No. 22-

IN THE

Supreme Court of the United States

ANGIE WALLER, CHRIS WALLER, TERRY WAYNE SPRINGER AND GAYLA WYNELL KIMBROUGH,

Petitioners,

v.

RICHARD HOEPPNER AND CITY OF FORT WORTH TEXAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fifth Circuit's "narrowed" test of reasonableness of a search or seizure under the Fourth Amendment, which deems as irrelevant any of the officer's actions leading up to the moment of the use of force or the execution of the search, conflict with the decisions of this Court in *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989), holding that the reasonableness of a search or seizure requires consideration of the "totality of the circumstances"?

2. Did the Fifth Circuit decide an important question of federal law that should be but has not been settled by this Court in refusing to apply proximate cause as the measure of causation in assessing municipal liability under *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978), as this Court held applied to 42 U.S.C. § 1983 Fourth Amendment issues in *County of Los Angeles v. Mendez*, 581 U.S. 420 (2017)?

3. In rejecting jurisdiction to review the district court's denial of plaintiffs' properly pled illegal search claims against defendants Hoeppner and the City of Fort Worth, did the Fifth Circuit violate the fundamental basis of federal appellate jurisdiction required by the Judicial Act of 1789, 28 U.S.C. § 1291 (1789), confining appeals to final decisions, and this Court's decisions in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1995), and *United States v. American Railway Express Co.*, 265 U.S. 425 (1924)?

4. By the passage of the Civil Rights Act of 1871 (42 U.S.C. § 1983) (popularly known as the Ku Klux

Klan Act), given the resurgence of the Klan following the Civil War and the remedial purpose of the Act to enforce the protections of the United States Constitution, did Congress intend enforcement of the Act against municipal corporations through the common law doctrine of *respondeat superior,* contrary to Part II of this Court's decision in *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694-95 (1978)?

LIST OF PARTIES

The parties are listed in the caption.

PARTIES TO PROCEEDING AND RELATED CASES

• *Kathy Waller, Angie Waller, and Chris Waller, Plaintiffs; Terry Wayne Springer and Gayla Wynell Kimbrough, Plaintiffs/Intervenors, v. City of Fort Worth, Texas, Richard A. Hoeppner, Benjamin B. Hanlon; Jeffrey Halstead; Dana L. Baggott; Merle Davon Green; B.S. Hardin; and A. Chambers;* Case No. 3:15-cv-01808-B, U.S. District Court for the Northern District of Texas, Dallas Division. Transferred to Fort Worth Division, Case No. 4:15-cv-00670-Y (September 8, 2015).

• *Angie Waller and Chris Waller, Plaintiffs; Terry Wayne Springer and Gayla Wynell Kimbrough, Plaintiffs/Intervenors, v. City of Fort Worth, Texas, Richard A. Hoeppner, Benjamin B. Hanlon; B.S. Hardin;* Case No. 4:15-cv-00670-Y, U.S. District Court for the Northern District of Texas, Fort Worth Division. Memorandum Opinion and Order, Order Resolving Motions (April 12, 2018).

• *Angie Waller and Chris Waller, Appellees-Plaintiffs; Terry Wayne Springer and Gayla Wynell Kimbrough, Appellees-Plaintiffs/Intervenors, v. Benjamin B. Hanlon; Richard Hoeppner; B.S. Hardin, Appellants-Defendants;* Appeal No. 18-10561, U.S. Court of Appeals, Fifth Circuit. Judgment entered (April 24, 2019).

• *Waller, et al., Plaintiffs, v. City of Fort Worth and Richard A. Hoeppner, Defendants;* Case No. 4:15-cv-00670-P, U.S. District Court for the Northern District of Texas, Fort Worth Division. Order Denying Hoeppner's

Motion for Summary Judgment and Denying Plaintiffs' Illegal Search Claim (January 19, 2021).

• *Waller, et al., Plaintiffs, v. City of Fort Worth and Richard A. Hoeppner, Defendants;* Case No. 4:15-cv-00670-P, U.S. District Court for the Northern District of Texas, Fort Worth Division. Order Granting City of Fort Worth's Motion for Summary Judgment and Denying Plaintiffs' Illegal Search Claim (January 25, 2021).

• *Waller, et al. v. City of Fort Worth and Hoeppner;* Case No. 4:15-cv-00670-P, U.S. District Court for the Northern District of Texas, Fort Worth Division. Hoeppner's Notice of Interlocutory Appeal. (February 11, 2021).

• *Waller, et al. v. City of Fort Worth and Hoeppner;* Case No. 4:15-cv-00670-P, U.S. District Court for the Northern District of Texas, Fort Worth Division. Judgment entered Pursuant to Rule 54(b), Fed. R. Civ. P. (April 8, 2021).

• *Waller, et al. v. City of Fort Worth and Hoeppner;* Case No. 4:15-cv-00670-P, U.S. District Court for the Northern District of Texas, Fort Worth Division. Waller, et al.'s Notice of Appeal (April 29, 2021).

• *Waller, et al., Plaintiffs-Appellees v. Hoeppner, Defendant-Appellant;* Appeal No. 21-10129, consolidated with *Waller, et al., Plaintiffs-Appellants v. Hoeppner, Defendant-Appellee,* Appeal No. 21-10457, consolidated with *Waller, et al., Plaintiffs-Appellants v. City of Fort Worth, Texas, Defendant, Appellee.* Appeal No. 21-10458, U.S. Court of Appeals, Fifth Circuit. Opinion and Judgment entered (September 27, 2022).

• *Waller, et al. v. Hoeppner and City of Fort Worth, Texas;* Appeal No. 21-10129, consolidated with Appeal Nos. 21-10457 and 21-10458, U.S. Court of Appeals, Fifth Circuit. Order Denying Plaintiffs/Intervenors' Petition for Rehearing and Rehearing En Banc (November 15, 2022).

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The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Waller, et al. v. Hoeppner and Waller, et al. v. Hoeppner and Waller, et al. v. City of Fort Worth, Texas*, 2022 WL 4494111 (5th Cir. September 27, 2022) (App. A at 1a-13a), where the court affirmed decisions of the United States District Court for the Northern District of Texas, in *Waller, et al. v. Hoeppner*, reported at 2021 WL 633433 (N.D. Tex. January 19, 2021) (App. C at 36a-46a) (Denying Officer Hoeppner's Motion for Summary Judgment asserting qualified immunity and denying plaintiffs' illegal search claim) and in *Waller, et al. v. City of Fort Worth, Texas*, reported at 515 F.Supp.3d 577 (N.D. Tex. 2021) (App. B at 14a-35a) (Granting the City of Fort Worth's Motion for Summary Judgment on municipal liability and denying plaintiffs' illegal search claim).

