understand.* As he later testified, any justification for the arrests (in other words, probable cause) would have to be explained by the DA's office.

92. Defendant Chavez swore to 177 template affidavits *en masse* – that is, he swore under oath that the stack before him was true and correct – and is the sole affiant for all affidavits.

93. Chavez swore under oath he had personal knowledge of the information contained therein, even though he did not. Having read the affidavit,

Defendant Chavez knew he did not have personal knowledge as to the particular facts of each individual, including Plaintiffs.

94. Chavez knew that the affidavit was open-ended, false, and misleading in a material manner, yet he presented it to Magistrate Peterson for the purpose of obtaining arrest warrants, including Plaintiffs.

95. In an attempt to deflect responsibility for his decision to order the mass arrests, including the arrests of Plaintiffs, Defendant Reyna claimed under oath that he specifically recalled personally instructing Chavez to confirm the accuracy and truthfulness of the statements made in the probable cause affidavit before presenting it to the magistrate.

96. However, Chavez has testified that he didn't even speak to Reyna prior to swearing to the affidavit.

97. The template affidavit, sworn to by Defendant Chavez, is wholly lacking in probable cause, and instead is filled with conclusory, inaccurate statements and/or background facts. Plain and simple, the affidavit does not indicate any particular facts that Plaintiffs were even aware of tension that might have existed between certain individuals that were present at Twin Peaks. The affidavit does not assert how, when, where, or with whom Plaintiffs conspired or to any facts that could be construed as a decision by Plaintiffs to engage in a conspiracy. The affidavit is devoid of any facts describing any criminal activity in which Plaintiffs were believed to be involved.

98. The affidavit falsely states that each Plaintiff is "a member of a criminal street gang." That statement is categorically *false*.

99. It is an indisputable fact that Defendants did not possess any reliable, particularized information to indicate that Plaintiffs themselves were members of a criminal street gang on or before the date such fact was sworn to by Defendant Chavez.

100. Plaintiffs were not, and have never been in a gang of any type, much less a "criminal street gang." Membership in a motorcycle club does not constitute "gang membership," no matter how many times Defendants Reyna and Swanton suggest otherwise on television.

101. Plaintiffs are law-abiding citizens who associate with other law-abiding citizens and in no way, shape, or form are members of a "criminal street gang."

102. At the time of the incident, the motorcycle club(s) that Plaintiffs belonged to were not included on any law enforcement lists as a "criminal street gang."

103. Finally, no law enforcement list or database showed any of these Plaintiffs to be a "member of a criminal street gang" at the time of the incident or on the date on which Defendant Chavez swore to those facts for the purpose of establishing probable cause.

104. Furthermore, the affidavits falsely imply that ALL "members and associates" of the Bandidos or Cossacks "engaged in an altercation" and "brandished and used firearms, knives, or . . . other weapons." In

fact, Plaintiffs did not engage in such activity, and law enforcement had no evidence that they had.

105. Moreover, law enforcement knew very well that only a small minority of the motorcyclists present had actually participated in the violence, so this was a blatant misrepresentation to the magistrate.

106. The affidavits contain *no particularized facts* to support an allegation that any Plaintiff herein was directly involved in the violence that occurred.

107. Notwithstanding any of the above, Defendants Rogers, Swanton, Schwartz, and Frost made material misrepresentations that Plaintiffs were members or associates of a known criminal street gang, which they knew would be relied upon in forming a basis for probable cause to arrest Plaintiffs.

108. By indicating that Plaintiffs were members of criminal street gangs, when in fact they were not, and when there was no such evidence of gang membership, the individual Defendants caused a warrant to be issued that would otherwise have lacked any factual basis for probable cause.

109. Defendants Chavez, Lanning and Reyna all knew the exact wording of the probable cause affidavit and knew at the time it was sworn to and presented to the magistrate for a determination of probable cause that it contained false statements.

110. They knew the affidavit contained false and misleading statements because they were involved in every aspect of the investigation from the beginning,

and knew or should have known that Plaintiffs were not members of a criminal street gang because no evidence existed that made such an assertion, and neither Plaintiffs nor their respective motorcycle clubs were identified on any law enforcement database at the time of the incident in question as being in a criminal street gang, or members of a criminal street gang.

111. On the date that Plaintiffs were arrested and falsely charged, Defendants Chavez, Stroman, Reyna, Lanning, Rogers, Swanton, Schwartz, and Frost all were privy to DPS gang databases and knew or should have known that none identified Plaintiffs as members of a criminal street gang.

112. Nonetheless, each Defendant allowed the false statement to become a central basis for the arrests and detention of Plaintiffs.

113. Further, the individual Defendants all knew, or should have known, that Plaintiffs were not engaging in criminal conduct at Twin Peaks since the video evidence in their possession CLEARLY and UNAMBIGUOUSLY proves that Plaintiffs did not participate in, nor did they encourage, the disturbance that escalated into violence. In fact, the video evidence **proves** that Plaintiffs were **not** involved, yet the individual Defendants willfully ignored the video evidence and caused Plaintiffs' constitutional rights to be violated.

114. Each individual Defendant was certainly aware that neither he, nor any other law enforcement

officer, possessed knowledge that Plaintiffs regularly associated in the commission of criminal activities.

115. In the aftermath of the incident at Twin Peaks, Defendants apparently concluded that the Bill of Rights to the U.S. Constitution ceased to apply and could be ignored, given what they perceived as an immediate need to announce the reestablishment of law and order in their town.

116. Compounding Defendants' gross violations of civil rights, an identical one million dollars ($1,000,000.00) bail was set for each of the 177 detained individuals, including Plaintiffs, despite the Eighth Amendment to the U. S. Constitution's clear mandate that "excessive bail shall not be required, nor excessive fines imposed . . . " Magistrate Peterson announced publicly that he was "sending a message" with the million-dollar bonds.

117. As a result of all of the above, Plaintiffs were wrongfully incarcerated following their arrest.

MISSTATEMENTS AND EXAGGERATIONS TO THE MEDIA

118. Since the outset, law enforcement's narrative of the event as told to the public bears little resemblance to the actual facts.

119. Within hours of the Twin Peaks incident, information was provided to the media that was inaccurate, exaggerated, and highly misleading. Defendant Stroman allowed WPD representatives, particularly

Defendant Swanton, to set forth a narrative that was inaccurate in many respects. The "shootout between outlaw motorcycle gangs" theme that continues to be trumpeted is patently false. Defendant Swanton's perpetuation of the narrative has caused irreparable harm to the reputations of the many individuals, including Plaintiffs, who had nothing to do with the fatalities and injuries.

120. WPD's intent to create a false picture of the event is most evident in the manner that guns and knives were displayed to the media following the incident. The majority of the knives confiscated would not be considered illegal under § 46.02 of the TEXAS PENAL CODE, and were voluntarily relinquished upon requests from law enforcement soon after the shootings. Notwithstanding an individual's right to carry a legal knife, the knives were displayed to the media with blades extended in an effort to appear as menacing as possible.

121. A similar storyline emerged regarding the number of guns seized after the incident, which was grossly overstated in initial reports. Police representatives omitted the truth that many of these guns were found outside the restaurant following the incident, stored safely on motorcycles or in other vehicles, as permitted by Texas law.

122. Perhaps the most misleading characterization of the events was made days after the incident by Defendant Reyna when he implied that those arrested were guilty because "if they're victims, then they

shouldn't have any problem coming to law enforcement and cooperating . . . and, at least in the first round of interviews, we ain't getting that." This is blatantly false.

123. A review of investigators' records documenting the interviews that were conducted with the detained bikers clearly establishes that the vast majority, including Plaintiffs, were completely cooperative during interviews, and voluntarily submitted to questioning and requests for forensics (volunteering DNA samples and gunshot residue testing) from law enforcement. Defendant Reyna knew of these facts at the time he made the above described public statement.

124. Almost three years after the incident, Defendant Reyna publicly asserted during his re-election campaign that every person arrested at Twin Peaks was a member of a criminal street gang and involved in criminal activity. Reyna made these statements knowing full well that Plaintiffs were not members of a criminal street gang, nor did he possess any evidence that in any manner connected them to criminal activity.

THE INDICTMENT

125. On November 10, 2015 and March 23, 2016, a McLennan County Grand Jury indicted a total of 154 individuals, including Plaintiffs, for the exact same crime of Engaging in Organized Criminal Activity with the Intent to Commit or Conspire to Commit Murder, Capital Murder, or Aggravated Assault. The

indictments, like the probable cause affidavit, are identical for every single individual. To date, there has been no attempt to state with any particularity the facts on which the first-degree felony charges against Plaintiffs are based. From a fill-in-the-name template probable cause affidavit, to a fill-in-the-name template Indictment, violations of Plaintiffs' constitutional rights continue.

GRAND JURY DELIBERATIONS WERE TAINTED

126. The Grand Jury's deliberations that resulted in Plaintiffs' True Bills of Indictment were tainted by the use of wholly inaccurate, false, and woefully incomplete information.

127. Plaintiffs' counsel has requested from Defendants a transcript of the Grand Jury proceedings.

128. According to counsel for Defendant Reyna, no transcript of the proceeding exists, nor were the proceedings recorded such that a transcript could be created.

129. Despite the "secrecy" of the Grand Jury deliberations, numerous factual inferences can be drawn that demonstrate that the Grand Jury deliberations were tainted. They are as follows:

130. The Grand Jury was misled by the presentment of materially misleading and false statements claiming Plaintiffs to have been members of criminal street gangs at the time of the Twin Peaks incident, when in fact, they were not. Membership in a criminal

gang is an essential element of the organized crime charge with which Plaintiffs were indicted.

131. Defendants have admitted repeatedly in sworn testimony that they had no knowledge or evidence of the motorcyclists' intentions. Combined with the fact that Plaintiffs are NOT members of a criminal gang, only inaccurate, false, and/or incomplete evidence could have been submitted to the Grand Jury to support an allegation that they *specifically intended* to "participate as a member of a criminal gang."

132. Further, clear and unambiguous video evidence that would have proven each Plaintiff's lack of involvement in the Twin Peaks violence was intentionally withheld from the Grand Jury.

133. Video evidence shows Plaintiffs were either nowhere near the violence when it occurred, or immediately ducked for cover or ran away from the altercation. This evidence is directly exculpatory for the elements of "*participating* as a member of a criminal gang" and "committing or conspiring to commit" murder, capital murder, or aggravated assault. Upon information and belief, this critical evidence was not presented to the Grand Jury that indicted Plaintiffs herein. Defendants had this video evidence in their possession at the time they sought Plaintiffs' indictment from the Grand Jury.

134. Upon information and belief, no non-law-enforcement eyewitnesses were presented to the Grand Jury. Countless eyewitnesses would have testified that they knew of no plan to commit violence and witnessed

most of the motorcyclists—including Plaintiffs—actively avoid getting involved in the altercation after it started.

135. Upon information and belief, Defendant Chavez testified before the Grand Jury.

136. It is reasonable to believe that Defendant Chavez testified consistent with his sworn affidavit upon which the arrest warrants for Plaintiffs were issued. As outlined above, the probable cause affidavit contains false and materially misleading statements.

137. Because there is no other evidence that in any way links these Plaintiffs to the violence that occurred at Twin Peaks on May 17, 2015, it is a reasonable inference that Defendant Chavez tainted the Grand Jury deliberations by repeating the same false statements contained in his probable cause affidavit.

138. It is a reasonable inference that Defendant Chavez testified to the Grand Jury consistent with his probable cause affidavit because Chavez testified to those same "facts" during one or more examining trials involving individuals arrested at Twin Peaks on or about May 17, 2015.

139. Despite admitting a lack of personal knowledge of certain key facts that were contained in his probable cause affidavit, Chavez testified at one or more examining trials related to the Twin Peaks arrests that all individuals wearing certain patches and clothing were members of criminal street gangs.

140. These statements were false when made at the examining trials, and were also false when made to the Grand Jury.

141. The indictments returned against each Plaintiff herein (and every other person against whom the DA has chosen to present a case) charge Plaintiffs with murder and assault, and includes the statement "And the Defendant did then and there commit the offense as a member of a criminal street gang." As discussed above, Plaintiffs were not, nor have they ever been, a member of a criminal street gang. This false and misleading evidence was originally sworn to by Defendant Chavez in his probable cause affidavit and was clearly repeated to the Grand Jury despite the total falsity of the statement.

142. There is simply no logical or plausible explanation for the inclusion of this false statement in the indictment returned by the Grand Jury except that the Grand Jury was misled by the use of false and inaccurate testimony. The Grand Jury could not make such an allegation in the absence of testimony to that effect. It is a reasonable inference that the Grand Jury was provided false information regarding membership in a criminal street gang since it is nearly verbatim the language contained in the probable cause affidavit. Further, it is almost identical to testimony that Chavez and/or Schwartz gave in one or more examining trials related to this incident.

143. Upon information and belief, Defendant Schwartz also testified before the Grand Jury. It is a

reasonable inference that he too provided false and misleading evidence to the Grand Jury since, like Chavez, he had testified on the same subject at one or more examining trials related to the Twin Peaks mass arrests. In multiple examining trials, Schwartz testified that individuals were conspiring with those who committed the actual violence by their mere presence at the COC meeting. Despite admissions at examining trials that he possessed no knowledge of direct participation in the violence of many of those arrested, he repeatedly swore that criminal conduct occurred because individuals who were merely present at the location were there in a "show of force" to support the violence. This assertion was categorically false when testified to in examining trials, and there is no reason to believe Schwartz testified differently before the Grand Jury. It was false because the vast majority that he claimed were there as a "show of force" had no prior knowledge that an incident was likely to occur, and had specifically denied similar allegations during interviews with law enforcement.

144. As noted previously, there is an abundance of CLEAR and UNAMBIGUOUS video evidence in this case, and it conclusively proves that Plaintiffs in no way, shape, or form participated in or encouraged the violence that occurred at Twin Peaks. In fact, Plaintiffs did the opposite.

145. For several reasons, it is a reasonable inference that this key video evidence was withheld from the Grand Jury. First, the theory that hundreds of bikers came from all over the state of Texas in a show of

force is unequivocally debunked by the video evidence. The vast majority of those present IMMEDIATELY took cover and hid behind vehicles upon the first shots being fired. The actions depicted on the video evidence directly contradicts the sole theory of culpability upon which Plaintiffs' false arrests are based. Had this evidence been shown to the Grand Jury, it is reasonable to believe that Plaintiffs would not have been indicted.

146. Second, it is a reasonable inference that the video evidence was withheld from the Grand Jury because they simply did not have time to consider this important evidence. Public statements by Defendant Reyna and others make it clear that the Grand Jury met concerning the Twin Peaks arrests for the first time on November 10, 2015. On that same day, the Grand Jury issued 106 true bills, and based on public statements made by Reyna, the Grand Jury issued indictments on every case that was presented.[5] It is significant to note that on January 27, 2016 (more than eight months after the Twin Peaks incident), District Attorney Reyna stated in a Motion for Continuance that the State would likely need another twelve months before it could sort through all the evidence and be ready for trial. Yet in a matter of a single work day, the Grand Jury was presented evidence and returned indictments against 106 separate individuals,

[5] Since that day, the Grand Jury convened on March 23, 2016 for half a day and returned another 48 indictments. To date, the Grand Jury has returned indictments on 154 of the 154 cases that have been presented. No witnesses were called to testify during the Grand Jury deliberation of March 23, 2016. Nevertheless, the Grand Jury returned 48 indictments.

all for the same crime—using identical fill-in-the-blank indictments, of course!

147. The above description of the Grand Jury deliberations is necessary to dispel any notion that a "neutral intermediary" considered particularized evidence pertaining to each Plaintiff's arrest prior to issuing true bills of indictment. It is a reasonable inference that Defendant Chavez and Schwartz simply regurgitated the same false testimony that was sworn to in the probable cause affidavit or to which they had previously testified to in one or more examining trials, and that all video evidence that would have demonstrated the lack of probable cause to indict Plaintiffs was withheld from the Grand Jury deliberations.

148. In fact, Plaintiffs allege that no specific evidence concerning the Plaintiffs herein was ever presented to the grand jury. No gang database evidence was presented that would identify Plaintiffs as members of a criminal street gang because no such evidence exists.

149. Further evidence that the Grand Jury's deliberation was tainted is the fact that in all 106 indictments issued on November 10, 2015 the list of those killed includes an individual named William Anderson, who in fact, was not killed at Twin Peaks and is very much alive to this day. The Grand Jury was so misled by the evidence presented that it indicted 106 people, including Plaintiffs, with Mr. Anderson's death, despite Mr. Anderson not being killed or injured in the Twin Peaks incident.

150. During various examining trials, law enforcement witnesses, including Chavez and Schwartz, have continued to perpetuate the idea that motorcycle club affiliation, jacket and vest patches, and other lawful clothing is evidence of membership in a criminal street gang. It is a reasonable inference that this same misleading, false information was presented to the Grand Jury in order to obtain the indictment of Plaintiff.

151. Not only was video evidence that would have clearly shown an absence of probable cause to indict Plaintiffs available, that same video evidence was being used by law enforcement immediately after the incident to determine whether to return motorcycles and vehicles that were initially seized by law enforcement.

152. Additionally, each indictment separately accuses each Plaintiff of having "intentionally and knowingly caused the death" of one or more of a long list of individuals *and* of having "intentionally, knowingly, and recklessly caused bodily injury" to one or more of a long list of individuals.

153. Given that Defendants have spent several years analyzing multiple terabytes of information, and have not unearthed *any* evidence to specifically link any individual Plaintiff herein to a murder or assault at Twin Peaks, no such evidence could possibly have been presented to the Grand Jury when Plaintiffs were indicted.

154. Similarly, Defendants have not found, and therefore could not possibly have presented to the Grand Jury, *any* evidence that any of the Plaintiffs herein "agreed with one or more persons"[6] to commit murder or assault.

155. No truly independent factfinder could possibly have indicted each Plaintiff without *any* such evidence—evidence that is *necessary to the elements of the crimes with which Plaintiffs were charged.* This illustrates how the Grand Jury was in no way an "independent intermediary" in this case, but rather relied completely on Reyna's and other Defendants' incomplete, false and misleading version of the events and how the law applied to them.

156. Finally, unlike a "typical" indictment in which a case is presented to a Grand Jury by prosecutors who had nothing to do with the original arrest, here, *the bad actors who caused the unlawful arrests were the exact same individuals who persuaded the Grand Jury to indict Plaintiffs.* This belies any notion that the Grand Jury was "independent," and instead allows an inference that the indictment was an intentional and direct continuation of the unlawful mass arrest.

157. In sum, the "evidence" presented to the Grand Jury was, as described in the preceding paragraphs, intentionally false, misleading, and incomplete in the most material ways. In other words, much less

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[6] Tex. Pen. Code § 71.01(b) (Definition of "conspires to commit").

than all of the relevant facts were presented to the Grand Jury, and the Grand Jury's decision to indict was not "independent" in any imaginable meaning of the word. In fact, it amounted to nothing more than a rubber stamping of the absurd theory advanced by Defendants that has caused irreparable harm to Plaintiffs and many others, and has culminated in civil rights violations that are without precedent in this country.

HOUSE OF CARDS COLLAPSES

158. As of the date of this filing, only one of the 192 criminal cases has been tried, and not a single person has been convicted.

159. 37 of the original 177 were never even presented to a grand jury.

160. Over a period of several weeks, just shy of the three-year anniversary of the event, Defendant Reyna effectively folded his cards by dismissing 168 of the 192 people charged. Many of the remaining charges have been reduced to drastically lesser charges. The newly-elected McLennan County District Attorney Barry Johnson has been publicly skeptical of the validity of the remaining charges; more dismissals are expected in the coming months.

VI. FACTS PERTAINING TO PLAINTIFFS

161. John Wilson is a resident of McLennan County, Texas. Plaintiff John Wilson is a small

business owner and owns and operates a motorcycle shop in Waco, Texas.

162. Upon hearing gunfire, Plaintiff Wilson took cover.

163. Plaintiff Wilson spent 28 days in jail.

164. John Arnold is a resident of McLennan County, Texas.

165. Upon hearing gunfire, Plaintiff Arnold took cover.

166. Plaintiff Arnold spent 28 days in jail.

167. James Brent Ensey is a resident of Stephens County, Texas. Plaintiff is married and has two children.

168. Plaintiff Ensey was inside the Twin Peaks when he first heard gunfire, and he immediately took cover.

169. Plaintiff Ensey spent 33 days in jail.

170. Edgar Kelleher is a resident of Palo Pinto County, Texas. Plaintiff is married and a father of four. Mr. Kelleher is also a small business owner in the oil field service industry.

171. Upon hearing gunshots, Plaintiff Kelleher took cover.

172. Plaintiff Kelleher spent 16 days in jail.

173. Brian Logan is a resident of Maryland. Plaintiff is an honorably discharged veteran of the Navy and a dedicated father.

174. Upon hearing gunshots, Plaintiff Logan took cover.

175. Plaintiff Logan spent 21 days in jail.

176. Terry S. Martin is a resident of Lubbock County, Texas.

177. Upon hearing gunshots, Plaintiff Martin took cover.

178. Plaintiff Martin spent over thirty days in jail.

179. Robert Robertson is a resident of Tarrant County, Texas. Plaintiff is married and has three children.

180. Upon hearing gunshots, Plaintiff Robertson took cover.

181. Plaintiff Robertson spent 30 days in jail.

182. Jacob Wilson is a resident of McLennan County, Texas and the son of Plaintiff John Wilson. Jacob works for his dad at Legends Motorcycle in Waco, Texas and is also a father himself.

183. Upon hearing gunshots, Plaintiff Jacob Wilson took cover.

184. Plaintiff Jacob Wilson spent 37 days in jail.

185. John Craft is a resident of Bell County, Texas.

186. Upon hearing gunshots, Plaintiff Craft immediately took cover.

187. Plaintiff John Craft spent over three weeks in jail.

188. Daniel Johnson is a resident of McLennan County, Texas. Mr. Johnson lost his job as a truck driver as a result of his false arrest.

189. Upon hearing gunfire, Plaintiff Johnson ran and took cover inside the restaurant.

190. Plaintiff Johnson spent 30 days in jail.

191. Jason Dillard is a resident of Smith County, Texas.

192. Upon hearing gunfire, Plaintiff Dillard took to the ground and crawled away for cover.

193. Plaintiff Dillard spent 30 days in jail.

194. Ronald Atterbury is a resident of Coryell County, Texas.

195. Upon hearing gunfire, Plaintiff Atterbury immediately took cover.

196. Plaintiff Atterbury spent over three weeks in jail.

Facts Common to Each Plaintiff

197. On the date in question, Plaintiffs were not, nor have they ever been, members of a criminal street gang. Defendants were aware that Plaintiffs were not members of a criminal street gang because they had access to websites and state databases that proved that Plaintiffs were not in a criminal street gang.

198. Each Plaintiff was at the Twin Peaks in Waco for the purpose of attending the COC meeting, and to socialize with friends from around the state.

199. Each Plaintiff was engaged in **completely lawful conduct** at all times relevant to the Twin Peaks incident.

200. Plaintiffs' attendance at the COC meeting on May 17, 2015, was lawful and did not violate any laws of Texas or the United States.

201. All clothing worn by Plaintiffs on May 17, 2015, including jackets, vests, t-shirts, and patches, was completely lawful and did not violate any laws of Texas or the United States.

202. No Plaintiff herein shot, struck, or threatened any person on May 17, 2015.

203. No Plaintiff herein encouraged anyone to shoot, strike, or threaten any person on May 17, 2015.

204. Each Plaintiff's actions upon hearing gun shots were consistent with what 99% of the population would do – they immediately took cover to avoid being struck.

205. In summary, Plaintiffs had absolutely nothing to do with the tragic deaths and injuries that occurred on May 17, 2015, at Twin Peaks.

206. The entire basis of Defendants' belief that probable cause existed to arrest and charge Plaintiffs comes down to their membership in a motorcycle club and their mere presence at the Twin Peaks restaurant on May 17, 2015.

207. With respect to each Plaintiff herein, the affidavit on which probable cause to arrest was based is false in every material way.

208. The probable cause affidavit signed by Manuel Chavez fails to identify even one single fact specific to any individual Plaintiff that would reasonably constitute criminal conduct.

209. Each Plaintiff's cell phone has been examined by law enforcement and contains no evidence of any illegal plan or desire to engage in illegal conduct before, during, or after May 17, 2015.

210. With respect to each Plaintiff herein, video evidence conclusively shows that he did not participate in, nor did he encourage anyone to participate in the violence.

211. The video evidence shows each Plaintiff herein acting in a lawful manner prior to and during the violence.

212. **Despite analysis of multiple terabytes of evidence including phone records, computer**

records, eyewitness accounts, jail phone calls, jail letters, multiple video accounts of the incident, and wiretap evidence, Defendants have no evidence that any Plaintiff herein had any intention to commit a crime or encourage anyone to commit a crime at Twin Peaks on May 17, 2015.

213. Despite the lack of any indicia to establish probable cause, each Plaintiff herein was arrested for Engaging in Organized Criminal Activity and their bonds were initially set at one million dollars ($1,000,000). Plaintiffs were only able to post bail after their bonds were substantially lowered.

VII. CAUSES OF ACTION

42 U.S.C. § 1983 – 4th Amendment Violation pursuant to *Malley v. Briggs*

214. All preceding paragraphs are incorporated herein by reference.

215. Plaintiffs had a clearly established Constitutional right to be free from unlawful arrest. As a direct result of Defendants' conduct, Plaintiffs were falsely arrested and charged with Engaging in Organized Criminal Activity, despite the absence of probable cause to establish that each had committed a crime. Defendants' conduct, as described above, deprived Plaintiffs of their right to be secure in their persons against unreasonable seizure, in violation of the Fourth Amendment of the Constitution of the United States and 42 U.S.C. § 1983.

216. The Fourth Amendment of the U.S. Constitution states,

> "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, **and no warrants shall issue, but upon probable cause**, supported by oath or affirmation, and **particularly describing** the place to be searched, and the persons or things to be seized." (*Emphasis added*.)

As the Supreme Court of the United States has plainly stated, "**[w]here the standard is probable cause, a . . . seizure of a person must be supported by probable cause particularized with respect to that person**." *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).[7]

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[7] *See also Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (" . . . **the belief of guilt must be particularized with respect to the person to be searched or seized**."); *Trapper v. North Carolina*, 451 U.S. 997, 1000 (1981); *Michigan v. Summers*, 452 U.S. 692, 695, n. 4 (1981); *U.S. v. Hearn*, 563 F.3d 95, 103 (5th Cir. 2009) (quoting *Ybarra*, 444 U.S. at 91); *U.S. v. Zavala*, 541 F.3d 562, 575 (5th Cir. 2008); *Williams v. Kaufman Co.*, 352 F.3d 994, 1003 (5th Cir. 2003) (quoting *Ybarra*, 444 U.S. at 91); *Merchant v. Bauer*, 677 F.3d 656, 666 (4th Cir. 2012) ("**The Supreme Court has emphasized that '[w]here the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person.**'"); *Hawkins v. Mitchell, et al*, 983, 994 (7th Cir. 2014); U.S. *v. Ojeda-Ramos*, 455 F.3d 1178, 1181 (10th Cir. 2006) (quoting *Ybarra*, 444 U.S. at 91); U.S. *v. Guzman*, SA-13-CR-89-DAE (W.D. Tex. 2013); *Dinler v. City of New York*, 2012 WL

217. Plaintiffs plead that Defendants Stroman, Lanning, Reyna, Chavez, Rogers, Swanton, Schwartz, and Frost knowingly and intentionally, or with reckless disregard for the truth, caused a facially deficient, fill-in-the-name template affidavit, completely lacking in particularized facts against them to be presented to the Magistrate Judge for the purpose of obtaining an arrest warrant.

218. Further, Defendants Chavez and Reyna are liable to Plaintiffs because they knowingly and intentionally, or with reckless disregard for the truth, presented or caused to be presented a facially deficient, fill-in-the-name template affidavit, completely lacking in particularized facts against Plaintiffs to the Magistrate Judge for the purpose of obtaining arrest warrants.

219. A person acting under color of law is not entitled to qualified immunity when he submits a warrant application that is so lacking in indicia of probable cause as to render official belief in its existence unreasonable. *Malley v. Briggs*, 475 U. S. 335, 345, 106 S. Ct. 1092, 1098, 89 L.Ed.2d 271 (1986). No reasonable police officer or law enforcement actor could reasonably have believed the law was otherwise, or that the affidavit in question established probable cause against Plaintiffs.

220. Because the template affidavits regarding Plaintiffs lack assertions of fact that, even if true,

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4513352 *6 (S.D.N.Y 2012) ("**The Fourth Amendment does not recognize guilty by association.**").

would establish probable cause, Defendants have each, individually and as a group, violated Plaintiffs' Fourth Amendment rights.

221. "The Fourth Amendment directs that 'no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized.' Thus, 'open-ended' or 'general' warrants are constitutionally prohibited." *Ybarra v. Illinois*, 444 U.S. 85, 92 n. 4 (1979). It was well settled law in this country prior to May 17, 2015 that use of a general warrant application was prohibited. Defendants' actions effectively constitute the use of a general warrant prohibited by the Constitution and decades of United States Supreme Court case law.

222. As set forth in *Malley v. Briggs*, and its progeny, Plaintiffs' Fourth Amendment rights were violated when a probable cause affidavit was presented for the purpose of obtaining an arrest warrant that was so lacking in indicia of probable cause as to render official belief in existence of probable cause "unreasonable."

223. The affidavit, attached as Exhibit 1 to this Complaint, contains identical language to the affidavits used to establish probable cause against Plaintiffs, and is incorporated herein by reference. The plain language of the affidavit indicates that it does not contain a single particularized assertion of fact against any Plaintiff that would establish a reasonable belief that any Plaintiff has committed a criminal offense.

224. As a direct result of Defendants' conduct and actions, Plaintiffs were deprived of their constitutional rights all to their damages.

42 U.S.C. § 1983 – 4th Amendment Violation Pursuant to *Franks v. Delaware*

225. All preceding paragraphs are incorporated herein by reference.

226. In the alternative, Plaintiffs plead civil liability against Defendants based on a "*Franks*" violation. *See Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *see also Hale v. Fish*, 899 F.2d 390, 400 n.3 (5th Cir. 1990). Defendants Stroman, Lanning, Reyna, Chavez, Rogers, Schwartz, and Frost knowingly and intentionally, or with reckless disregard for the truth, caused an affidavit against each Plaintiff to be presented to the Magistrate Judge that each knew to be materially false and misleading.

227. Further, Defendant Chavez is liable to Plaintiffs because he knowingly and intentionally, or with reckless disregard for the truth, swore to probable cause affidavits against Plaintiffs that he either knew to be materially false and misleading, or at a minimum, did not know them to be true, and presented them to the Magistrate Judge.

228. Defendant Chavez swore under oath that he had personal knowledge of the information set forth in the probable cause affidavits. He did not. In fact, he did

not possess any knowledge of any facts pertaining to Plaintiffs.

229. By indicating that Plaintiffs were members of criminal street gangs, when in fact they were not, and when there was no such evidence of gang membership, Defendants Reyna, Rogers, Swanton, Schwartz, and Frost caused a warrant to be issued that would otherwise have lacked any factual basis for probable cause.

230. The affidavits falsely state that each Plaintiff is "a member of a criminal street gang." That statement is categorically false. It is an indisputable fact that Defendants did not possess any reliable particularized information to indicate that Plaintiffs themselves were members of a criminal street gang on or before the date such fact was sworn to by Defendant Chavez. Plaintiffs were not, and never have been, members of a criminal street gang.