Defendant Hoeppner gave notice of interlocutory appeal of the district court's denial of qualified immunity on February 11, 2021. ROA.9610-11.[1] Plaintiffs, in their Appellees' Reply Brief in response to Hoeppner's interlocutory appeal, agreed with the district court that the summary judgment record supported the court's judgment denying qualified immunity to Hoeppner, but

1. (a) The three appeals were consolidated by the Fifth Circuit in three separate records, Nos. 21-10129, 21-10457 and 21-10458.

(b) Petitioners will cite to Record No. 21-10457 since it is the most complete record. Record citations are abbreviated "ROA" and cite to pages only. Crime scene photographs will be abbreviated "CSPhotos" and cite to pages only. Autopsy photographs will be abbreviated "APhotos" and cite to pages only.

(c) The reference to Petitioners' Appellees' Reply Brief is to Doc. No. 00516091923 in Record No. 21-10457.

objected to the denial of their illegal search claim. ROA Doc. No. 00516091923 at 10 (filed 11/12/2021). Pursuant to the cross-appeal doctrine, plaintiffs were not required to file a notice of appeal or file a cross-appeal in order for the federal court to have jurisdiction of plaintiffs' appeal. *United States v. American Railway Express Co.*, 265 U.S. 425 (1924).

The district court entered judgment in favor of the City of Fort Worth, pursuant to Rule 54(b), Fed.R. Civ. P., on April 8, 2021. ROA.9644. Plaintiffs filed their notice of appeal from the judgment in favor of the city and the denial of plaintiffs' illegal search claim on April 29, 2021. ROA.9652-53.

The Fifth Circuit dismissed the appeal of both of plaintiffs' Fourth Amendment illegal search pleadings claiming lack of jurisdiction relying in part on *Waller, et al. v. City of Fort Worth, Texas*, 2018 WL 11452174 (N.D. Tex. April 12, 2018)). (App. E, 69a-104a)

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fifth Circuit's opinion was rendered on September 27, 2022. (App. A) Petitions for Panel Rehearing and Rehearing En Banc were timely filed and denied on November 15, 2022. (App. F, 105a-107a) The Fifth Circuit denied petitioners' Motion to Stay the Issuance of the Mandate on November 23, 2022. The District Court for the Northern District of Texas granted petitioners' motion to stay pending the filing and decision on this Petition for Writ of Certiorari on December 6, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States. (App. G, 108a)

Title 42 United States Code, Section 1983. (App. G, 108a)

STATEMENT OF THE CASE

The Waller family sued the City of Fort Worth and police officer Richard Hoeppner pursuant to 42 U.S.C. § 1983 for violating both the search and seizure provisions of the Fourth Amendment to the United States Constitution when Hoeppner, dispatched to a welfare/residential alarm call at 1:00 a.m., went to the wrong house, entered onto and remained in the curtilage of the Waller home and standing in the shadows of the unlit driveway seven yards outside the rear-facing garage, shining his flashlight in the face of Jerry Waller, a 72 year-old businessman, as Mr. Waller entered his attached garage, and without identifying himself, shot and killed the unarmed homeowner. (CSPhotos.2656, .2657, .2607) Based on the physical evidence, crime scene photographs, and autopsy results, two district court decisions affirmed by two opinions of the Fifth Circuit found sufficient evidence that Jerry Waller was unarmed when he was shot so as to deny qualified immunity to Hoeppner. *Waller v. Hanlon*, 922 F.3d 590 (5th Cir. 2019) (App. D at 47a-68a); *Waller v. City of Fort Worth*, 2022 WL 4494111 (5th Cir. September 27, 2022) (App. A). CSPhotos, *id.;* APhotos.2636, .2615, .2617.

At 12:49 a.m., May 28, 2013, the Fort Worth Police Department dispatched probationary officers Hoeppner

and Hanlon in response to a residential alarm activation/ welfare call at 409 Havenwood Lane N. ROA.3115-16, .2996-97, .9678, .6606, .6921, .8506.

Unable to reach the customer whose line was busy, the ADT operator advised the dispatcher: "I did reach a keyholder and she told me the owner, Mrs. Bailey, has been … sick and she would like the police to go check." ROA.2985-87. This was forwarded to the officers. *Id.*

Both officers parked in front of a curbside mailbox at address 412. ROA.2256-2269, 2987-89, 6635-40. Following Fort Worth Police Department policy and training, the officers did not verify the address clearly painted on both curbs of the Waller driveway at 404 and on the curb and mailbox across the street at 409. *Id.* Not having been taught by the city that odd-numbered addresses are on one side of the street and even on the other, the officers remained on the even-side of the street, as Hanlon explained, "… When I saw 412 and I cut my light off, I know one of the next houses was 409 which was our call location." ROA.2554-55. They then carried out the longstanding department procedure by custom, training, and policy for alarm/welfare calls such that the homeowner is *not* notified of the police presence while the officers, using their flashlights, "surveilled the landscape" searching the backyard, driveway, garage, front porch, patio, pool area, front yard, and other areas within the perimeter of the home, including the garage.[2] ROA.2554-69, .2584, .3067-70, .7097-7100, .7095-96. Having thoroughly searched the perimeter of the home, Hoeppner returned to the rear

2. Which they claim, contrary to Mrs. Waller's sworn testimony, had an open door. ROA.2597.

while Officer Hanlon went to the front door and began knocking. ROA.2535, .3067-70. He noticed a light come on in the back of the home and radioed Hoeppner to come to the front at 1:06:06 a.m. ROA.3050, .3063, .0367-70. Hoeppner did not respond. *Id.*

Jerry and Kathy Waller were awakened by their small dogs barking inside the home. ROA.3103. Telling Kathy that he thought his car alarm was causing the flashing lights Jerry, dressed in blue jeans and white socks, went to the den overlooking the patio and driveway to cut off the alarm with the key fob. *Id.* Apparently realizing that his car was not the source of the flashing lights, he armed himself with a small five-shot snub-nosed revolver and entered his attached garage. *Id.* ROA.2788-2812. According to Hoeppner, Mr. Waller appeared in his garage holding a small black revolver in his right hand pointed down. ROA.8603-05. Hoeppner immediately drew his gun and aimed it and his powerful LED flashlight at Mr. Waller's face as he had been taught to do at the police academy. ("Hit them with the light … the light conceals you … So, I'm trying to keep him from seeing me.") ROA.3002, .3162-64. Hoeppner had his Glock pistol and flashlight held on Mr. Waller right up to opening fire. ROA.908, .1005. Standing in the dark, unlit rear driveway, 20-25 feet from the garage entrance, the only words spoken by Hoeppner were when he yelled "drop the gun" three or four times in succession. ROA.3002, 3162-64; CSPhotos.2656-57, .2607. The only words spoken by Mr. Waller according to Hoeppner were, "get the light out of my eyes." ROA.2535; CSPhotos.2656, .2657, .2607.