231. Further, the probable cause affidavits state, "[a]fter the altercation, the subject was apprehended at the scene, while wearing common identifying distinctive signs or symbols **or** had an identifiable leadership or continuously **or regularly associate in the commission of criminal activities**." These statements are false and misleading and were known to be false and misleading by Defendants at the time Chavez swore to such.

232. Defendants offer no specific facts of any nature that Plaintiffs regularly associated in the

commission of criminal activities.[8] In fact, the probable cause affidavits misstate an essential element of the definition of "criminal street gang". TEXAS PENAL CODE § 71.01(d) states that "'Criminal street gang' means three or more persons having a common identifying sign or symbol or an identifiable leadership **who continuously or regularly associate in the commission of criminal activities**." There is no "or" before "who continuously or regularly . . . " The last phrase MUST be proven as an essential element of the definition. The omission of this essential element, or language suggesting that it is not an essential element, is misleading on its face.

233. Information omitted from the probable cause affidavit by Defendants would have negated probable cause. Despite a duty to include information that weighs against probable cause, Defendants knowingly and intentionally, or with reckless disregard for the truth, failed to reference the complete lack of any particularized evidence connecting Plaintiffs to the deaths or injuries that occurred at Twin Peaks. Further, the affidavit fails to reference the indisputable video evidence that is completely contrary to the notion that Plaintiffs planned, participated, or engaged in criminal conduct.

234. Since at least *Franks v. Delaware*, and as reiterated by the Fifth Circuit in *Hale v. Fish*, police officers and law enforcement officials have known that

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[8] Plaintiffs categorically deny that they continuously or regularly associated in the commission of criminal activities.

willful, intentional, and/or reckless misrepresentations made for the purpose of establishing probable cause violate an individual's Fourth Amendment rights. Put otherwise, no reasonable officer could possibly conclude that he was authorized to include known false statements and/or fail to include exculpatory information in an affidavit. As a direct result of Defendants' conduct and actions, Plaintiffs were wrongfully arrested even though probable cause did not exist.

42 U.S.C. § 1983 – 14th Amendment Violation

235. All preceding paragraphs are incorporated herein by reference.

236. If it is determined that a Fourth Amendment violation is not sustainable, Plaintiffs alternatively assert a violation of their Due Process rights under the Fourteenth Amendment to be free from unlawful arrest as a result of false and misleading statements that were knowingly, or with reckless disregard, included in the probable cause affidavits. The Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing its power, or employing it as an instrument of oppression.

237. Specifically, Plaintiffs have rights guaranteed by the Fourteenth Amendment not to have law enforcement deliberately fabricate evidence, including the insertion of facts in affidavits and arrest documents (and provide testimony based on those "facts" to

secure an indictment), that Defendants know to be false.

238. Here, Defendants knew there was no basis for the claims that Plaintiffs were members of a criminal street gang who committed or conspired to commit murder, capital murder, or aggravated assault. By inserting such claims in the probable cause affidavit and other official documents related to Plaintiffs' arrests, Defendants violated Plaintiffs' Fourteenth Amendment rights. This is conduct sufficient to shock the conscience for substantive due process purposes.

239. The doctrine set forth by the Fifth Circuit in *Cole v. Carson*, 802 F.3d 752 (5th Cir. 2015)[9] is hereby invoked and pled.

240. Plaintiffs alternatively assert a violation of their fundamental rights under the Fourteenth Amendment.

241. As a result of their arrest and the charges that Defendants maintained against them long after they were aware that they lacked probable cause to arrest in the first place, Plaintiffs were deprived of their ability to freely associate with other motorcycle

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[9] In 2016, the Supreme Court vacated the 2015 *Cole* opinion and remanded to the Fifth Circuit for further consideration. *Hunter v. Cole*, 137 S.Ct. 497 (Mem.) (Nov. 28, 2016). Upon remand, a panel of the Fifth Circuit re-examined portions of the qualified immunity analysis for the Fourth Amendment claim, and reinstated the 2015 opinion "as concerns all other parts of the appeal . . . " *Cole*, 905 F.3d at 342. The rule that a due process claim maybe brought when police fabricate evidence and use it to falsely charge a person continues to apply in full force.

enthusiasts regardless of whether there was any demonstrated connection to criminal activity.

242. As a result of their arrest and the charges that Defendants maintained against them long after they were aware that they lacked probable cause to arrest in the first place, Plaintiffs were deprived of their ability to travel outside of Texas.

243. As a result of their arrest and the charges that Defendants maintained against them long after they were aware that they lacked probable cause to arrest in the first place, as well as ongoing, disparaging statements made through mass media, Defendants inflicted publicity on Plaintiffs which placed them in a false light in the public eye, causing Plaintiffs to suffer reputational harm that impinged upon their fundamental right to personal liberty.

244. As a result of their arrest and the charges that Defendants maintained against them long after they were aware that they lacked probable cause to arrest in the first place, Plaintiffs were deprived of their right to privacy, specifically the intrusion upon their seclusion or solitude and private affairs.

245. No reasonable police officer or law enforcement actor could reasonably have believed the law was otherwise, or that such conduct was not a violation of Plaintiffs' rights.

42 U.S.C. § 1983 – Conspiracy

246. All preceding paragraphs are incorporated herein by reference.

247. In the hours and days immediately following the incident, Defendants Stroman, Chavez, Reyna, Lanning, Rogers, Swanton, Schwartz, and Frost entered into a conspiracy to deprive Plaintiffs of their right to be free from unlawful seizure and incarceration in violation of their Fourth and/or Fourteenth Amendment rights. Defendants acted in concert either to orchestrate or to carry out the illegal seizure and cause the illegal arrest and incarceration described in this Complaint when they knew there was no probable cause to arrest them or to charge them with the offenses of Engaging in Organized Criminal Activity. Defendants are liable to Plaintiffs for their violations of the Fourth and/or Fourteenth Amendments under 42 U.S.C. § 1983.

248. As described above, Defendants Stroman, Chavez, Reyna, Lanning, Rogers, Swanton, Schwartz, and Frost caused a warrant to be issued against Plaintiffs based on false or deficient probable cause affidavits that Defendants knew to be false or deficient.

249. Defendants were aware that Chavez was swearing to false statements for the purpose of obtaining an arrest warrant yet took no action to stop him. In fact, as described above, they encouraged Chavez despite knowledge of video evidence that directly contradicted any reasonable belief that Plaintiffs had committed a crime. Defendants Reyna,

Stroman, Lanning, Rogers, Swanton, Schwartz, and Frost's encouragement of Chavez is evident in that Defendants met together on May 17 and May 18 to discuss this very issue and records indicate full knowledge and acquiescence by all Defendants. Public statements by Stroman, Reyna, and Swanton further confirm Defendants' awareness of the actions taken to cause Plaintiffs to be arrested without probable cause.

250. The conspiracy involved state action, as Defendants Stroman, Chavez, Reyna, Lanning, Rogers, Swanton, Schwartz, and Frost acted under color of the statutes, customs, ordinances, and usage of the State of Texas.

251. As a direct result of Defendants illegal conduct, Plaintiffs were deprived of their constitutional rights, all to their damages.

Defendant Reyna is not entitled to immunity.

252. Defendant Reyna investigated the scene within hours of the incident, took photographs of the scene, reviewed information as it became known, and in all respects inserted himself in the role of an investigator/detective.

253. Defendant Reyna's conduct was not "intimately associated with the judicial process," but rather he involved himself in the **investigative phase** of the case **prior to a determination of probable cause**, and thus, is not entitled to absolute prosecutorial immunity.

254. In fact, law enforcement witnesses and Reyna himself have testified under oath that Reyna established the criteria that provided a basis for probable cause.[10]

255. To the extent Reyna provided legal advice, it was provided to police and other law enforcement officials **during the investigative phase**. Defendant Reyna involved himself in the decision to arrest when he called the meeting described above and changed the course of earlier decisions to release most of those detained, including Plaintiffs.

256. In fact, Chief Stroman and acting Chief Lanning ultimately acquiesced to Reyna's decision to arrest each individual who met certain established criteria related to club affiliation and/or clothing, patches, bumper stickers, etc. that in their minds suggested "support" for either the Bandidos or the Cossacks.

42 U.S.C. § 1983 – Municipal Liability

257. All preceding paragraphs are incorporated herein by reference.

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[10] Abel Reyna testimony from Motion to Disqualify, August 8, 2016, page 151:

> Q: And there has been testimony and there have been police reports prepared that imply that you or your office set the criteria of who to arrest. Is that a fair statement?
>
> A: The criteria?
>
> Q: Yes.
>
> A: Yes.

258. At all relevant times, Defendant Brent Stroman and/or Defendant Lanning, as the acting Chief on the day in question, was the policymaker, or the *de facto* policymaker, for the City of Waco with respect to all law enforcement matters relating to the Waco Police Department.

259. At all relevant times, Defendant Abel Reyna, as the District Attorney for McLennan County, Texas, was the policymaker, or the *de facto* policymaker, for McLennan County with respect to all law enforcement matters relating to the McLennan County District Attorney's Office.

260. Defendants Stroman, Lanning, and/or Reyna ordered the arrest of Plaintiffs, despite their knowledge that there was no probable cause to charge them with any offense, and/or deliberate indifference to the absence of such probable cause.

261. As such, the City of Waco and McLennan County are liable for Plaintiffs' constitutional wrongs suffered as the individual Defendants are the policymakers for their respective governmental employers.

262. Defendant Stroman had final policymaking authority from the City of Waco concerning the unconstitutional acts of Defendants Chavez, Rogers, and Swanton and ratified those acts, that is, Defendant Stroman knew of and specifically made a deliberate choice to approve Defendants Chavez, Rogers, and Swanton's unconstitutional acts and the basis for them.

263. Alternatively, Defendant Lanning had final policymaking authority from the City of Waco concerning the unconstitutional acts of Defendants Chavez, Rogers, and Swanton and ratified those acts, that is, Defendant Lanning knew of and specifically made a deliberate choice to approve Defendants Chavez, Rogers, and Swanton's unconstitutional acts and the basis for them.

264. Defendant Reyna had final policymaking authority from McLennan County concerning the unconstitutional acts of those working for him and at his direction, and ratified those acts, that is, Defendant Reyna knew of and specifically made a deliberate choice to approve the unconstitutional acts of those working for him and at his direction, and the basis for those acts.

265. Furthermore, despite all the obvious wrongs, no City of Waco or McLennan County employee has received any discipline or consequence due to their actions, thereby ratifying their actions as policy of the City of Waco and McLennan County.

266. In the event the City Council is determined to be the final policy maker for the City of Waco, the Waco City Council was aware that Plaintiffs were being detained without probable cause, and yet refused to release Plaintiffs from custody, conduct any investigation, and was deliberately indifferent to Plaintiffs' constitutional rights.

267. Alternatively, in the event that either the McLennan County Commissioners' Court or Sheriff's

Department is determined to be the final policymaker for McLennan County, both the McLennan County Commissioner's Court and the McLennan County Sheriff were aware that Plaintiffs were being detained without probable cause, and yet refused to release Plaintiffs from custody, conduct any investigation, and were deliberately indifferent to Plaintiffs' constitutional rights.

268. The events of May 17, 2015 garnered national media attention and pervasive attention in local media that has continued to this day. The Waco City Council, the McLennan County Commissioners' Court, and the McLennan County Sheriff's Department were all aware of the events that transpired and the serious allegations that hundreds of individuals had been arrested and were being detained despite a total lack of probable cause.

269. In addition to their knowledge from media coverage, they were kept apprised of the ongoing circumstances surrounding the event on a regular basis.

VIII. DAMAGES

270. As a direct and proximate result of the acts and omissions outlined above, each Plaintiff has been severely damaged. Each Defendant, acting individually, or in concert with the other Defendants, has caused each Plaintiff to suffer the damages described below.

271. Each Plaintiff seeks compensatory damages in an amount deemed sufficient by the trier of fact to compensate them for their damages, which includes past and future mental anguish, past and future pain and suffering, past and future damage to their reputations, and past and future lost wages and lost earning capacities.

272. Each Plaintiff also seeks damages as a result of Defendants' actions and conduct that have impinged on rights guaranteed by the First Amendment, such as Plaintiffs' right to free speech, and to association. Conditions placed on Plaintiffs' bonds have deprived Plaintiffs of rights guaranteed by the Constitution. It was entirely foreseeable to Defendants that falsely arresting and charging Plaintiffs with a felony criminal offense for which probable cause was lacking would lead to these constitutional deprivations and damages.

273. Each Plaintiff also seeks damages for the costs they incurred in having to post bail and defend against the false criminal charges filed against them. Those costs include the money they paid for legal representation.

274. Each Plaintiff also seeks exemplary damages against each individual Defendant.

275. Each Plaintiff has retained the services of the undersigned counsel, and claim entitlement to an award of reasonable and necessary attorney's fees under 42 U.S.C. § 1983 and 1988.

IX. JURY DEMAND

276. Plaintiffs respectfully request a trial by jury.

X. PRAYER FOR RELIEF

For these reasons, each Plaintiff seeks a judgment against each Defendant for:

a. compensatory and actual damages in an amount deemed sufficient by the trier of fact;

b. exemplary damages;

c. attorney's fees pursuant to 42 U.S.C. §§ 1983 and 1988;

d. costs of court; and

e. interest allowed by law for prejudgment or post judgment interest.

Respectfully submitted,

By: */s/ Don Tittle*

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 2019, I electronically submitted the foregoing document with the Clerk of Court for the U.S. District Court, Western District of Texas, using the electronic case filing system of the court, and that a true and correct copy of the foregoing has been served upon the following counsel of record, by electronic service via the Court's CM/ECF system:

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/s/ Don Tittle
Don Tittle

THE STATE OF TEXAS § DOCKET # _____
§ COURT: JP COURT
COUNTY OF MCLENNAN § PRECINCT I PLACE 2

COMPLAINT
(Articles 15.04 & 15.05,
Texas Code of Criminal Procedure)

BEFORE ME, THE UNDERSIGNED AUTHORITY, PERSONALLY APPEARED THE AFFIANT HEREIN, A PEACE OFFICER UNDER THE LAWS OF TEXAS, WHO, BEING DULY SWORN, ON OATH MADE THE FOLLOWING STATEMENTS AND ACCUSATIONS:

My name is MANUEL CHAVEZ and I am commissioned as a peace officer with the City of Waco by The State of Texas. I hereby state upon my oath that I have reason to believe and do believe that heretofore, and before the making and filing of this Complaint, that on or about May 17, 2015, in McLennan County, Texas, the said _____ did then and there, as a member of a criminal street gang, commit or conspire to commit murder, capital murder, or aggravated assault, against the laws of the State.

My probable cause for said belief and accusation is as follows:

Three or more members and associates of the Cossacks Motorcycle Club (Cossacks) were in the parking lot of the Twin Peaks restaurant in Waco, McLennan County Texas. Three or more members and associates of the Bandidos Motorcycle Club (Bandidos) arrived in the

parking lot of the Twin Peaks restaurant and engaged in an altercation with the members and associates of the Cossacks. During the course of the altercation, members and associates of the Cossacks and Bandidos brandished and used firearms, knives or other unknown edged weapons, batons, clubs, brass knuckles, and other weapons. The weapons were used to threaten and/or assault the opposing factions. Cossacks and Bandidos discharged firearms at one another. Members of the Waco Police Department attempted to stop the altercation and were fired upon by Bandidos and/or Cossacks. Waco Police Officers returned fire, stilling multiple gang members. During the exchange of gunfire, multiple persons where shot Nine people died as a result of the shooting between the members of the biker gangs. Multiple other people were injured as a result of the altercation. The members and associates of the Cossacks and Bandidos were wearing common identifying distinctive signs or symbols and/or had an identifiable leadership and/or continuously or regularly associate in the commission of criminal activities. The Texas Department of Public Safety maintains a database containing information identifying the Cossacks and their associates as a criminal street gang and the Bandidos and their associates as a criminal street gang.