Hanlon, waiting on the front porch heard Hoeppner yell, but, like Kathy Waller, could not understand what

he said. ROA.2535. He ran to the back of the long ranch-style home which he states took nine seconds.[3] ROA.2501, .2564, .2655.

In a tape-recorded statement given to Detective Dana Baggott at 2:48 a.m. in the Harris Hospital emergency room where Kathy Waller had been taken after entering her garage and seeing her husband of forty-six years lying prone on the floor bleeding profusely. Not having been told for certain that her husband had died, and not aware that a police officer had shot him (she was told, "they were looking for the person who did this"), Mrs. Waller stated:

> Waller: I said, 'but I see the lights, but I don't hear your alarm going off' and he said, 'oh that stupid thing does that.' ... when it does that ... he normally goes ... we have French doors leading out to the patio and he stands by the French doors and he hits this button ... and he turns them off ... well he took longer. Suddenly, I heard this pounding. I thought someone was pounding on the wall. And someone yelled something, but I don't know what they yelled, a man's voice yelled something and then they pounded. ... and I heard someone yell. Someone said something ...
>
> Baggott: Could you hear what was said?
>
> Waller: No, like I said, my hearing, and I was in the back bedroom ... and I thought with my hearing the way it is I thought some of it was loud and whoever yelled was loud ... but it was

3. Hoeppner states it took forty-five seconds. *Id.*

> multiple, multiple bangs that must have been shots.
>
> Baggott: Oh, you think it was gunshots not just something -
>
> Waller: Yeah, it must have been gunshots because ... somebody yelled something that was a ... that was a few words spoken.
>
> Baggott: Okay. Was that before or after the banging?
>
> Waller: As the banging started.
>
> **Baggott: As the banging started you heard the yelling?**
>
> **Waller: As the banging started there were words spoken.**
>
> Baggott: Okay. Could you tell if it was more than one person speaking or ...?
>
> Waller: No, it was just one person.

ROA.2588-95. (Emphasis added.)

At 1:06:50 a.m., Hanlon contacts dispatch requesting an ambulance and a sergeant. ROA.6311. In response to an inquiry from the dispatcher, Hanlon states, "I don't know who the guy is. The guy came out with a gun, wouldn't put the gun down and pointed it at Hoeppner and Hoeppner fired." *Id.* ROA.3243-44.

Initially, both officers maintained this version of the shooting, claiming Mr. Waller did not put his gun down, pointed it at Hoeppner and Hoeppner fired. ROA.3092-93, .3098-3101, .3065-69, .3120-32. Hanlon never fired his pistol. *Id.* Neither was Mr. Waller's pistol fired.[4] Both officers told Detective Green, who prepared the search warrant to use in the investigation, the same story which was then sworn to in the affidavit used to obtain the search warrant. ROA.3130-32.

The police union attorney arrived at the scene and informed both officers that they were at the wrong house. Hoeppner and Hanlon then changed their account to the current version in which they claim Mr. Waller placed the gun on the trunk of his wife's car, turned as if to re-enter his home, then turned back, grabbed the pistol and aimed it at Hoeppner. ROA.908, .1005, .2488. Hanlon claims Hoeppner was one to two feet from Mr. Waller when he grabbed the pistol with his left hand and Hoeppner shot him. ROA.2271, .2618. Hoeppner swears that he was seven yards and never closer to Mr. Waller, who grabbed the gun with both hands, aimed it at him, and he fired five rounds from that distance. *Id.* With Mr. Waller still on his feet holding the gun in both hands, Hoeppner fired a sixth

4. Detective Green, the head Critical Police Incident investigator, had Mr. Waller's pistol wiped clean prior to having it analyzed for blood, fingerprints or DNA, thus destroying essential evidence. The gun was wiped clean for the ballistics test by the Fort Worth Crime Lab even though the gun had not been discharged and had five unspent shells in the cylinder. Neither Fort Worth Police Chief Kraus nor any other expert could see a reason for not testing the gun for blood, fingerprints and DNA nor any reason for performing a ballistics test when the small revolver clearly had not been fired and thus, nothing to compare. ROA.8554-56.

round and Mr. Waller fell on the gun. ROA.2271, .2492, .2540-41, .2542, .2681, .3092-93, .3098-3010, .3065-66, .3021, .3253, .7273, .7692, .8471-72. Both plaintiffs' expert, Ed Hueske, and defendants' expert, Albert Rodriguez, agree that Hoeppner fired the first five shots in less than one second, with the last shot, according to Hoeppner, a second or two later. ROA.7356-57, .8619.

The city's Rule 30(b)(6) organizational representative, Fort Worth Police Chief Ed Kraus, admitted that the bullet wounds in Mr. Waller's left hand, there being no evidence of damages to the small pistol, made it impossible for Mr. Waller to have had the pistol in his left hand when he was shot. CSPhotos.2607, .2653, .8222, .2618, .2617, .2636, .2609, .2824; APhotos.2636, .2615, .2617; ROA.8599, .8600-12, .8618. Plaintiffs' reconstruction expert, Ed Hueske, and forensic pathologist, Dr. Amy Grusecki, agree with Chief Kraus that Mr. Waller could not have had the small revolver in his left hand nor in both hands. *Id.* Plaintiffs' experts also point to the blood spatter evidence on the left side of Mr. Waller's head and on his right palm, as conclusive proof Mr. Waller was unarmed when he was shot. CSPhotos.2646, .2622, .2607; *id.* Crime scene photos show that the unsmeared blood spatter on Mr. Waller's right hand and on the left side of his face support the plaintiffs' claim that Mr. Waller was unarmed with his hands shading his eyes when he was shot. *Id.* The autopsy revealed no gun powder residue on Mr. Waller's body, which, together with Hoeppner's testimony that he was seven yards from Mr. Waller, confirmed by the location of the spent cartridges and the angle of the bullet tracks through the torso, refute Hanlon's version of the shooting and cast doubt on whether Hanlon even witnessed the shooting. *Id.* ROA.2542, .7283, .7692. Hanlon was fired for

falsifying a sworn probable cause affidavit in an unrelated matter a short time after this shooting. ROA.3359.

The district court's decision denying Hoeppner's motion for summary judgment outlines the evidence supporting denial of qualified immunity to Hoeppner:

> *First*, Waller could not have held the gun in his right hand because his right palm had blood droplets. If the gun was in his right hand, it would have prevented blood from reaching his palm. Or at least, as the gun left his hand, the gun would have left any blood on the hand smeared. Although there are doubtless other explanations about how blood got onto Waller's right hand even though he was holding a gun, this evidence does support Plaintiffs' story. A rational juror could conclude that holding a gun would block blood droplets from getting onto Waller's palm, or that the gun would have smeared the blood around on his hand.

(App. C at 43a)

> *Second,* Waller could not have held the gun in his left hand because its pattern of wounds. If the left hand were holding a gun, the bullet's path through Waller's left hand seems impossible. *See* Pls.' Resp. to Hoeppner MSJ App'x at 200. A bullet travels in a straight line, and there is no way to draw a straight line through the bullet holes if the hand was holding a gun. Also, given the bullet's necessary path between thumb and index finger, it is likely, if Waller's left hand

> were holding the gun, that the gun would have damage. But the gun had no damage.

(App. C at 43a-44a)

> *Finally,* Waller's injuries are consistent with him holding his hands above his eyes when he was shot. Hoeppner was shining his flashlight into Waller's face, which would have affected Waller's vision. It seems reasonable that Waller would have used his hands to block the light from his eyes. The first shot may have hit Waller's left hand as he was holding it in front of his eyes. This also would explain the blood on the left-side of Waller's face. That blood may have been the splatter from his left hand that was held near his eyes. The remaining shots hit Waller's chest and abdomen in a downward direction, consistent with him falling forward.

(App. C at 44a)

In affirming the district court, the Court of Appeals observed:

> The medical examiner noted seven gunshot wounds from the six shots fired. Hoeppner shot Waller in the torso and through the outside of the left thumb and through the first and second fingers. Plaintiffs contend that the shot to the left hand, together with the direction of the shots to the torso, are consistent with Waller being shot while standing upright with his hands shading his eyes with the left hand in

> front of the right. The small handgun had no damage suggesting it was not held in the left hand or in both hands. They contend that the gunshot wounds to the fingers, a blood spatter pattern on the left side of Waller's face, and an unsmeared blood spatter on his right hand, all of which are shown in the crime scene and autopsy photographs demonstrate that Waller was unarmed when he was shot.

(App. A at 4a-5a)

According to Officer Hoeppner's description of the shooting, Mr. Waller had the small revolver in both hands and never dropped the gun when Hoeppner fired six shots from his Glock semi-automatic pistol while also aiming his powerful LED flashlight at Mr. Waller's face. ROA.908, .1005. Hoeppner describes the shooting:

> ... I put rounds on him he starts falling and kind of like ... it wasn't like falling like, it wasn't a free fall he kind of bent over. And then a lot of times in the academy … we see uh, play videos of people getting hit and they just bend over and all of a sudden they're re … (sic) re-engaging, you know. We have to stop all the threat. He was still a threat with the gun in his hand. And then so like I shoot him … I shoot him and then he falls on top of the gun.

ROA.2488.

The physical evidence shows that Mr. Waller did not fall on "top of the gun" as claimed by both officers and

Officer B.S. Hardin, who claimed to have retrieved the pistol from underneath Mr. Waller's body. The crime scene photos show the small revolver about two feet from Mr. Waller's head, but devoid of any evidence it had been under his body in a pool of blood. CSPhotos.2607, .2609, .2623, .2624, .2647. There is no blood on Mr. Waller's right arm and only blood spatter in the palm of his right hand, contrary to Hardin's claim that both hands were under the body with the gun near his chest all in a pool of blood. *Id.*

Furthermore, the testimony of disinterested witnesses, MedStar Paramedic Joe Gonzalez and MedTech Aundrea Campbell, refute the officers' claim that Mr. Waller fell on the small pistol with his hands under his chest in a pool of blood. *Id.,* ROA.1601.07. Both ambulance personnel were warned upon arrival about the gun near Mr. Waller's head by an officer and discussed its location and whether the body should be moved. *Id.* The gun's location was documented in their medical reports and CPI statements and also identified by the paramedic in crime scene photos. CSPhotoes.2608, .2610. The gun and its location were discussed prior to Mrs. Waller entering the garage which was prior to officer Hardin and his partner even arriving at the scene. ROA.1613.

REASONS FOR ALLOWANCE OF THE WRIT

1. Review is warranted to resolve whether the Fifth Circuit's "narrowed" test of the reasonableness of a search or seizure under the Fourth Amendment, which deems irrelevant all evidence prior to the moments just before the officer's use of force or execution of a search, conflict with this Court's decisions in *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), holding that the reasonableness of a search or seizure requires consideration of the "totality of the circumstances."

Since the Court's holdings in *Garner* and *Graham*, each court of appeals,[5] except for the Fifth Circuit, applies the "totality of the circumstances" test of objective reasonableness, which this Court described in *Graham*:

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5. 1st Circuit *Lachance v. Town of Charlton,* 990 F.3d 14 (1st Cir. 2021)
2nd Circuit *Sullivan v. Gagnier,* 225 F.3d 161 (2nd Cir. 2000)
3rd Circuit *Santini v. Fuentos*, 795 F.3d 410 (3rd Cir. 2015)
4th Circuit *E.W. by and through T.W. v. Dolgos*, 884 F.3d 172 (4th Cir. 2018)
6th Circuit *Burgess v. Fischer*, 735 F.3d 462 (6th Cir. 2013)
7th Circuit *Payne v. Pauley*, 337 F.3d 767 (7th Cir. 2003)
8th Circuit *Banks v. Hawkins*, 999 F.3d 521 (8th Cir. 2021)
9th Circuit *Estate of Lopez v. Gelhaus*, 871 F.3d 998 (9th Cir. 2017)
10th Circuit *Harte v. Bd. of Commr's of Cty. of Johnson, Kansas*, 864 F.3d 1154 (10th Cir. 2017)
11th Circuit *Hammett v. Paulding*, 875 F.3d 1036 (11th Cir. 2017)
D.C. Circuit *Hall v. District of Columbia*, 867 F.3d 138 (D.C. Cir. 2017)

> Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application … (citations omitted), however its proper application requires careful attention to the facts and circumstances of each particular case … *See Tennessee v. Garner*, (citation omitted) (the question is "… whether the totality of the circumstances justifie[s] a particular sort of search or seizure.")