After the altercation, the subject was apprehended at the scene, while wearing common identifying distinctive signs or symbols or had an identifiable leadership or continuously or regularly associate in the commission of criminal activities.

After the altercation, firearms, knives or other unknown edged weapons, batons, clubs, brass knuckles, and other weapons were recovered from members and associates of both criminal street gangs.

Multiple motorcycles with common identifying signs or symbols of the Cossacks and Bandidos and their associates were recovered at the scene. Additional weapons including: firearms, ammunition, knives, brass knuckles, and other weapons were found on the motorcycles.

/s/ Manuel Chavez 238
Complainant

SWORN TO AND SUBSCRIBED BEFORE ME BY SAID AFFIANT/COMPLAINANT ON THIS THE 18th DAY OF MAY, 2015.

/s/ W.H. Peterson
JUSTICE OF THE PEACE
MCLENNAN COUNTY, TEXAS

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

JOHN WILSON, JOHN ARNOLD, JAMES BRENT ENSEY, EDGAR KELLEHER, BRIAN LOGAN, TERRY S. MARTIN, ROBERT ROBERTSON, JACOB WILSON, JOHN CRAFT, DANIEL JOHNSON, JASON DILLARD, and RONALD ATTERBURY,	§	**CN: 1:17-CV-453-ADA**
Plaintiffs,	§	
v.	§	
BRENT STROMAN, MANUEL CHAVEZ, ABELINO "ABEL" REYNA, CITY OF WACO, TEXAS, ROBERT LANNING, JEFFREY ROGERS, PATRICK SWANTON, STEVEN SCHWARTZ, and CHRISTOPHER FROST,	§	
Defendants.	§	

DEFENDANTS' ABELINO REYNA AND MCLENNAN COUNTY MOTION TO DISMISS

(Filed Mar. 25, 2019)

NOW COME Defendants McLennan County, Texas ("County") and Abelino "Abel" Reyna ("Reyna") (hereinafter collectively "Defendants"), and file their Motion

to Dismiss pursuant to Fed.R.Civ.P, 12(b)(6), directed at Plaintiffs' First Amended Complaint and Jury Demand (Pl.'s Comp.)[1], and in support thereof respectfully show as follows:

I.
PLAINTIFFS' CLAIMS

Plaintiffs bring this suit based upon the aftermath of violence that erupted between rival motorcycle gangs at the Twin Peaks restaurant in Waco, Texas on May 17, 2015, during which nine persons were killed and many more injured. Plaintiffs bring suit pursuant to 42 U.S.C. §1983 against, *inter alia*, McLennan County and McLennan County District Attorney Abelino Reyna. Plaintiffs' claim that their arrests for the offense of Engaging in Organized Criminal Activity violated their rights under the 4th and 14th Amendments because Defendants allegedly lacked probable cause to arrest them. Plaintiffs also allege that Defendants conspired to violate their civil rights.

II.
BACKGROUND

Shortly after noon on May 17, 2015, a battle occurred at the Twin Peaks restaurant in Waco, Texas. The battle involved members of various rival motorcycle gangs. At the end of the battle, 9 individuals were dead and at least 18 others were wounded. After the

[1] Docket 23.

battle, various law enforcement authorities responded and 177 of the rival gang members were arrested and charged with the offense of Engaging in Organized Criminal Activity pursuant to Texas Penal Code Section 71.02. The battle at Twin Peaks was the largest battle of a larger war. In order to understand the larger context of the battle, it is helpful to review a federal RICO indictment which describes events surrounding the Twin Peaks incident.

The Bandidos Motorcycle Club is a recognized, highly organized criminal organization that is international in scope.[2] "Allegiance to this organization and their fellow brothers is valued above all else . . . Bandidos OMO members do not fear authority and have a complete disdain for the rules of society. Bandidos OMO members will not permit any perceived disrespect to any member by a non-member. Any person who disrespects or hurts a Bandidos OMO member will face retribution from the Bandidos OMO membership."[3] According to the U.S. Attorney's Office, since at least 2000 the Bandidos are involved in an extensive criminal enterprise and conspiracy that includes murder, robbery, extortion, racketeering,

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[2] *See* Ex. 1, Fourth Superseding Indictment (hereinafter "Indictment"), pp. 2-3, ¶¶1-3. As discussed below, as a public record, the indictment is properly considered by the Court in ruling on this motion to dismiss. *Rome v. HCC Life Ins. Co.*, 323 F.Supp.3d 862, 866 (N.D. Tex. 2018); *Cinel v. Connick*, 15 F.3d 1338, 1343, n. 6 (5th Cir. 1994).

[3] *Id.* at p. 4, ¶8.

assault, possession and delivery of illegal drugs, and illegal possession and transportation of firearms.[4]

Members of the Bandidos Motorcycle Club are required to wear clothing ("cuts") with specific patches ("cookies"), insignias, and markings that symbolize the organization and identify the wearer as part of the group.[5] The Bandidos have affiliated "support" clubs that operate in the same geographical areas as the Bandidos, and also wear designated reverse-color schemes and patches to indicate their allegiance to the Bandidos.[6] "These support clubs are also referred to as 'farm clubs' because this is generally the recruiting pool for the Bandidos OMO to pick individuals to prospect and become members of the Bandidos OMO."[7]

Since at least December, 2014, the Bandidos had explicit conflict with the Cossacks Motorcycle Club. According to the U.S. Attorney, at some point prior to December 12, 2014, Bandidos National Vice President John Portillo advised Dallas-based Bandidos that the Bandidos were "at war" with the Cossacks, and again declared this war on March 3, 2015.[8] On December 12, 2014, in Ft. Worth, Bandidos assaulted members of the Cossacks, Ghost Riders, and Winos motorcycle clubs,

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[4] *Id.* at pp. 5-8, ¶¶15-17; and pp. 9-17.

[5] *See* Ex. 1, Indictment, p. 5, ¶12.

[6] *Id.* at p. 3, ¶6.

[7] *Id.*

[8] *See* Ex. 1, Indictment, pp. 13-14, ¶¶(29) and (32).

killing a Ghost Rider.[9] Several confrontations and assaults involving Bandidos and Cossacks across Texas throughout March and April, 2015.[10]

The battle at Twin Peaks on May 17, 2015, was part of a larger war raging between the Bandidos, Cossocks, and their support groups. On May 23, 2015, the week after the events at Twin Peaks in Waco, Bandidos National Vice President Portillo raised Bandidos' dues and support club donations "to pay for bonds and legal expenses for Bandidos OMO members that would go to jail for 'club business,' including criminal acts committed against members of the Cossacks OMO."[11] After the Twin Peak incident, the war between the Bandidos and Cossacks continued across the State of Texas.[12]

On May 17, 2018, a federal jury in San Antonio, Texas, unanimously found Bandidos National President Jeffrey Fay Pike and Bandidos National Vice-President John Xavier Portillo guilty on numerous counts, including Racketeering Conspiracy, Murder in

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[9] *See* Ex. 1, Indictment, at p. 13, ¶(30).This incident ultimately resulted in the conviction of Band do Howard Wayne Baker for the crimes of directing activities of a street gang and engaging in organized crime and directing the activities of a street gang, the latter being the crime for which Plaintiffs were arrested in this me. *See* Ex. 6, Judgment of Conviction by Jury of Howard Wayne Baker.

[10] *See* Ex. 1, Indictment, at p. 14, ¶¶(33)-(37).

[11] *See* Ex. 1, Indictment, pp. 14-15, ¶(38).

[12] *See* Ex. 1, Indictment, pp. 15-16, ¶¶(39)-(52).

Aid of Racketeering, Conspiracy to Commit Murder in Aid of Racketeering and more.[13]

III.
ARGUMENT AND AUTHORITIES

A. Motion to Dismiss Standard

To survive a motion to dismiss, a plaintiff must plead sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.[14] 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.[15] Determining plausibility is a context-specific task and must be performed in light of a court's judicial experience and common sense.[16] A plaintiff's obligation in response to a motion to dismiss is to provide the grounds for his entitlement to relief which requires more than labels and conclusions; a formulaic recitation of the elements of a cause of action

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[13] *See* Exs. 4 and 5, Verdicts and Judgments against Portillo and Pike in in *U.S. v. Portillo*, No. SA-15-CR-821; *see also* Ex. 1, Indictment, pp. 8-9, ¶(18)(a) and (b) (identifying Pike as National President and Portillo as National Vice-President of the Bandidos).

[14] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[15] *Iqbal*, 556 U.S. at 678.

[16] *Id.*

will not suffice.[17] A plaintiff must allege sufficient facts to create more than a mere possibility that a defendant acted unlawfully.[18] 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.[19] The court should dismiss a complaint if it lacks an allegation regarding one of the required elements of a cause of action.[20]

A court should begin its analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth.[21] A court is not bound to accept legal conclusions couched as factual al legations.[22] The Court need only accept as true the "well-pleaded" facts in a plaintiff s complaint.[23] To be "well pleaded," a complaint must state specific facts to support the claim, not merely conclusions couched as

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[17] *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678. ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice.")

[18] *Iqbal*, 556 U.S. at 678.

[19] *Id*.; *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level.")

[20] *See Keane v. Fox TV Stations, Inc.*, 297 F. Supp. 2d 921, 925 (S.D. Tex. 2004) (citing *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995)).

[21] *Iqbal*, 556 U.S. at 679.

[22] *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010) ("We do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.").

[23] *Papasan*, 478 U.S. at 283; *Greene v. Greenwood Pub. Sch. Dist.*, 890 F.3d 240, 242 (5th Cir. 2018).

factual allegations.[24] In deciding a motion to dismiss, courts may consider the complaint, as well as other sources such as documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.[25] In ruling on a Rule 12(b)(6) motion, a court generally limits its review to the face of the pleadings.[26] However, a court may consider categories of information that are outside the pleadings. First, a court may also consider categories of information that are outside the pleadings. First, a court is permitted to rely on documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.[27] Second, "a written document that is attached to a complaint as an exhibit is considered part of the complaint and may be considered in a

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[24] *Iqbal*, 556 U.S. at 679; *Tuchman v. DSC Comm. Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994) (Plaintiff must plead "specific facts, not merely conclusory allegations."); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 244 (5th Cir. 2009).

[25] *Tellabs, Inc. v. Makor Issues & Rights, Ltd*, 551 U.S. 308, 322 (2007). In deciding a Rule 12(b)(6) motion to dismiss, a court can rely on matters of public record without converting the motion into a motion for summary judgment. *Norris v. Hearst Trust*, 500 F.3d 457, 461, n.9 (5th Cir. 2007); *Davis v. Bayless, Bayless & Stokes*, 70 F.3d 367, 372, n.3 (5th Cir. 1995); *Cinel v. Connick*, 15 F.3d 1338, 1343, n. 6 (5th Cir. 1994).

[26] *Rome v. HCC Life Ins. Co.*, 323 F.Supp.3d 862, 866 (N.D. Tex. 2018) (citing *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999)).

[27] *Id.* (citing *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008)) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

12(b)(6) dismissal proceeding."[28] Third, a "court may consider documents attached to a motion to dismiss that are referred to in the plaintiff's complaint and are central to the plaintiff's claim."[29] Finally, "a court may permissibly refer to matters of public record."[30]

B. Plaintiffs Have Failed to Plead Viable Claims

1. Plaintiffs' Fourth Amendment Wrongful Arrest Claim Fails

a. Fourth Amendment Standards

The 4th Amendment protects the rights of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.[31] Because arrests are "seizures" of "persons," they must be reasonable under the circumstances.[32] A warrantless arrest is reasonable if the officer has probable cause to believe that the suspect committed a crime in

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[28] *Id.* (citing *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007)).

[29] *Id.* (citing *Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 546 (5th Cir. 2010)).

[30] *Id.* at 866 (citing *Cinel*, 15 F.3d at 1343, n. 6); *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011) (stating, in upholding the district court's dismissal pursuant to Rule 12(b)(6), that "the district court took appropriate judicial notice of publicly-available documents and transcripts . . . which were matters of public record directly relevant to the issue at hand").

[31] *District of Columbia v. Wesby*, 583 U.S. ___, 138 S. Ct. 577, 585 (2018).

[32] *Id.* (citing *Payton v. New York*, 445 U.S. 573, 585 (1980)).

the officer's presence.[33] An arrest violates the 4th Amendment when it lacks probable cause.[34] "Probable cause exists when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense."[35]

To determine whether an officer had probable cause for an arrest, courts examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.[36] Facts must not be viewed in isolation but rather as factors in the totality of the circumstances, which requires the court to look at the "whole picture."[37] The Supreme Court explained that its precedents "recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation."[38] Because probable cause "deals with probabilities and depends on the totality of the circumstances"[39] and is "a fluid concept" that is "not readily, or even usefully,

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[33] *Wesby*, 138 S.Ct. at 586 (citing *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001)).

[34] *Deville v. Marcantel*, 567 F.3d 156, 164 (5th Cir. 2009).

[35] *Id.* at 164.

[36] *Wesby*, 138 S.Ct. at 586 (citing *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)).

[37] *Id.* at 588.

[38] *Wesby*, 138 S. Ct. at 588.

[39] *Pringle*, 540 U.S. at 371

reduced to a neat set of legal rules."[40] Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity" and "is not a high bar."[41]

Law enforcement officers are not required to rule out a suspect's innocent explanation of suspicious facts. "'[T]he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty', but the degree of suspicion that attaches to particular types of noncriminal acts.'"[42] Probable cause only involves a probability or substantial chance of criminal activity, not the actual commission of criminal activity.[43] Generally, the issuance of an arrest warrant breaks the chain of causation in a wrongful arrest claim.[44] The officer, who obtained the arrest warrant, can still be held liable for unlawful arrest if "the warrant application is so lacking in indicia or probable cause as to render official belief in its existence unreasonable . . . "[45] A 4th Amendment violation occurs when an officer knowingly, intentionally, or with reckless disregard for the

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[40] *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

[41] *Id.* at 243-244, n. 13; *Wesby*, 138 S.Ct. at 586 (quoting *Kaley v. United States*, 134 S. Ct. 1090, 1103 (2014)).

[42] *Wesby*, 138 S.Ct. at 588.

[43] *Id.* at 586.

[44] *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1994).

[45] *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986).

truth makes false statements in an affidavit in support of a warrant.[46]

b. Defendants Did Not Arrest Plaintiffs and Could Not Compel an Arrest

Plaintiffs' pleadings establish that they were arrested by the *Waco Police Department*, not by Reyna or any official of McLennan County.[47] Plaintiffs allege that Reyna provided criteria to justify arrests and advocated for arrests, but it is undisputed that the Waco Police Department arrested Plaintiffs. Reyna does not have the authority to compel the Waco Police Department to make an arrest. As a matter of law, Reyna cannot be held liable for Plaintiffs' alleged wrongful arrests. Brent Stroman, the former Chief of the Waco Police Department, confirms this with his undisputed, sworn testimony that he made the decision to arrest the individuals at the scene.[48] In that hearing,

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[46] *Franks v. Delaware*, 438 U.S. 154, 155-56 and 171-72 (1978).

[47] Pl.'s Comp., p. 20, ¶92 and Exhibit 1.

[48] *See* Exhibit 2, transcript of 8/8/16, hearing on Motion to Disqualify McLennan County District Attorney's Office and Appoint an Attorney Pro Tem, p. 93, line 23 to p. 94, line 22; p. 95, line 20 to p. 97, line 5; p. 101, line 23 to p. 102, line 13; p. 108, line 25 to p. 109, line 3; p. 109, lines 19-24; p. 113, lines 1-14; and p. 117, lines 4-11. The August 8, 2016, motion to disqualify hearing was a public proceeding in open court. Additionally, Plaintiffs' complaint refers to and quotes from other purported testimony at this hearing. *See* Pl.'s Comp., pp. 14-15, ¶66. Excerpts from the transcript of the motion to disqualify hearing are therefore properly considered by the Court. *Rome*, 323 F.Supp.3d at 866; *Cinel*, 15 F.3d at 1343, n. 6.

attorneys for arrestees, Matthew Clendennen and Ray Nelson, repeatedly tried to get Chief Stroman to agree to their theory that Reyna's advocacy caused the arrests at Twin Peaks but Chief Stroman repeatedly denied that contention and made clear the decision to arrest was his alone.

> "Q. And when you talked to Abel Reyna, he's the one who ultimately told you, I want to arrest everyone?
>
> A. *He did not say that.*
>
> Q. He said, I want to arrest everyone?
>
> A. He said. . . . I can prosecute every one of them that you arrest.
>
> Q. And that we should arrest them?
>
> A. *No. He did not say that.*[49]
>
> "Q. It was clear to you that Mr. Reyna – even though Mr. Reyna couldn't put the handcuffs on people, it was clear to you that he wanted your department to arrest all these people?
>
> A. That's what I – that was what was presented to me.
>
> Q. *And based on that advocacy by Mr. Reyna or this want by Mr. Reyna a determination was made to arrest everybody or arrest the people that ere in fact arrested*?

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[49] *See* Exhibit 2, p. 96, line 22 to p. 97, line 5 (emphasis added).

> *No. I won't say that because it was my decision.* And what – what I was – the information I got from that, from that conversation is that there was probable cause for the arrest. *And it was my decision past that point to make arrest – to have them arrested or not*.[50]
>
> "Q. You've talked to Mr. Reyna over the years since he's been D.A. and you've been the police chief; is that right?
>
> A. That's correct.
>
> Q. Ya'll have a working relationship?
>
> A. Absolutely.
>
> Q. If Mr. Reyna asked you to do something and you didn't feel comfortable with it, you'd be fine telling him no?
>
> A. Absolutely.
>
> Q. *You had to make a decision as police chief, not because of what somebody else wanted you to do or didn't want you to do*?
>
> A. *Absolutely. It was my decision*.[51]

Reyna did not arrest Plaintiffs and Defendants cannot be held liable for Plaintiffs' alleged wrongful arrests.

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[50] *Id*. at p. 101, line 23 to p. 102, line 13 (emphasis added).

[51] *Id.* at p. 113, lines 1-14 (emphasis added). Chief Stroman's testimony further established that his knowledge of the facts of what had occurred at Twin Peaks, and what had been discovered during the investigation at that point, was provided by Waco Police Department investigators, **not** Abel Reyna, going so far as to say "I did not talk to Abel about any of that." *See* Exhibit 2, p. 95, line 20 to p. 96, line 1; and p. 117, lines 4-11.

Plaintiffs' wrongful arrest claims against Reyna should be dismissed.

c. An Indictment Breaks the Chain of Causation for a Wrongful Arrest Claims

Plaintiffs admitted that they have been indicted by the McLennan County Grand Jury for the offense for which they claim they were arrested without probable cause.[52] Plaintiffs' indictment is fatal to his claim of unlawful arrest. "A grand jury indictment is sufficient to establish probable cause . . . When the facts supporting an arrest 'are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party . . . '"[53] This is so "even if the independent intermediary's action occurred after the arrest, and even if the arrestee was never convicted of any crime."[54] Since the indictments establish probable cause, any claim Plaintiffs assert for unlawful arrest fail as a matter of law and must be dismissed.

Plaintiffs attempt to overcome this bar by claiming that Defendants somehow "tainted" the grand jury

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[52] Pl.'s Comp., pp. 26-27, ¶125.

[53] *Russell v. Altom*, 546 Fed.Appx. 432, 436 (5th Cir. 2012) (citing *Gerstein v. Pugh*, 420 U.S. 103, 117, n. 19 (1975); *Cuadra v. Houston ISD*, 626 F.3d 808, 813 (5th Cir.2010)); see also *Glenn v. City of Tyler*, 242 F.3d 307, 313 (5th Cir. 2001).

[54] *Buehler v. City of Austin/Austin Police Dept.*, 824 F.3d 548, 554 (5th Cir. 2016).

proceedings,[55] seeking to invoke the exception discussed in *Russell*.[56] Plaintiffs' claims in this regard fail for two reasons. First, Plaintiffs have no personal knowledge of what actually transpired before the Grand Jury.[57] Rather, Plaintiffs offer nothing more than Plaintiffs' rank speculation and self-serving conclusions, with no evidentiary support.[58] Where a person's grand jury testimony is unknown, an "argument that the [defendant] must have testified falsely to the grand jury amounts to rank speculation."[59] Plaintiffs' speculative contentions regarding a tainting of the grand jury proceedings cannot survive a challenge under Rule 12(b)(6).[60] Second, Plaintiffs' allegation of a "tainting" of the grand jury proceedings cannot serve as a basis for liability for a prosecutor such as Defendant Reyna, who is entitled to prosecutorial immunity for his actions in front of grand juries. As such, Plaintiffs' allegations fail to state a claim.

d. Reyna is Entitled to Prosecutorial Immunity

Prosecutors are absolutely immune from Section 1983 monetary liability for "initiating a prosecution

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[55] *See* Pl.'s Comp., pp. 27-35, ¶¶126-157.

[56] *See Russell*, 546 Fed.Appx. at 437; *Cuadra*, 626 F.3d at 813.

[57] *See* Pl.'s Comp., p. 27, ¶¶127-129.

[58] *Id.* at pp. 27-35, ¶¶130-157.

[59] *Rothstein v. Carriere*, 373 F.3d 275, 284 (2nd Cir. 2004).

[60] *Gentilello*, 627 F.3d at 544.

and in presenting the State's case.[61] Absolute prosecutorial immunity is not defeated by a showing that the prosecutor acted wrongfully or even maliciously.[62] Prosecutorial immunity protects a prosecutor's conduct before a grand jury.[63] "[T]he cases establish that presentation of evidence to a grand jury in a manner calculated to obtain an indictment, *even when maliciously, wantonly, or negligently accomplished*, is immunized by [absolute prosecutorial immunity]."[64] Thus, even to the extent that the Court assumes the truth of the speculative allegations that Plaintiffs have made regarding alleged tainting of the grand jury proceedings by Reyna, and even if Plaintiffs were to actually *prove* that Reyna somehow "tainted" the grand jury proceedings, such actions cannot serve as the basis for any civil liability for Reyna. Accordingly, Plaintiffs' claims against Reyna must be dismissed based on the existence of the indictments and Reyna's prosecutorial immunity.

e. Reyna is Entitled to Qualified Immunity

Governmental officials are protected from suit and liability by qualified immunity unless their alleged conduct: (1) violated a Constitutional or statutory

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[61] *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976).

[62] *Id.* at 427.

[63] *Burns v. Reed*, 500 U.S. 478, 490 (1991); *Brown v. Lyford*, 243 F.3d 185, 191 (5th Cir. 2001).

[64] *Morrison, v. City of Baton Rouge*, 761 F.2d 242, 248 (5th Cir. 1985) (emphasis added).

right; and (2) the illegality of the alleged conduct was clearly established at the time.[65] "Clearly established" mean that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful.[66] In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate."[67] This demanding standard means that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law.[68] To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent.[69] The rule must be "settled law" which means it is dictated by "controlling authority" or "a robust consensus of persuasive authority."[70] It is insufficient that the rule is suggested by then-existing precedent.[71] The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply.[72] Otherwise, the rule is not one that "every reasonable official would know."[73]

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[65] *Wesby*, 138 S.Ct. at 589.

[66] *Id.* (quoting *al-Kidd*, 563 U.S. at 735).

[67] *Id.*; *al-Kidd*, 563 U.S. at 741.

[68] *Wesby*, 138 S.Ct. at 589 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

[69] *Id.*

[70] *Id.* at 589-590; *al-Kidd*, 563 U.S. at 741.

[71] *Wesby*, 138 S.Ct. at 590.

[72] *Id.*; *see Reichle v. Howards*, 566 U.S. 658, 664 (2012).

[73] *Wesby*, 138 S.Ct. at 590; *Reichle*, 566 U.S. at 666.

The "clearly established" standard also requires that the legal principle clearly prohibits the officer's conduct in the particular circumstances before him.[74] The rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[75] The Supreme Court repeatedly stressed that courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced."[76] A rule is too general if the unlawfulness of the officer's conduct "does not follow immediately from the conclusion that [the rule] was firmly established."[77] The Supreme Court also stressed that the "specificity" of the rule is "especially important in the Fourth Amendment context."[78] In the context of a warrantless arrest, the rule must obviously resolve "whether the circumstances with which [the particular officer] was confronted . . . constituted probable cause."[79]

Probable cause "turn[s] on the assessment of probabilities in particular factual contexts" and cannot be "reduced to a neat set of legal rules."[80] It is "incapable

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[74] *Wesby*, 138 S.Ct. at 590.

[75] *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

[76] *Id.* (quoting *Plumhoff v. Pickard*, 571 U.S. 765, 779 (2014)).

[77] *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

[78] *Id.* (citing *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam)).

[79] *Id.* (citing *Mullenix*, 136 S. Ct. at 309).

[80] *Id.* (quoting *Illinois*, 462 U.S. at 232).

of precise definition or quantification into percentages."[81] Given its imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in "the precise situation encountered."[82] The Supreme Court stresses the need to "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment."[83] While there does not have to be "a case directly on point," existing precedent must place the lawfulness of the particular arrest "beyond debate."[84] "A body of relevant case law" is usually necessary to "clearly establish the answer" with respect to probable cause.[85]

Qualified immunity is overcome only if, at the time and under the circumstances of the challenged conduct, *all* reasonable officers would have realized the conduct was prohibited by the federal law on which the suit is founded.[86] The question is whether a reasonable officer could have believed that the actions of the defendant officer were lawful in light of clearly established law and the information the officer possessed at the time.[87] If reasonable officers could differ on the lawfulness of a defendant's actions, the defendant is

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[81] *Id.* (quoting *Pringle*, 540 U.S. at 371).

[82] *Id.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017)).

[83] *Id.* (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017)).

[84] *Id.* (quoting *al-Kidd*, 536 U.S. at 741).

[85] *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)).

[86] *Dudley v. Angel*, 209 F.3d 460, 462 (5th Cir. 2000).

[87] *Anderson*, 483 U.S. at 641.

entitled to qualified immunity.[88] The legal principle in question must clearly prohibit the specific conduct of the official in the particular circumstances that were confronting the official.[89]

It is the plaintiffs burden to plead and prove specific facts overcoming qualified immunity.[90] To do so, a claimant "must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity."[91] Under qualified immunity's pleading standard, Plaintiffs' conclusory and speculative 4th Amendment allegations fail to state a claim.

Plaintiffs extrapolate from the uniformity of the warrant affidavits that the warrant affidavits for their arrest are "general warrants", so lacking in particularized probable cause that no reasonable officer could believe that probable cause existed.[92] Plaintiffs claim that because the affidavits were the same for the persons arrested, particularized probable cause cannot exits.[93] Plaintiffs also allege that video evidence shows that Plaintiffs did not engage in any violent acts.[94] Qualified immunity protects Reyna First, by their very

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[88] *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

[89] *Wesby*, 138 at 590.

[90] *Elliot v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985).

[91] *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012).

[92] *See* Pl.'s Comp., pp. 40-42, ¶¶214-224.

[93] *Id.*

[94] *Id.* at p. 24, ¶113; p. 31, ¶144; p. 39, ¶¶210-211.

nature, criminal enterprise offenses involve generally uniform facts, and similarity should not be surprising. In any event, the warrant affidavits identify Plaintiffs and facts which are asserted to apply to Plaintiffs.[95] It also does not matter that Plaintiffs claim that they did not actually participate in any violent acts. The persons arrested at the scene were arrested for engaging in organized criminal activity to commit *or conspire to commit* murder, capital murder, or aggravated assault.[96] Actually committing murder, capital murder, or aggravated assault is not a necessary element of the offense.[97] Similarly, it does not matter if Plaintiff was not a member of the Bandidos or Cossacks, but belonged to some other motorcycle club. The warrant authorized the arrest of Bandidos, Cossacks, *and their associates*.[98]

More importantly, the situation faced by law enforcement at Twin Peaks involved multiple suspects in a group and clear criminal conduct by members of that group. At the time of the incident, it was not clearly established that the concept of particularized probable cause, in the form asserted by the Plaintiffs, was the applicable standard. It was also not clearly established how such a concept should be applied.

Plaintiffs' Complaint base their claims on the assertion that it was clearly established that the United

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[95] Docket 23, Exhibit 1.

[96] Pl.'s Comp., p. 17, ¶82 and Exhibit 1.

[97] *See* TEX. PENAL CODE §71.02(a).

[98] *See* Exhibit 1 to Pl.'s Comp.

States Constitution requires a showing of facts particularized to an individual for there to be probable cause to arrest.[99] This framing of the issue, however, is far too general and broad, and runs afoul of the Supreme Court's admonition that the legal issue must be defined with sufficient specificity to determine if conduct is reasonable in the particular circumstances faced by the defendant.[100] In the case at bar, the issue with respect to qualified immunity is as follows: Was it clearly established on May 17, 2015, that law enforcement officers are prohibited from arresting a member of a large, riotous group, members of which had been observed committing serious, violent crimes in a public place resulting in multiple deaths, unless the officers can identify specific unlawful acts attributable to the specific individual member of the group who is being arrested? To establish an affirmative answer to that question, Plaintiffs are required to identify "controlling authority" or a "robust consensus of persuasive authority" indicating "beyond doubt" that such conduct is prohibited.[101] Plaintiffs cannot do so.

Plaintiffs primarily rely on *Ybarra v. Illinois*,[102] in support of their broad legal theory regarding the concept of particularized probable cause.[103] *Ybarra*

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[99] *See* Pl.'s Comp., p. 19, ¶¶86-87; and p. 40, ¶216.

[100] *Wesby*, 138 S.Ct. at 590; *Plumhoff*, 572 U.S. at 779.

[101] *Wesby*, 138 S.Ct. at 589-90; *al-Kidd*, 563 U.S. at 741-42; *Wilson v Layne*, 526 U.S. 603, 617 (1999); *Brosseau*, 543 U.S. at 199.

[102] *Ybarra v. Illinois*, 444 U.S. 85 (1979).

[103] Pl.'s Comp., p. 40, ¶216.

arose from a situation where law enforcement, who had a search warrant for a bar and the owner of bar, decided to conduct warrantless pat down searches of nine to thirteen patrons who happened to be in the bar when the search warrants were executed.[104] That situation is not sufficiently similar to the situation in the case at bar to establish the clearly established illegality of Defendant's conduct. Below is a brief synopsis of the other cases identified by Plaintiffs in support of their legal theory.[105]

1. *Maryland v. Pringle*, 540 U.S. 366 (2003): Whether there was probable cause to arrest all three persons in a car for possession of drugs where none of them would admit to knowing about the drugs and police could not definitely tie any one person to them;[106]

2. *Trapper v. North Carolina*, 451 U.S. 997 (1981): Whether there was probable cause for the arrest of two persons for crimes related to the possession, sale, and delivery of marijuana following a traffic stop and search of the vehicle and, later, a search of a residence;

3. *Michigan v. Summers*, 452 U.S. 692 (1981): Whether there was probable cause for the arrest of a person for heroin possession, when

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[104] *Ybarra*, 444 U.S. at 87-89.

[105] *See* Pl.'s Comp., pp. 40-41, n. 7.