490 U.S. at 396; *Garner*, 471 U.S. at 9.

Only the Fifth Circuit has chosen to narrow the scope of reasonableness in considering whether a "particular sort of search or seizure" violates the Fourth Amendment. The Fifth Circuit has repeatedly held, as the panel did here, that, "… any of the officers' actions leading up the shooting are *not relevant* for the purposes of an excessive force inquiry in this Circuit."[6] (Emphasis added.) *Waller*, 2022 WL 4494111 at *4. (App. A at 10a-11a) Thus, as here, relevant evidence of the reasonableness of the search or seizure is by law eliminated from consideration.

Following this precedent in ruling on the city's motion for summary judgment, the district court observed that it was "tragic" that "… an innocent man lost his life," but that the court could only consider the forty-four seconds between the time Mr. Waller entered his garage and Hanlon called for an ambulance and a sergeant. *Waller*, 515 F.Supp.3d at 580. (App. B at 15a, 24a-25a) "It follows that the court must ignore the case's most disturbing fact – that the officers were at the wrong house." *Id.* at 25a.

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6. *Citing, Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014).

The Fifth Circuit panel applied the "narrowed test" of reasonableness to the summary judgment evidence excluding the very policies that violate the Constitution and were at work dictating the action taken by the officers right up until the end holding this evidence "not relevant":

> This means that a city policy or custom had to directly influence the use of excessive force during the crucial forty-four seconds of the shooting. Plaintiffs allege policies and customs that relate to the series of events that preceded that timeframe. We agree with the district court, "[t]hese policies may be 'but for' causes but they are not the moving force behind Hoeppner's use of force."

Waller, 2022 WL 449411 at *4. (App. A at 10a-11a)

The city's policy did not require officers to verbally identify themselves. ROA.908, .2535, .3002, .3162-64, .2608; CSPhotos.2656, .2657. The city supports Hoeppner's admitted failure to do so in confronting Mr. Waller in the early morning darkness. *Id.*

Both the district court and the Fifth Circuit misstate the record claiming Hanlon identified himself:

> As for the failure to identify theory, the city and district court emphasize that there is "undisputed evidence that Hanlon did verbally identify as police."

(App. A at 11a; App. B at 26a-27a)

This statement ignores valid, relevant contradictory summary judgment evidence, favorable to the plaintiffs as non-movants, which thoroughly refutes Hanlon's claim that he identified himself as "police." Kathy Waller's statement to Detective Baggott at Harris Hospital, approximately an hour and a half after her husband was shot and without knowing who shot him and whether he was still alive, clearly states that the gunshots that killed her husband occurred immediately after the yelling began: "one person" "yelled something it was … it was a few words spoken" - "… **as the banging started there were words spoken**." [Emphasis added.] ROA.2588-95. Hanlon was on the Wallers' front porch when he too heard Hoeppner yell, but like Kathy Waller, he could not determine what was yelled. ROA.2535. He ran to the back which he estimates took nine seconds. ROA.2501. Hoeppner states it took forty-five seconds. ROA.2564. The six shots took two seconds. ROA.7356-57, .8619. There was not time for Hanlon to run to the back and witness the shooting which explains the numerous discrepancies in his account. Kathy Waller's statement was submitted as summary judgment evidence, as part of the official police investigation file ("CPI"). It is a public record in Texas, thus admissible pursuant to Rules 803(8), Fed. R. Evid. Her statement is also admissible as a present sense impression, Rule 803(a), as an excited utterance, Rule 803(2), and pursuant to the Residual Exception Rule, 807(a)(1) and (2), Fed. R. Evid. Since Mrs. Waller died in 2017, her statement is also admissible, pursuant to Rule 804(a)(4)(b)(1)(A)(B), Fed. R. Evid. The five shots that took Jerry Waller's life, experts for both sides say, took less than one second. Mrs. Waller states as the yelling commenced, the shots were fired. Hanlon had not arrived at the rear of the home and could not have announced "police" as he claims. Furthermore,

his account of the shooting in which he claims Hoeppner shot Mr. Waller at a distance of one to two feet is contrary to the physical evidence. There is no gunpowder residue on Mr. Waller's body, and the angles of the shots are such that Mr. Waller was almost prone when struck by the last shot. *Id.;* ROA.2542, .7283, .7692. The location of the spent cartridges were over twenty feet from Mr. Waller's body, together with Hoeppner's testimony that he was seven yards from Mr. Waller during the entire encounter, all show Hanlon never witnessed the shooting. *Id.*

Both the Fifth Circuit and the district court have failed to adhere, "… to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justiciable inferences are to be drawn in his favor.' *Anderson v. Liberty Lobby, Inc.*, (citation omitted)." *Tolan v. Cotton*, 572 U.S. 650, 651 (2014). Thus, the plaintiffs' evidence viewed in the light most favorable to them as non-movants and in considering all reasonable influences from the evidence, it is clear that Hanlon did not witness the shooting and neither he nor Hoeppner announced their presence as officers contrary to the reasonableness required by the Fourth Amendment. These officers, in complying with their training and city policy, not only went to the wrong address (which with simple rudimentary training would have avoided), but trespassed on the curtilage of the Waller home in setting up the "perimeter surveillance," intruded onto the curtilage of "the entire landscape around the house," garage, porch and patio as described by Hoeppner without notice to the homeowners. In *Caniglia v. Strom*, this Court disapproved as violative of the Fourth Amendment the warrantless search of a house where, as here, there was no warrant and no exigent circumstances. 141 S.Ct. 1596, 1599-1600 (2021).

During the entire time, Mr. Waller, in his garage, and Hoeppner, in the darkened driveway were both within the curtilage of the Waller home, which this Court has long-held is protected by the Fourth Amendment. In *Collins v. Virginia*, 584 U.S. ___, 138 S.Ct. 1663, 1670 (2018), this Court addressed the importance of protection of the curtilage:

> … the Fourth Amendment's protection of the curtilage has long been black letter law … 'At the Amendment's 'very core' stands 'the right of a man to retreat into his home and there be free from unreasonable governmental intrusion'.' (quoting *Silverman v. United States*, (citation omitted). To give full practical effect to that right, the Court considers curtilage – 'the area immediately surrounding and associated with the home' – to be "'part of the home itself for Fourth Amendment purposes'.' *Jardines*, (citation omitted).
>
> ….

Id. at 1670; see also, *Caniglia v. Strom*, at 1596, 1599.