[106] As discussed below, *Pringle* is the case that is often cited to as limiting the reach of, or at least modifying for multi-suspect cases, the *Ybarra* "particularized probable cause" standard.

the person was seen leaving a house as a search warrant was being executed;

4. *U.S. v. Hearn*, 563 F.3d 95 (5th Cir. 2009): Whether there was probable cause for the arrest of three persons for drug offenses following a drug deal in a hotel room;

5. *U.S. v. Zavala*, 541 F.3d 562 (5th Cir. 2008): Whether there was probable cause for the arrest of a person based upon his alleged involvement in a drug deal;

6. *Williams v. Kaufman County*, 652 F.3d 994 (5th Cir. 2003): Whether there was probable cause for a pat-down search, strip search, and warrant check of all patrons of a nightclub where law enforcement had a search warrant that only allowed them to search the nightclub and five specific persons in the nightclub (similar to the fact situation in *Ybarra*);

7. *Merchant v. Bauer*, 677 F.3d 656 (4th Cir. 2012): Whether there was probable cause for the arrest of a person for impersonating a police officer;

8. *Hawkins v. Mitchell*, 756 F.3d 983 (7th Cir. 2014): Whether there was probable cause for the arrest of a person for domestic violence; and

9. *U.S. v. Ojeda-Ramos*, 455 F.3d 1178 (10th Cir. 2006): Whether there was probable cause for the arrest of a person for possession of drugs.

None of these cases are remotely similar enough to what law enforcement were dealing with at Twin

Peaks on May 17, 2015, to demonstrate that the alleged illegality of Defendants' actions was clearly established.[107] Moreover, several cases indicate the *Ybarra* particularized probable cause standard does *not* apply to multi-suspect arrests in the manner posited by Plaintiffs, and thus, Defendants' alleged conduct does not violate clearly established law.

In *Maryland v. Pringle*, the Supreme Court considered a case involving a passenger (Pringle) in a vehicle that was also occupied by the driver and another passenger and that was stopped for a traffic violation.[108] After a consensual search of the vehicle, police discovered $763 in cash in the glove compartment and five baggies of cocaine behind a back-seat armrest.[109] All three occupants of the vehicle denied knowing about the money or drugs.[110] Police arrested all three men and transported them to the police station.[111] Later, Pringle admitted that the cocaine was his and that he and his friends were going to a party where he intended to sell it.[112] At his criminal trial, however, he moved to suppress his confession as the fruit of an illegal arrest, contending he was arrested without probable cause.[113] The trial court denied the motion

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[107] *Wesby*, 138 S.Ct. at 589-90.

[108] *Pringle*, 540 U.S. at 367-68.

[109] *Id.*

[110] *Id.* at 368-69.

[111] *Id.* at 369.

[112] *Id.*

[113] *Id.*

to suppress and Pringle was convicted.[114] The Maryland Court of Appeals reversed, finding that absent specific facts showing Pringle personally knew about and controlled the drugs, merely being present where drugs were found was insufficient to establish probable cause.[115]

The U.S. Supreme Court disagreed and reversed. The Court noted that probable cause is a flexible concept which deals with probabilities and the totality of the facts and circumstances present in a particular case.[116] A court analyzing probable cause must look at all circumstances leading to an arrest, making reasonable inferences from the facts in doing so, and decide whether those circumstances would lead an objectively reasonable officer to believe probable cause existed.[117] The Court then conducted an analysis of the totality of the facts at issue in the case and determined there was probable cause to arrest Pringle.[118]

Pringle argued that his arrest was prohibited by the particularized probable cause standard in *Ybarra.*[119] The Supreme Court, however, noted that the fact situation in *Ybarra* was nothing like the fact situation in *Pringle.*[120] *Ybarra* involved police deciding to search all

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[114] *Id.*

[115] *Id.*

[116] *Id.* at 369-71.

[117] *Id.* at 370-71.

[118] *Id.* at 371-73.

[119] *Id.* at 372.

[120] *Id.* at 372-73.

patrons in a public bar when they only had a warrant authorizing the search of the bar and the owner of the bar.[121] Nothing about those facts suggested any reasonable inference that bar patrons who just happened to be at the location could be searched. By contrast, the fact situation in *Pringle* (three persons in a car with several hundred dollars in cash and cocaine that was accessible to all of them) allowed inferences to be made to support a reasonable belief that all three were involved in a criminal enterprise, and the arrest was therefore legal.[122]

Following *Pringle*, several courts of appeal held that it either modified or threw into question how the "particularized probable cause" standard discussed in *Ybarra* should be applied in multi-suspect cases. In these decisions, the courts allowed officers to make reasonable inferences from all the facts, and found probable cause to arrest all persons in a group which was reasonably suspected to have been involved in criminal activity, *even in the absence of facts attributing specific criminal activity to a specific arrestee.* In *Carr v. District of Columbia*,[123] the D.C. Circuit considered a case where all the members of a protest march were arrested for vandalism after some members of the group engaged in acts of vandalism during the march, and there was an allegation that the entire group appeared

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[121] *Id.*

[122] *Id.* at 373-74

[123] *Carr v. District of Columbia*, 587 F.3d 401 (D.C. Cir. 2009).

to celebrate whenever vandalism occurred.[124] Several of those arrested later sued for false arrest. They did not dispute that they were a part of the protest march, nor that some members of the protest march committed acts of vandalism, but did claim that they themselves had not participated in any such activity, and that therefore there was no probable cause to arrest them.[125] The trial court agreed, finding that law enforcement "lacked 'particularized grounds' to believe that *every one* of the seventy persons arrested committed the crime of rioting because the officers could not possibly have observed each one's behavior."[126]

The D.C. Circuit reversed the district court, noting that it was established precedent in the D.C. Circuit that "officers may be able to establish that they had probable cause to arrest an entire group of individuals if the group is observed violating the law *even if specific unlawful acts cannot be ascribed to specific individuals*."[127] The court rejected the plaintiffs' assertion that no arrests could be made unless law enforcement can demonstrate they can observe every single member of a group.[128] Rather, the D.C. Circuit stated its precedents establish that, in a multi-suspect setting, the particularized probable cause standard "is satisfied if the officers have grounds to believe all arrested

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[124] *Carr*, 587 F.3d at 402-04.

[125] *Id.* at 404-05.

[126] *Id.* at 405 (emphasis in original).

[127] *Id*. at 406 (emphasis added).

[128] *Id.* at 406-07.

persons were a part of the unit observed violating the law."[129] The court noted that "it is possible that an entirely innocent person would be mistaken for a rioter. But it should be borne in mind that the legal issue is probable cause, not ultimate conviction. Probable cause only requires a reasonable belief of guilt. Not a certitude."[130]

In *Bernini v. City of St. Paul*,[131] the 8th Circuit considered a case involving police arresting a large group of protesters during a political convention.[132] Police arrested 160 people out of a large group that initially violated the law at an intersection, and then proceeded down the street to a park, where they were surrounded by police.[133] During the move from the intersection to the park, people who were not present when legal violations were committed earlier at the intersection, had joined the crowd.[134] Thirty-two plaintiffs filed suit, alleging they were arrested without probable cause in violation of their 4th Amendment rights.[135] The plaintiffs alleged that their arrests violated the 4th Amendment because police needed to have particularized probable cause for each person arrested, and police only had

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[129] *Id.* at 407.

[130] *Id.* at 408.

[131] *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2012).

[132] *Bernini*, 665 F.3d at 1000-02.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 1002-03.

such particularized probable cause for a few people at the time of event in question, citing to *Ybarra*.[136]

The 8th Circuit disagreed, noting "the touchstone of the Fourth Amendment is reasonableness under the particular circumstances presented [citations omitted]. *What is reasonable in the context of a potential large-scale urban riot may be different from what is reasonable in the relative calm of a tavern with a dozen patrons*."[137] The 8th Circuit then cited to the *Carr* case as holding that the 4th Amendment is satisfied if police officers have grounds to believe that all arrested people were part of a unit that was observed violating the law.[138] Accordingly, "*Carr* thus demonstrates that a reasonable officer in St. Paul could have believed that the Fourth Amendment did not require a probable cause determination with respect to each individual in a large and potentially riotous group before making arrests."[139]

Callahan v. Unified Government of Wyandotte County[140] involved the 10th Circuit considering the lawfulness of the arrest of all members of a police team who were suspected of stealing while executing search warrants.[141] The team was videotaped executing a

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[136] *Id.* at 1003.

[137] *Id.* (emphasis added).

[138] *Id.*

[139] *Id.*

[140] *Callahan v. Unified Government of Wyandotte County*, 806 F.3d 1022 (10th Cir. 2015).

[141] *Callahan*, 806 F.3d at 1024-25.

search warrant and some, but not all, of the team were observed stealing items of property.[142] Due to the officers' protective gear, they could not be individually identified.[143] All six members of the team were arrested for theft, but ultimately, only three of the six officers ended up being involved in the crime.[144] The other three officers sued for false arrest, arguing that no particularized probable cause existed to arrest them, citing to *Ybarra*.[145]

The 10th Circuit chided the plaintiffs and the district court for framing the legal issue at too broad a level of generality. "Both [plaintiffs and the district court] assert that the law was clearly established that an officer must have probable cause to make a warrantless arrest. *Of course it was. But such a sweeping pronouncement of the law could not put Defendants on fair notice that their conduct was illegal*."[146] The 10th Circuit, complying with Supreme Court precedent, stated that the properly focused inquiry was whether it was clearly established that police could arrest an entire group when police know some unidentifiable members of the group, but not all, have committed a crime.[147] The court stated, "This question of probable cause in multi-suspect situations *is far from beyond*

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[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* at 1025 and 1028.

[146] *Id.* at 1028 (emphasis added).

[147] *Id.*

debate"[148] and observed, "*Ybarra* may have served as a case on point if *Maryland v. Pringle*—which the district court appears to have overlooked in its clearly established law analysis—had never been decided. But *Pringle* makes the question debatable at the very least, and therefore precludes a finding that the law was clearly established."[149]

Plaintiffs only identify one case with a fact situation similar to the case at bar[150], the unreported New York District Court decision of *Dinler v. New York*.[151] *Dinler* involved the mass arrests of two groups of protestors during the Republican National Convention in New York in 2004.[152] The groups of protestors were arrested for various offenses in connection with the marches such as obstructing traffic and parading without a permit.[153] Several arrestees sued for 4th Amendment violations, claiming they had been arrested without probable cause.[154] The district court appears to reject the multi-suspect probable cause standards enunciated in the *Carr* and *Bernini* cases and imposes

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[148] *Id.* (emphasis added).

[149] *Id.*

[150] Pl.'s Comp., pp. 40-41, n. 7.

[151] *Dinler v. New York*, No. 04 Civ. 7921(RJS)(JCF), 2012 WL 4513352 (S.D. New York 2012).

[152] *Id.* at *1.

[153] *Id.*

[154] *Id.*

a strict, particularized probable cause standard discussed in *Ybarra*.[155] *Dinler* is of no help to Plaintiffs.

Dinler is one unreported district court decision from the 2nd Circuit and, as such, is neither controlling authority for this Court nor a "robust consensus" of persuasive authority that is necessary to establish the legal principle it espouses "beyond debate."[156] To the contrary, the cases cited above from other circuits regarding the different particularized probable cause analysis that should be applied in multi-suspect cases demonstrates that the consensus of persuasive authority is *contrary* to Plaintiff's position. At best, *Dinler* shows that courts disagree on the proper probable cause analysis in factual situations such as the one in this case and such disagreement precludes any assertion that the law in this case was "clearly established."

Thus, allegations that the 4th Amendment was violated by the use of uniform, identical affidavits, and by the alleged existence of video evidence that shows Plaintiffs did not themselves engage in any violence are insufficient to overcome Reyna's qualified immunity. Legal authority exists that establishes such allegations fail to even state a claim for violation of a Constitutional right. Alternatively, the law is not clearly established that such uniform affidavits and lack of evidence tying Plaintiffs to specific conduct cannot satisfy probable cause requirements. "We cannot ask officers to make a legal determination—that law

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[155] *Id.* at *3-6.

[156] *Wesby*, 138 S.Ct. at 589-90.

professors probably could not agree upon—without any guidance from the courts and then hold them liable for guessing incorrectly. Qualified immunity exists to prevent exactly that."[157]

Plaintiffs' claim under *Franks* fails to overcome Reyna's qualified immunity.[158] In essence, Plaintiffs allege that the warrant affidavits are wrong when they say they were members of a criminal street gang, and that Defendants knew it was wrong.[159] Plaintiffs' conclusory allegation of Defendants' "knowledge" of falsity are not supported by any factual allegations. Plaintiffs plead only conclusions, rather than facts, as to the alleged "falsity" of the information itself.[160] Plaintiffs' allegations do not sufficiently implicate Reyna in any misconduct.[161] Plaintiffs have not sufficiently pled their claim under *Franks* to overcome Reyna's qualified immunity.

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[157] *Callahan*, 806 F.3d at 1029.

[158] Pl.'s Comp., pp. 43-45, ¶¶225-234.

[159] *Id.*

[160] *See Fisher v. City of Slidell*, 205 F.3d 1337 (5th Cir. 1999) (conclusory allegations that information was false and known to be false without specific factual allegations in support is insufficient to satisfy qualified immunity heightened pleading requirement); *Morin v. Caire*, 77 F. 3d 116, 121 (5th Cir. 1996); *DeLeon v. City of Dallas*, 141 F. App'x 258, 262 (5th Cir. 2005); *Rich v. Hopper*, 985 F.2d 557 (5th Cir. 1993). "[A] plaintiff in a civil suit cannot, merely by alleging that information in an affidavit is incorrect, strip an affiant of his qualified immunity." *Reed v. Marker*, 762 F.Supp. 652, 655 (W.D. Pa. 1991).

[161] Pl.'s Comp., pp. 43-45, ¶¶225-234.

Plaintiffs failed to plead a 4th Amendment claim that overcomes Reyna's qualified immunity, and he is entitled to dismissal of that claim, as well as any claim for punitive damages.[162] Further, as noted above, without an underlying Constitutional violation, there can be no liability for the County, either.[163]

2. Plaintiffs' Fourteenth Amendment Substantive Due Process Claim Fails

Plaintiffs' 14th Amendment substantive due process claim should be dismissed.[164] Substantive due process "prevents the government from engaging in conduct that shocks the conscience . . . or interferes with rights implicit in the concept of ordered liberty

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[162] The existence of, at the least, arguable probable cause to arrest is established, not only by the over 150 indictments issued by the McLennan County Grand Jury, but also by the fact that some arrestees from Twin Peaks opted to have an examining trial to determine whether there was probable cause to arrest them. At that examining trial, an independent magistrate specifically found there was probable cause. *See*, *e.g.*, Ex. 3, excerpts from Examining Trial in cause #J12F15-169, p. 7, line 4 to p. 8, line 16; and p. 100, line 20 to p. 101, line 4. (As already noted, the Court may properly consider this hearing, as the examining trial was a public proceeding in open court. *Rome*, 323 F.Supp.3d at 866; *Cinel*, 15 F.3d at 1343, n. 6). A finding of probable cause after an examining trial is an independent determination that breaks the chain of causation in a wrongful arrest claim. *Simon v. Dixon*, 141 Fed. Appx. 305, 306 (5th Cir. 2005); *Simon v. Lundy*, 139 Fed. App'x 629, 630 (5th Cir. 2005); *Taylor v. Meacham*, 82 F. 3d 1556, 1564 (10th Cir. 1996).

[163] *Heller*, 475 U.S. at 799.

[164] Pl.'s Comp., pp. 45-47, ¶¶235-245.

. . . "[165] "As a general matter, the [Supreme] Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended."[166] Thus, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims."[167]

Plaintiffs' substantive due process claims are based on their alleged unlawful arrests, the same conduct for which they bring suit under the 4th Amendment.[168] The 4th Amendment provides a direct, explicit source of Constitutional protection from unlawful seizure, and the Supreme Court has expressly held that there is no 14th Amendment substantive due process right to be free from unlawful arrest.[169] Moreover, Plaintiffs' suit simply does not fit within the very limited exception discussed in *Cole v. Carson*. *Cole* provides for a potential 14th Amendment claim when there is intentional fabrication of evidence to frame a person for a crime that the officer knows that the

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[165] *United States v. Salerno*, 481 U.S. 739, 746 (1987).

[166] *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

[167] *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998).

[168] Pl.'s Comp., pp. 45-46, ¶236.

[169] *Albright*, 510 U.S. at 270-71; *see also Bosarge v. Mississippi Bureau of Narcotics*, 796 F.3d 435, 441-42 (5th Cir. 2015); *Cuadra*, 626 F.3d at 814.

person did not commit.[170] *Cole* itself distinguished cases like *Bosarge*, where the plaintiff made conclusory allegations that the officers knowingly or recklessly included false information in a warrant affidavit.[171] Plaintiffs' Complaint is much more like the allegations in *Bosarge* than like the allegations in *Cole*.[172] Plaintiffs' Complaint is made up of conclusory allegations of Defendants "knowingly" or "recklessly" including false or misleading information in the warrant affidavit.[173] Plaintiffs also plead conclusory allegations as to the alleged "falsity" of the information itself.[174] Also, *Cole* involved a situation where law enforcement officers fabricated a criminal at when, in fact, no crime had been committed. In the case at bar, it is undisputed that multiple, serious criminal acts had occurred, distinguishing this case from *Cole*.[175] Like the plaintiff in *Bosarge*, Plaintiffs failed to state a 14th Amendment claim.[176] Plaintiffs' substantive due process claims should be dismissed.

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[170] *Cole v. Carson*, 802 F.3d 752, 772 (5th Cir. 2015).

[171] *Id.* at 767.

[172] *See Bosarge* 796 F.3d at 442-44.

[173] Pl.'s Comp., pp. 45-46, ¶¶236-238.

[174] *Id.*

[175] *See*, *e.g.*, *Hood v. McKinnon*, 2016 WL 4376517, at *11, n. 7 (S.D. Tex. 2016) (discussing the distinction between allegations of manufactured probable cause and the egregious facts alleged in *Cole*).

[176] *Cole* involved a very egregious set of facts and was intended to be limited in application. In ***most*** Fourth Amendment cases there will be allegations of false or misleading information. *Cole* was not intended to transform every Fourth Amendment

Plaintiffs' allegation that they were "deprived of their ability to freely associate with other motorcycle enthusiasts" fails to state a viable substantive due process claim.[177] The claim is conclusory and unsupported by any specific factual allegations regarding the alleged deprivation or Defendants' responsibility for it. Moreover, a freedom of association claim would be expressly governed by the 1st Amendment, not the 14th, and Plaintiffs may not therefore pursue a substantive due process claim for the alleged Constitutional deprivation.[178]

Plaintiffs' allegation that they were "deprived of their ability to travel outside of Texas" as a result of their arrests and charges fails to state a viable substantive due process claim.[179] This claim is conclusory and unsupported by any specific factual allegations regarding the alleged deprivation or Defendants' responsibility for it. To the extent the claim implicates some condition of bail, Plaintiffs failed to plead Reyna or the County's responsibility for, or involvement in, the imposition of such conditions. Indeed, Defendants, as a matter of law, cannot be held responsible for any bail issues of Plaintiffs. First, Plaintiffs expressly plead that it was Magistrate Peterson who imposed Plaintiffs

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case into a Fourteenth Amendment case by the mere addition of the word "fabricated" to the plaintiff's allegations.

[177] Pl.'s Comp., pp. 46-47, ¶241.

[178] *Lewis*, 523 U.S. at 842. And, as briefed, *infra*, Plaintiffs have no viable First Amendment claim under the facts of this case.

[179] Pl.'s Comp., p. 47, ¶242.

bail.[180] Plaintiffs could not plead otherwise, as it is a justice of the peace or a State district judge who sets bail pursuant to the requirements of State law, not a district attorney.[181] Moreover, a local judge or magistrate acting in his judicial capacity is **not** considered a local government official whose actions are attributable to a county for the purpose of liability under §1983.[182] A justice of the peace or state district judge acts in his judicial capacity when making decisions concerning bail.[183] Consequently, any justice of the

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[180] *Id.* at p. 24, ¶116.

[181] *See*, *e.g.*,TEX. CODE CRIM. PROC. §§ 17.15, 17.21, and 17.38.

[182] *See*, *e.g.*, *Krueger v. Reimer*, 66 F.3d 75, 77 (5th Cir. 1995); *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992); *Bigford v. Taylor*, 834 F.2d 1213, 1222 (5th Cir. 1988) (explaining that the job of a justice of the peace "does not involve any of the policymaking functions assigned to the county judge" and that a justice of the peace's "deliberate or mistaken departure from the controlling law cannot be said to represent county policy"); *Kastner*, 390 Fed. App'x 311, 316 (5th Cir. 2010) (judge's issuance of arrest warrants did not create an official policy for the municipality); *Cunningham ex rel. Cunningham v. City of W. Point Miss.*, 380 Fed. App'x 419, 421-22 (5th Cir. 2010) (dismissing a §1983 claim against the municipality because, "our precedents foreclose the argument that Judge Edwards operated as a municipal policymaker when he denied bail" and holding that "regardless of whether Cunningham suffered a constitutional deprivation, the City cannot be liable under the facts of this case because the claimed deprivation was not the result of an official policy, practice, or custom"); *Harris v. City of Austin*, No. A-15-CA-956-SS, 2016 WL 1070863, at *4 (W.D. Tex. Mar. 16, 2016) (Sparks, J.) (dismissing complaint after noting that "actions taken by municipal judges in their judicial capacities cannot constitute municipal policy").

[183] *Brewer v. Blackwell*, 692 F.2d 387, 393 (5th Cir. 1982); *Grundstrom v. Darnell*, 531 F.2d 272, 273 (5th Cir. 1976); *Cunningham*, 380 Fed. App'x at 421; *Washington v. City of Arlington,*

peace and/or district judge's actions in determining Plaintiffs' bail conditions cannot serve as the basis for McLennan County's liability under §1983. Finally, any Constitutional bail claim would fall under the express protections of the 8th Amendment, and Plaintiffs may not therefore pursue such a claim under the 14th Amendment.[184]

Plaintiffs' allegation that they suffered reputational harm as a result of their arrests and charges also fails to state a claim.[185] First, this allegation is really more an element of damage associated with Plaintiffs' 4th Amendment, not a separate 14th Amendment claim. If considered a separate cause of action, it is more accurately characterized as a State-law defamation claim, from which the County is protected by governmental immunity, and Reyna is entitled to dismissal pursuant to Section 101.106(e) of the Texas Civil Practice & Remedies Code.[186]

Tex., No. 2005 WL 1502150, 2005 WL 1502150, at *3 (N.D. Tex. June 23, 2005) (citing *U.S. v. Abrahams*, 604 F.2d 386, 393 (5th Cir. 1979) and TEX. CODE CRIM. PROC. §§10.01 *et seq.*).

[184] *See Lewis*, 523 U.S. at 842.

[185] Pl.'s Comp., p. 47, ¶243.

[186] *See* TEX. CIV. PRACT. & REM. CODE §101.057(2); *Univ. of Tex. Medical Branch at Galveston v. Hohman*, 6 S.W.3d 767, 777 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); *Delaney v. Univ. of Houston*, 835 S.W.2d 56 (Tex. 1992); *Jackson v. Texas A&M Univ.*, 975 F.Supp 943, 946 (S.D. Tex. 1996); TEX. CIV. PRACT. & REM. CODE §101.106(e); *Garcia*, 253 S.W.3d at 658-59; *Univ. of Tex. Health Science Ctr. at Houston v. Crowder*, 349 S.W.3d 640, 648-49 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *Franka v. Velasquez*, 332 S.W.3d 367, 375-80 (Tex. 2011); *see also* briefing of Defendants Reyna and McLennan County

Lastly, Plaintiffs' allegation that their rights to privacy were deprived as a result of their arrests and charges fails to state a 14th Amendment claim.[187] Again, this allegation is really more an element of damage associated with Plaintiffs' 4th Amendment wrongful arrest claim, not a separate cause of action for a substantive due process violation. Moreover, the claim is conclusory and unsupported by any specific factual allegations regarding the alleged deprivation or Defendants' responsibility for it. Certainly, Plaintiffs did not plead any facts demonstrating that any "conscience shocking" conduct in regards to Plaintiffs' purported privacy rights.[188]

With respect Reyna's qualified immunity, Plaintiffs failed to adequately plead that their arrests violated clearly established law and/or were objectively unreasonable. As such, Reyna is entitled to qualified immunity from any substantive due process claim based on the arrests, and the County cannot be liable as there is no underlying Constitutional violation.[189]

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regarding Defendants' immunity from any defamation *claims* in their Motion to Dismiss Plaintiff's First Amended Original Complaint in *Morgan English v. City of Waco, et al.*, cause number 1:17-CV-219, which is incorporated by reference.

[187] Pl.'s Comp., p. 47, ¶244.

[188] *Salerno*, 481 U.S. at 746.

[189] *Heller*, 475 U.S. at 799.

3. Plaintiffs' Conspiracy Claim Fails

Plaintiffs bring a §1983 conspiracy claim, alleging that the individual Defendants conspired to violate their 4th and/or 14th Amendment rights.[190] The court is not required to accept such terms as "conspiracy" as sufficient without more specific allegations.[191] To prove a conspiracy under 42 U.S.C. §1983, a plaintiff must show: (1) an agreement between private and public defendants to commit an illegal act, and (2) an actual deprivation of constitutional rights.[192] "A conspiracy may be charged under section 1983 . . . *but a conspiracy claim is not actionable without an actual violation of section 1983*.[193] Defendants demonstrate that Plaintiffs failed to plead a viable claim for any violation of their Constitutional rights. Asa result, Reyna and the County cannot be liable for any conspiracy.

In any case, Plaintiffs failed to state a conspiracy claim. Bald allegations of conspiracy are insufficient to avoid dismissal.[194] Plaintiffs must plead each Defendant's personal involvement in the alleged violation of constitutional rights and must also plead why

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[190] Pl.'s Comp., pp. 48-49, ¶¶246-251.

[191] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

[192] *Latiolais v. Cravins*, 484 Fed. App'x 983, 991 (5th Cir. 2012) (quoting *Cinel*, 15 F.3d at 1343).

[193] *Id*. at 989 (quoting *Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995)) (emphasis added).

[194] *See Twombly*, 550 U.S. at 557; *Streetman v. Jordan*, 918 F. 2d 555, 557 (5th Cir. 1990); *Lynch v. Cannatella*, 810 F. 1363, 1370 (5th Cir. 1987).

qualified immunity does not apply to each Defendant.[195] Global allegations or lumping defendants into groups in allegations does not suffice.[196] Attempts to impute to all Defendants allegations against one Defendant do not meet the required standard.[197] Plaintiffs offer no more than global allegations which lump Defendants together. Plaintiffs do not offer any specific allegations sufficient to defeat each individual Defendant's entitlement to qualified immunity.[198] Such global conspiracy allegations are insufficient. Plaintiffs' conspiracy claim should be dismissed.

4. Plaintiffs Have Failed to Plead a Viable Section 1983 Claim Against the County

Plaintiffs fail to adequately plead any Section 1983 municipal liability claim against the County, and all claims against the County should therefore be

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[195] The Court must analyze separately each individual Defendant's entitlement to qualified immunity. When Defendants alleged to have engaged in a conspiracy are shown to be entitled to qualified immunity, no claim for a §1983 conspiracy exists. *Hale*, 45 F.3d at 921; *Mowbray v. Cameron County*, 274 F.3d 269, 279 (5th Cir. 2001); *see Iqbal*, 556 U.S. at 676; *Meadours v. Ermel*, 483 F. 3d 417, 421-22 (5th Cir. 2007); *Jacobs v. West Feliciana Sheriff's Dept.*, 228 F.3d 388, 395 (5th Cir. 2000); *Andrade v. Chojnacki*, 65 F. Supp. 2d 431, 459 (W.D. Tex. 1999).

[196] *See Andrade*, at 459; *Rivera v. Kalafut*, No. 4:09cv181, 2010 WL 3701517, at *4 (E.D. Tex. June 15, 2010); *Cavit v. Rychlik*, No. H-09-1279, 2010 WL 173530, at *2 (S.D. Tex. Jan. 14, 2010).

[197] *DeLeon v. City of Dallas*, 141 Fed. App'x 258, 261, 263 (5th Cir. 2005).

[198] Pl.'s Comp., pp. 48-50, ¶¶247-256.

dismissed. First, as set forth above, Plaintiffs failed to adequately plead a cause of action demonstrating that Reyna, or any other County employee or official, violated any of Plaintiffs' Constitutional rights. In the absence of an underlying Constitutional violation, there can be no liability for McLennan County, as a matter of law.[199]

A Governmental entity is not subject to respondeat superior liability under Section 1983 solely because an employee may have violated the law.[200] Rather, to hold a county liable under Section 1983, in addition to proving an underlying Constitutional violation occurred, a plaintiff must allege and prove that the violation was caused by an official county policy, custom, or practice.[201] Locating a "policy" ensures that an entity is held liable only for those deprivations resulting from acts that may fairly be said to be those of the entity, rather than an individual employee.[202] To prevail on a "custom or practice" theory, a plaintiff must allege and prove unconstitutional practices or customs are "so permanent and well-settled as to constitute a 'custom or usage' with the force of law."[203] Isolated instances of wrongdoing do not suffice.[204] Finally, in order for a

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[199] *Heller*, 475 U.S. at 799.

[200] *Monell v. Department of Social Services*, 436 U.S. 658, 692 (1978); *Oklahoma City v. Tuttle*, 471 U.S. 808, 828 (1985).

[201] *Monell*, 436 U.S. 658.

[202] *Id.* at 692.

[203] *Id.* at 691.

[204] *Hamilton v. Rodgers*, 791 F.2d 439, 443 (5th Cir. 1986); *Fraire v. City of Arlington*, 957 F.2d 1268, 1278 (5th Cir. 1992).

governmental entity to be liable for monetary damages under Section 1983, it must be shown that the alleged official policy or custom was the "moving force" or proximate cause of the violation of the plaintiffs federally protected rights.[205]

Plaintiffs' municipal liability allegation consists of the conclusory statement that Reyna is the policymaker for all law enforcement matters relating to the McLennan County District Attorney's Office.[206] This bald legal conclusion is insufficient to state a Section 1983 claim against the County. Plaintiffs complain that they were wrongfully arrested and indicted by a tainted grand jury.[207] The final policymaking authority for a Texas county in the areas of law enforcement, preserving of the peace, and arresting of offenders is the *sheriff*.[208] Plaintiffs do not plead any involvement of McLennan County Sheriff's Office personnel in the interview and arrest of suspects much less any involvement of the McLennan County Sheriff himself. Plaintiffs therefore fail to state a claim against the County.

Plaintiffs' ratification allegations also fail to state a claim.[209] "To establish the existence of a governmental

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[205] *Monell*, 436 U.S. at 694; *Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1988), *cert. denied* 110 S.Ct. 75 (1989).

[206] Pl's Comp., p. 50, ¶259.

[207] *Id.* at p. 18, ¶85; p. 27, ¶126.

[208] *Turner v. Upton County, Texas*, 915 F.2d 133, 136 (5th Cir. 1990).

[209] Pl's Comp., pp. 51-52, ¶¶264-265, and 267-269.

custom [of] failure to receive, investigate, or at on complaints of violations of constitutional rights, a plaintiff must prove: (1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; (2) deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after [actual or constructive] notice to the officials of that misconduct; and (3) that plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was the moving force behind the constitutional violation."[210] Moreover, Section 1983 liability may be imposed on a governmental unit for alleged ratification of an employee's unconstitutional act only if "authorized policymakers approve a subordinate's decision and the basis for it . . . "[211] This ratification theory of municipal liability is further limited to "extreme factual situations," and cannot arise where policymakers simply defend the propriety of conduct that might later be found to be unlawful.[212] Rather, a plaintiff must impute the improper motives of the unlawful actor to the policymakers who allegedly ratified the conduct.[213]

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[210] *Jane Doe "A" v. Special School District*, 901 F.2d 642, 646 (8th Cir. 1990).