> The "'conception defining curtilage' is … familiar enough that it is 'easily understood from our daily experience.'" *Jardine*s, (citation omitted) (quoting *Oliver*, citation omitted). … Just like the front porch, side garden, or area "outside the front window" *Jardines*, (citation omitted), the driveway enclosure where Officer Rhodes searched the motorcycle constitutes "an area adjacent to the home and 'to which the activity of the home life extends,'" and

> so is properly considered curtilage. (Citation omitted.)

Collins, 138 S.Ct. at 1671.

Both officers entered and remained on the curtilage of the Waller home, in the driveway, porch and entire perimeter of the home without warrant, probable cause, or exigent circumstances, and did so, pursuant to city custom, policy and training, not just temporarily, but throughout their entire search and surveillance of the entire landscape, setting up a perimeter around the home. This was not just temporary, since both remained on the curtilage the entire time up to and including Hoeppner's shooting of Jerry Waller.

This city policy authorized and dictated the unconstitutional intrusion on the curtilage carried out by Officers Hoeppner and Hanlon in violation of the Fourth Amendment. As this Court stated in *Collins*:

> When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. *Jardines*, (citation omitted). Such conduct thus is presumptively unreasonable absent a warrant.

138 S.Ct. at 1663.

Failing to identify as police officers, under the circumstances presented here, was an approved policy of the Fort Worth Police Department that is contrary to the Fourth Amendment since the policy allows for the illegal intrusion onto the curtilage without notice to the

homeowner. The failure to inform the homeowner when confronted is a right of announcement, a right afforded at common law predating our Fourth Amendment and that is afforded even persons for whom a magistrate has determined may be involved in criminal activity and thus, served with a warrant permitting police entry on their curtilage and in the home. *Wilson v. Arkansas*, 514 U.S. 927, 933 (1995); *Miller v. United States*, 357 U.S. 301, 306-12 (1958).

The Fifth Circuit's "narrowed test" of reasonableness failed to consider the totality of the circumstances as required by *Garner* and *Graham*. Consequently, the Fifth Circuit panel erroneously analyzed the issue of causation under *Monell*, claiming that the city's policies "precede[d]" the forty-four seconds prior to the shooting. Rather, the city's policies, including officers failing to identify, continued to govern the officers' actions in their initial and continued intrusion onto the curtilage right up to and including the shooting. The city policy of lack of notice to the Wallers of the police presence and intrusion onto the curtilage of their home was an illegal search that proximately caused Mr. Waller's death. *See Caniglia, id.* at 1599. The "narrowed test" refused to consider the evidence in a light most favorable to the plaintiffs.

The district court has, with the approval of the Fifth Circuit panel, speculated as to Hoeppner's "decision-making" when the test of reasonableness is an objective not a subjective one. *See Caniglia, id.* at 1599; *Graham,* 490 U.S. at 392.

> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an

> excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. (Citations omitted.)

Graham, 490 U.S. at 397.

The panicked yelling from Hoeppner, according to Hanlon and Mrs. Waller, when he yelled at Mr. Waller to drop the gun, was a direct cause of where the city policies and training placed Hoeppner, in the darkness of the curtilage surrounding the Waller home. It was and is clearly foreseeable that a citizen looking to protect his family and his property could be placed in a deadly confrontation with an unidentified officer surreptitiously setting up a perimeter around the curtilage of the citizen's home without the knowledge of or notice to the homeowner. *See District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008).

Plaintiffs' expert, Bob Taylor, Ph.D., a full professor at the University of Texas at Dallas in the graduate level of the Criminal Justice Program, a former Chair of the Department of Criminal Justice at the University of North Texas, a former police officer, and a co-author of *Criminal Investigations* (12th ed. 2018) and *Police Administration Structure Procedures and Behaviors* (9th ed. 2017), leading police practices textbooks, states in his sworn declaration and in his deposition that requiring the officers to verbally identify themselves especially at night, announce their presence, verify the street address and understand the street address system, as

well as being trained and having a policy not to enter the curtilage without having a warrant, probable cause or exigent circumstance are standard practices, policies and procedures for law enforcement agencies throughout the country. ROA.7191-94, .7202-05, .7218-220, .7202-05, .7092-7109, .7188, .7176-84. He states that the failure of then Police Chief Halsted (policymaker by ordinance) and the Fort Worth Police Department to have such policies in place and followed at the time of Mr. Waller's death was contrary to law enforcement practices throughout the nation. *Id.* Chief Halstead and the Fort Worth Police Department knew or should have known their policies would cause a risk of injury or death to citizens or officers by failing to adopt and enforce proper practices. *Id.*

2. The Fifth Circuit by refusing to apply proximate cause as the proper measure of causation in assessing municipal liability under *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978), decided an important question of federal law that should be but has not been settled by this Court, which has held that proximate cause is the proper measure of causation in 42 U.S.C. § 1983 Fourth Amendment violations in *County of Los Angeles v. Mendez*, 581 U.S. 420 (2017).

In *County of Los Angeles v. Mendez*, 581 U.S. 420 (2017), this Court held that Section 1983 "creates a species of tort liability" such that damages for constitutional violations are those proximately caused by the violation. 581 U.S. at 431. Thus, this Court has made it clear that victims of Section 1983 constitutional violations are to be awarded damages for injuries proximately caused by the constitutional violation. *Id.* Municipal liability under

Monell is no different than other liability questions. Nevertheless, the Fifth Circuit held that none of the policies identified by the plaintiffs were a "moving force" in Officer Hoeppner's use of excessive force. 2022 WL 4494111 at *4. (App. A at 11a)

In the forty-four years since *Monell* was decided, no court has provided a definition of "moving force." In *Board of County Commrs' of Bryan Cty. OK v. Brown*, 520 U.S. 397, 404 (1997), this Court held that a plaintiff must "demonstrate a direct causal link between the municipal action and the deprivation of federal rights." "Direct causation" means proximate cause as Justice Scalia points out in his dissent in *Babbitt v. Sweet Home Chapt. of Comms. for a Great Oregon*, 515 U.S. 687, 732-33 (1995). "In fact, 'proximate' causation simply means 'direct causation.' *See, e.g., Black's Law Dictionary*, 1103 (5th ed. 1979) (defining '[p]roximate' as 'Immediate; nearest; direct.')" *Id.* Justice O'Connor, the author of this Court's opinion in *Brown*, in a separate concurrence in *Babbitt*, agrees. *Id.* at 711-14. This Court, in an extensive discussion of causation in *Paroline v. United States*, 572 U.S. 434 (2014), explores in depth the definitions of factual causation described as "but for" causation and proximate cause which is "cause in fact," plus foreseeability. 572 U.S. at 442-50. There can be more than one proximate cause of an event. 572 U.S. 444.

As the plaintiffs' evidence shows, it was reasonably foreseeable that following the city's policy of warrantless entry onto the curtilage, failing to identify as officers, and failing to verify the address, particularly at night, would lead to confrontation between officers and citizens legitimately armed to protect their families and property against intruders. Plaintiffs' experts, Dr. Taylor and Ed

Hueske, point out that over one-half of adults in Texas own firearms. ROA.7202-05. The city's policies are not followed anywhere else in the United States. ROA.7188, .7202-08, .7176-84. These policies violate the Fourth Amendment. See *Caniglia, id.*; *Collins, id.* The city's policies, which none of the city's witnesses dispute, exist and remain in use. They are, as a matter of law, unconstitutional.

As this Court held in *District of Columbia v. Heller*:

> … the inherent right of self-defense has been central to the Second Amendment. The handgun ban amounts to a prohibition of an entire class of "crime" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family and property is most acute.

554 U.S. 570, 628-29.

It is clearly foreseeable that the city's policy will result in homeowners making contact with officers illegally intruding onto the curtilage of their homes carrying out these policies and causing foreseeable harm to both officers and homeowners.

3. In denying jurisdiction of plaintiffs' illegal search pleading, the Fifth Circuit decided an important federal question that conflicts with this Court's decision on the collateral order doctrine in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1995), the cross appeal doctrine in *United States v. American Railway Express Co.*, 265 U.S. 425 (1924), and the Judiciary Act of 1789, 28 U.S.C. § 1291 (1789).

The Fifth Circuit held it had no jurisdiction of plaintiffs' illegal search claim because the plaintiffs failed to timely appeal the dismissal of the plaintiffs' search claim by District Court Judge Means in his 2018 decision denying Officer Hoeppner's Rule 12(c) motion asserting qualified immunity. *Waller*, 2022 WL449411 at *5. (App. A at 11a-13a) Both the district court and the Fifth Circuit quote only a part of Judge Means' order, omitting that part contained in the brackets, "… any claims that were intended to be brought by plaintiffs against any defendant, but that the court has not addressed *[because it was unable to decipher such claims]* should be and, hereby are dismissed." [Brackets and italics added.] *Waller*, 2018 WL 1145274 at *1. (App. E at 70a-71a) Both the district court and the Fifth Circuit, however, fail to state that Judge Means did specifically "address" plaintiffs' illegal search claims which are clearly stated in paragraphs 82-83 and 86-87[7] of Plaintiffs' First Amended Complaint. *See* n.7.

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7. 82. At all relevant times, Defendant Hoeppner was acting under color of state law as a uniformed police officer for the City of Fort Worth. His use of deadly force against an unarmed 72 year-old father and grandfather, Jerry Waller, while Waller had both his hands in the air, standing in his own garage, was objectively unreasonable under clearly established law at the time of its occurrence, in violation of

The district court not only "addressed" plaintiffs' illegal search claim, but cited the very paragraphs in plaintiffs' First Amended Complaint alleging that the illegal search of their residence was a cause of Mr. Waller's death. *Id.* Judge Means, in part, stated:

> Jerry Waller's rights under the Fourth Amendment to the U.S. Constitution and art. I, § 9, of the Texas Constitution.
>
> 83. Defendant Hoeppner, by his assault on an unarmed Jerry Waller, entered upon the Wallers' property and house, and invaded the privacy of their home, all without a warrant and without probable cause and thus, in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution and art. I, §§ 9 and 19, of the Texas Constitution.
>
> ….
>
> 86. On the occasion in question, Jerry Waller, his wife, Kathy, were peacefully enjoying their home in the Woodhaven section of east Fort Worth when, without their permission, without any lawful right to enter their property or their home or intrude upon their seclusion and privacy, Defendant Hoeppner trespassed and entered upon their property and caused the bodily assault, injury and death to Jerry Waller while he was within the confines of the Waller home. Defendant Hoeppner violated Jerry Waller's rights under art. I, §§ 8, 9, 13, and 19, of the Texas Constitution and pursuant to the Texas Declaratory Judgment Act and for violation of the right to be free from unreasonable searches or seizures and due process of law under the Fourth and Fourteenth Amendments to the U.S. Constitution and art. I, §§ 8, 9, 13, and 19, of the Texas Constitution.
>
> 87. Defendant Hoeppner entered upon the property and invaded the home of Jerry and Kathy Waller on the occasion in question and took the life of the unarmed Jerry Waller by excessive force in violation of the rights guaranteed to them by the Fourth Amendment to the U.S. Constitution and art. I, §§ 9, 13, and 19 of the Texas Constitution.

> Plaintiffs allege that Hoeppner "entered upon [the] Wallers' property and house, and invaded the privacy of their home, . . . without a warrant [or] . . . probable cause," and used unlawful deadly force against Jerry Waller. (Pls.' 2d Am. Compl. (doc. 45-1) 23, ¶¶ 82-83.) Thus, plaintiffs contend, Hoeppner "violat[ed] . . . the Fourth and Fourteenth Amendments to the U.S. Constitution." *Id.*

(App. E at 81a)

> . . . .
>
> Again, taking plaintiff's allegations as true, Jerry Waller—at the moment he was shot—did not pose an immediate threat to Hoeppner or anyone else. Thus, Hoeppner's use of deadly force would have been unlawful, which should have been apparent to him at the time he fired his weapon.

(App. E at 84a)

Judge Means obviously did not need to decipher the search and seizure claims and clearly *did not dismiss them*.

In denying Hoeppner's claim of qualified immunity, Judge Means combined the search question with the excessive force claims, a common practice, but an erroneous one as this Court pointed out in *Mendez*, 581 U.S. at 428. There, officers were found to have qualified immunity in the excessive force claim, but they entered the wooden shack where two people were living without

a warrant thus, raising an illegal search issue which the Court held is a separate issue from that of excessive force:

> This approach mistakenly conflates distinct Fourth Amendment claims. Contrary to this approach, the objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional. An excessive force claim is a claim that a law enforcement officer carried out unreasonable seizure through a use of force that was not justified under the relevant circumstances. It is not a claim that an officer used reasonable force after committing a distinct Fourth Amendment violation such as an unreasonable entry.

Id. at 428-29.

> ….
>
> Thus, there is no need to dress up every Fourth Amendment claim as an excessive force claim. For example, if the plaintiffs in the case cannot recover on their excessive force claim, that will not foreclose recovery for injuries proximately caused by the warrantless entry. The harm proximately caused by these two torts may overlap, but the two claims should not be confused. (Emphasis by the Court.)

Id. at 431.