[211] *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (emphasis added).

[212] *Davidson v. City of Stafford, Texas*, 848 F.3d 384, 395-96 (5th Cir. 2017).

[213] *Culbertson v. Lykos*, 790 F.3d 608, 622 (5th Cir. 2015).

Plaintiffs did not allege any continuing, widespread, persistent pattern of unconstitutional misconduct which Reyna or the County's policymakers expressly approved of, or were deliberately indifferent to. Plaintiffs' suit references only the event made the basis of this suit. Plaintiffs also fail to specifically plead any express, intentional, and unlawfully motivated failure of Reyna or any County policymaker to discipline obviously illegal conduct by employees. Moreover, any defense of the decisions made in this case, which presented a unique situation of a massive riot and shoot-out in a public place, involving multiple deaths and dozens of suspects, simply does not present an extreme factual situation of a clearly unreasonable defense of undeniably unconstitutional conduct that is necessary to establish ratification.

Plaintiffs' purported ratification allegations against the County Commissioner's Court and/or the Sheriff suffer from additional deficiencies.[214] Any liability theory based on the assumption that the Commissioner's Court or the Sheriff has the authority to discipline a District Attorney is simply wrong. The Texas Constitution establishes the position of District Attorney and the position of Sheriff.[215] A sheriff is the final policymaker of a County in regards to law enforcement.[216] The Texas Constitution establishes the Commissioners

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[214] Pl's Comp., pp. 51-52, ¶¶264-265, and 267-269.

[215] *See* Tex. Const. art. V, §21 and §23.

[216] *Turner*, 915 F.2d at 136.

Court as the principal governing body of a county.[217] Nowhere in the Texas Constitution or in the Texas Local Government Code is there any provision which grants a county commissioner's court or a sheriff the authority to discipline a duly elected District Attorney. Plaintiffs' ratification claim based on a purported failure of the Commissioner's Court and/or the Sheriff to discipline Reyna fails.

Additionally, Plaintiffs' allegation that the Commissioner's Court and/or the Sheriff violated Plaintiffs' Constitutional rights by not releasing him from custody wholly fails to state a claim.[218] Plaintiffs concede that they were arrested pursuant to a warrant.[219] Plaintiffs therefore seek to impose liability on the County based on the Commissioner's Court or Sheriff's failure to release prisoners committed to the custody of the County Jail pursuant to facially valid legal process. Plaintiffs point to no authority showing that the Commissioner's Court or the Sheriff would have the legal ability to release prisoners in that situation, even if they wanted to. Plaintiffs also pled no facts indicating that the warrants under which they were incarcerated were ever invalidated, nor how the Sheriff or the Commissioner's Court would know that there was allegedly no arguable probable cause to support the arrests of Plaintiffs pursuant to those warrants. Indeed, it is difficult to imagine how such a claim could

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[217] *See* Tex. Const. art. V §18; *Commissioner Court of Titus County v. Agan*, 940 S.W.2d 77 (Tex. 1997).

[218] Pl.'s Comp., p. 52, ¶267.

[219] *Id.* at p. 18, ¶85.

reasonably be made when there were subsequent examining trials held at which an independent judge found probable cause to arrest,[220] and when a grand jury issued hundreds of indictments arising from the arrests at Twin Peaks. Plaintiffs' §1983 claims against the County are not viable and should be dismissed.

5. Plaintiffs Have Not Adequately Plead a First Amendment Claim

Plaintiffs improperly seek damages for a 1st Amendment violation which has not been pled in their Complaint. A plaintiff "is the master of his complaint and is able to choose which specific claims he wishes to assert."[221] "It is not for the Court to guess which causes of action a party intends to pursue."[222] When a plaintiff fails to assert a cause of action in his complaint but requests relief on the basis of this alleged cause of action in his relief requested portion of his complaint, the plaintiff has failed to assert the cause of action for which he can seek relief.[223] As such, a plaintiff cannot

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[220] *See* Ex. 3.

[221] *Jaimes v. Dovenmuehle Mortgage, Inc.*, No. B–07–186, 2008 WL 536644, at *3 (S.D. Tex. Feb.27, 2008) (citing *Avitts v. Amoco Production Co.*, 53 F.3d 690, 693 (5th Cir. 1995) (per curiam)).

[222] *Steward v. Prudential Ins. Co. of Am.*, No. 3:12-CV-3844-B, 2014 WL 4097632, at *7 (N.D. Tex. Aug. 19, 2014).

[223] *See Bezet v. United States*, 276 F. Supp. 3d 576, 592-93 (E.D. La), *aff'd*, 714 F. App'x 336 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 2579, 201 L. Ed. 2d 294 (2018). In the *Bezat* case, the Court allowed the plaintiff to proceed and assumed that the plaintiff intended to bring a specific cause of action when he only requested relief pursuant to that cause of action in the relief requested section of his complaint **because** the plaintiff was proceeding ***pro***

seek relief for an alleged violation where the plaintiff did not assert that specific cause of action in his complaint.

In the "Damages" section of their Complaint, Plaintiffs "seek damages as a result of Defendants' actions and conduct that have impinged on rights guaranteed by the 1st Amendment . . . "[224] However, Plaintiffs' Complaint clearly advances multiple, distinct causes of action, without ever including a cause of action under the 1st Amendment.[225] Plaintiffs cannot seek relief for an alleged violation which they failed to plead in their Complaint.[226]

Alternatively, if the Court determines that Plaintiffs has asserted a 1st Amendment claim, Plaintiffs fail to adequately allege that they engaged in any constitutionally protected activity or that any protected activity was a substantial motivating factor in their arrest. First, any assertion by Plaintiffs that their 1st Amendment rights were violated is merely a re-casting of their 4th Amendment wrongful arrest allegations. If

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se. *Bezet*, 276 F. Supp. 3d at 592-93 (emphasis added). In the case at bar, Plaintiff is being represented by competent counsel and is not in the position where his complaint should be liberally construed. Furthermore, Plaintiff has had ample opportunity to amend his Complaint to properly assert a First Amendment cause of action, and has failed to do so.

[224] Pl.'s Comp., p. 53, ¶272.

[225] *See* Pl.'s Comp., pp. 40-52, ¶¶214-269.

[226] *See Bezet*, 714 F. App'x at n. 1; *Steward*, 2014 WL 4097632, at *7; "A prayer for damages constitutes a remedy, not a claim . . . " *Jordan v. United States*, No. 15-CV-1199 BEN NLS, 2015 WL 5919945, at *3 (S.D. Cal. Oct. 8, 2015).

probable cause exists for the arrests, then there was no violation of any 1st Amendment rights of Plaintiffs, either. Moreover, if Plaintiffs failed to plead a viable 4th Amendment claim based on their arrests and failed to overcome Reyna's entitlement to qualified immunity from any claim for wrongful arrest, there was no violation of Plaintiffs' 1st Amendment rights either.

In any event, an assertion that the consideration of affiliation with a particular motorcycle club as part of a probable cause determination violates 1st Amendment rights is simply wrong. To state a claim for a 1st Amendment violation, a claimant must prove: (1) he engaged in constitutionally protected activity; (2) the defendant's actions inflicted an injury likely to cause a person of ordinary firmness from continuing to engage in the protected activity; and (3) the defendant's actions were substantially motivated by the constitutionally protected activity.[227] Plaintiffs' pleadings fail to state a claim for a 1st Amendment violation.

The criminal statute under which Plaintiffs' pleadings establish they were arrested does not criminalize mere association—it criminalizes participation in a combination of persons to commit or conspire to commit a criminal offense.[228] The motivation for Plaintiffs' arrests was their suspected commission of criminal conduct, not simply their association with a motorcycle club or motorcyclists. The persons who engaged in

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[227] *Cass v. City of Abilene*, 814 F.3d 721, 729 (5th Cir. 2016); *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002).

[228] *See* TEX. PENAL CODE §§71.01, 71.02.

violence at Twin Peaks, by Plaintiffs' own pleadings, were members of motorcycle clubs. Affiliation or association with a motorcycle club is often supported by colors, symbols, patches, clothing, etc. . . . Moreover, Plaintiffs' suspected association with a motorcycle club is merely a fact tending to establish involvement during events leading to and including the commission of a crime—and does not penalize the Plaintiffs for any protected 1st Amendment activity.[229] The criminal acts that occurred at Twin Peaks for which Plaintiffs were arrested do not qualify as 1st Amendment protected activity.[230] "Whatever the scope of [plaintiffs'] right of assembly, it does not encompass a right to associate with active members of a criminal street gang for the purpose of engaging in crime."[231] "The freedom of association protected by the 1st Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights."[232]

Plaintiffs fail to allege a viable 1st Amendment violation and thus, state a claim. As such, Reyna is entitled to qualified immunity, and there is no basis for holding the County liable.

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[229] *See Brosky v. State*, 915 S.W.2d 120, 129-31 (Tex. App.—Ft. Worth 1996, pet. red), *cert. denied*, 519 U.S. 1020 (1996).

[230] *Id*.

[231] *Ta v. Plier*, No. CV 03-00076-RSWL, 2009 WL 322251, at *33 (C.D. Cal. Feb. 6, 2009).

[232] *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 776 (1994).

6. Plaintiffs Have Not Adequately Pled an Unlawful Bail Claim

Plaintiffs seek relief for an unlawful bail cause of action that is not pled in their Complaint. In their "Damages" section, Plaintiffs state, for the first time, that "Conditions placed on Plaintiffs' bond has deprived Plaintiffs of rights guaranteed by the Constitution."[233] Plaintiffs nowhere in their causes of action, however, expressly assert an unlawful bail claim.[234] Plaintiffs have thus not properly pled an unlawful bail claim.[235] As already discussed, Plaintiffs cannot plead any excessive bail claim against Defendants. First, Plaintiffs expressly pled that Magistrate Peterson imposed Plaintiffs' bail.[236] Moreover, a local judge or magistrate acting in his judicial capacity is not considered a local government official whose actions are attributable to a county for the purpose of liability under §1983.[237] A justice of the peace or state district judge acts in his judicial capacity when making decisions concerning bail.[238] Any unlawful bail claim against Defendants must be dismissed.

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[233] Pl.'s Comp., p. 53, ¶272.

[234] *See* Pl.'s Comp., pp. 40-52, ¶¶214-269.

[235] *Bezet*, 276 F. Supp. 3d at 592-93; *Jaimes*, 2008 WL 536644, at *3; *Avitts*, 53 F.3d at 693; *Steward*, 2014 WL 4097632, at *7.

[236] *See* Pl.'s Comp., p. 24, ¶116.

[237] *See*, *e.g.*, *Krueger*, 66 F.3d at 77; *Johnson v*, 958 F.2d at 94; *Bigford*, 834 F.2d at 1222; *Kastner*, 390 Fed. App'x at 316; *Cunningham ex rel. Cunningham*, 380 Fed. App'x at 421-22; *Harris*, 2016 WL 1070863, at *4.

[238] *Brewer*, 692 F.2d at 393; *Grundstrom*, 531 F.2d at 273; *Washington, Tex.*, 2005 WL 1502150, at *3.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that the Court grant this motion and that all Plaintiffs' causes of action be dismissed, with prejudice to the refiling of same; Defendants further pray that Plaintiffs takes nothing by this suit; that all relief requested by Plaintiffs be denied; that Defendants recover all costs of suit and attorney's fees; and for such other and further relief, both general and special, at law or in equity, to which they may show themselves to be justly entitled.

Respectfully submitted,

/s/ Thomas P. Brandt

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ATTORNEYS FOR DEFENDANTS ABELINO "ABEL" REYNA AND MCLENNAN COUNTY, TEXAS

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of March, 2019, I electronically filed the foregoing document with the Clerk of the Court through the ECF system and an email notice of the electronic filing was sent to all attorneys of record.

/s/ Thomas P. Brandt

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
NO. J12F15-169

THE STATE OF TEXAS	)	JUSTICE OF THE PEACE COURT
VS.	)	
MORGAN J. ENGLISH	)	PRECINCT 1, PLACE 2
	)	MCLENNAN COUNTY, TEXAS

EXAMINING TRIAL

On the 17th day of August, 2015, the following proceedings came to be heard in the above-entitled and numbered cause before the Honorable James E. Morgan, judge presiding, held in Waco, McLennan County, Texas. proceedings reported by computerized Machine shorthand Method.

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[6] (Open court, defendants present, no jury.)

THE BAILIFF: All rise.

THE COURT: Court will be in order. You may be seated.

All right. So this is in the matters of Morgan English and William English, J12F15-167 and 169, correct?

MR. LOONEY: That's correct, Your Honor.

THE COURT: All right.

MR. JARRETT: That's correct, Your Honor.

THE COURT: All right.

MR. LOONEY: We have a preliminary issue if the Court would like to take that at this time.

THE COURT: All right. Go ahead.

MR. LOONEY: Originally, on behalf of Morgan English, Christopher Matt Buckalew made an appearance. We have filed in June a motion to substitute. It appears that it was nowhere to be found. We have refiled that last week. I don't think anybody has ruled on it yet. If the Court would – would see fit to grant that on the record, just substitute me for Mr. Buckalew, we would appreciate that. And we're ready to go forward.

THE COURT: No objection?

MR. JARRETT: We received notice, Judge. [7] We have no objection.

THE COURT: It's granted.

MR. LOONEY: Thank you.

MR. JARRETT: And just for the record, prior to the beginning of this hearing, we had discussions with the Court. The defense has asked the court to have Ms. Morgan English and her husband, William English, those cases heard in a joint Examining Trial, and the State has no objection to that.

THE COURT: Okay.

MR. LOONEY: That was our request.

THE COURT: And that is likewise granted consistent with the call that I just made.

The other matter that I want to take up. I know in reading the Code of criminal Procedure about Examining Trials, there's a lot of talk about memorializing – how you memorialize the testimony and, you know, about getting it written down and everybody signing off on it. I've requested that we do this by court reporter so that that can be obviated and not have to be complied with because that's a very burdensome kind of process. And I'm assuming that that's agreeable to both sides.

MR. LOONEY: Your Honor, until I found out that you had made that order, I had one coming.

[8] THE COURT: Okay.

MR. LOONEY: So I'm very agreeable to it.

MR. JARRETT: As is the State, Your Honor.

THE COURT: All right. The law provides, I believe, that we should first give the defendants an opportunity to make a statement and they can do so as I read it without taking an oath. They can just make a statement if they choose to do so.

Does either defendant wish to make a statement?

MR. LOONEY: We decline at this time, Your Honor.

THE COURT: All right. Then I think the purpose that we're here for is to give the State an

opportunity to show probable cause as to why these two defendants should be bound over.

MR. JARRETT: Thank you, Your Honor.

THE COURT: You may proceed.

MR. JARRETT: At this time, the State would call Lieutenant Steven Schwartz.

THE COURT: If you would raise your hand, Officer.

(Witness sworn.)

THE COURT: Please be seated.

State your name again for the record. I

* * *

[100] MR. LOONEY: Okay. Thank you.

Counsel has introduced an element that this witness never testified to in the law of parties on the actual commission of the crime. What the witness did testify to was that he had no information to share with the court of any kind that they participated or did anything that day that was illegal. The law of parties clearly isn't going to fit. The only indictment that could possibly be had would be this organized criminal activity. And he has specifically excluded that by eliminating the part of the statute that requires continuous and regular association for the commission of criminal activities.

If somehow they come up with additional evidence and they can get an indictment, what you do here today doesn't preclude that and they're easy to find. But as to the testimony today, if the testimony today is taken, an indictment can't be had on any matter and so these charges should be dismissed today.

THE COURT: Mr. Looney, you make a good argument, but it's one that I think has to be made for a jury. They will be bound over.

MR. LOONEY: May we be excused, Your Honor?

THE COURT: You may.

[101] MR. JARRETT: For the record, Judge, probable cause was found?

THE COURT: That's correct.

MR. JARRETT: Thank you, Your Honor.

(Hearing concluded.)