The Fifth Circuit then held that plaintiffs should have *appealed* Judge Means' ruling: "From this order, plaintiffs failed to timely appeal any claims other than the excessive-

force claim." *Waller, id.* at *5. (App. A at 11a-12a) Plaintiffs could not and did not appeal Judge Means' decision on "excessive force" which denied qualified immunity to Hoeppner on his Rule 12(c) motion to dismiss as plaintiffs' requested. *Waller,* 2018 WL 11452174 at *7. (App. E at 84a) Thus, Judge Means' ruling was only appealable on interlocutory appeal by Hoeppner, but not by plaintiffs, pursuant to the collateral order doctrine and this Court's rulings in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Mitchell v. Forsyth*, 472 U.S. 571 (1985). *See Waller v. Hanlon*, 922 F.3d 590 (5th Cir. 2019). Plaintiffs had no right to take an interlocutory appeal since the collateral order doctrine applies to a small number of orders: "… separate from, and collateral to, rights asserted in the action …" *Cohen,* 337 U.S. at 546. "A major characteristic of the denial or granting of a claim appealable under *Cohen's* "collateral order" doctrine is that "unless it can be reviewed before [the proceedings terminate], it can never be reviewed at all. (Citations omitted.)" *Mitchell* at 525; *Cohen,* 337 U.S at 546. A pleading defect, such as presents here, permits no such grounds for collateral order jurisdiction. The pleading is part of the case itself and reviewable on final judgment. Even if Judge Means' order struck plaintiffs' pleading, it was interlocutory and remained so until ruled on by Judge Pittman in: (1) denying Hoeppner's motion for summary judgment alleging qualified immunity; and (2) in granting the city's motion for summary judgment, the city having not been a party to Hoeppner's Rule 12(c) motion.

Plaintiffs, in their Appellees' Brief in the Fifth Circuit, raised the issue of their illegal search claim asking the court to affirm denial of Hoeppner's claim of qualified immunity but to reverse the district court's ruling striking

plaintiffs' illegal search pleading as fully compliant with Rule 8, Fed. R. Civ. P., and this Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). Plaintiffs' objection to a part of the district court's opinion while moving to affirm the resulting judgment without asking for any additional relief invokes the federal court's jurisdiction pursuant to the cross-appeal doctrine in *United States v. American Railway Express Co.,* 265 U.S.425 (1924). There, the Court held that no cross-appeal is necessary to challenge contentions that were rejected by the district court in an appealable order so long as the appellee does not seek to enlarge the relief granted by the judgment. That is the case here. *See,* Wright & Miller, *Federal Practice and Procedures,* Jurisdiction 2d § 3904 (1992). Thus, the Fifth Circuit erroneously claimed to not have jurisdiction of plaintiffs' pleading that an illegal search was a proximate cause of Jerry Waller's death.

Furthermore, plaintiffs' pleading was "addressed" by Judge Means and not dismissed. The pleading, as set out in footnote 7, and discussed by Judge Means fully complies with this Court's ruling in *Ashcroft v. Iqbal*, *id.*, and this Court's teaching in *Mendez, id.*, on the proper separate pleading and proof of search and seizure claims. *Id.* at 428-29.

4. By the passage of the Civil Rights Act of 1871 (42 U.S.C. § 1983) popularly known as the Ku Klux Klan Act, given the resurgence of the Klan following the Civil War, Congress intended the Act to provide a federal remedy for violations of the United States Constitution against all "persons," including municipal corporations, through the well-recognized at the time common law doctrine of *respondeat superior,* but the refusal to apply the doctrine in Part II of this Court's decision in *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694-95 (1978), merits reconsideration of the denial of *respondeat superior* as part of the intended enforcement mechanism of the Act.

The Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983, was enacted to provide a federal remedy to stop the Ku Klux Klan's "reign of terror" in the southern states following the passage of the Fourteenth and Fifteenth Amendments. In a March 23, 1871 letter to Congress, President Grant stated that the Klan had, "… render[ed] life and property insecure and the carrying of the mails and collection of revenues dangerous" and that, "… power to correct these evils [was] beyond the control of state authorities." Cong. Globe, 42nd Cong. 1st Sess. 244 (1871).

Signing the Act into law on May 3, 1871, President Grant issued a proclamation calling the act a "law of extraordinary public importance." Ron Chernow, *Grant*, (2017), p. 706. Historian Chernow in his seminal work, *Grant,* documents the atrocious murders of the newly freed black citizens throughout the south spurred on by former Confederate General Nathan Bedford Forrest, who urged white southerners to "Go out and shoot the radicals." *Id.* at 707.

When a joint congressional committee travelled to South Carolina to gather testimony on the Klan's resurgence, it became "abundantly clear that the Klan's word was law in many counties." *Id.* at 707. Grant's Attorney General Amos Akerman, himself a southerner, sent Grant a report on Klan activity that portrayed the Klan as "a comprehensive movement that spanned the entire white community." *Id.* at 707-708. Akerman reported that the Klan embraced "at least two-thirds of the active white men of these counties, and have the sympathy and countenance of a majority of the other third." *Id.* at 708. He told Grant: "I doubt whether from the beginning of the world until now a community, nominally civilized, has been so fully under the dominance of systematic and organized depravity." *Id.* at 709.

Despite this history and the remedial purpose of the Act to remedy violations of the Constitution and recognizing that corporate entities, including municipalities, can act only through their agents and employees, Section 1983 has been reduced to a dead letter by Part II of this Court's decision in *Monell* holding municipal corporations are not liable for the acts of their employees as are the employees of every other business, both private and public, through the doctrine of *respondeat superior.*

As Justice Stevens states in his very persuasive and well-documented dissent in *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 835-44 (1985), the doctrine of *respondeat superior.* was "well-recognized in the common law of the several states and in England" when Section 1983 was passed." There were no objections to the language of Section 1983 (Section 1 of the Act), in the legislative history. Justice Stevens reminds us that this Court approved the "common law principles" interpretation of

Section 1983 in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981):

> It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum. In the Civil Rights Act of 1871, Congress created a federal remedy against a person who, acting under the color of state law, deprives another of constitutional rights. One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.

Justice Stevens thoroughly documents not only the clear historical common law adherence to *respondeat superior* for municipal corporations, but moreover, cites with "greatest importance" the "nature of the wrong for which Section 1983 provides a remedy".

> The Act was primarily designed to provide a remedy for violations of the United States Constitution – wrongs of the most serious kind. As the plurality recognizes, the individual officer in this case was engaged in "'unconstitutional activity." But the conduct of an individual can be characterized as "unconstitutional" only if it is attributed to his employer. The Fourteenth Amendment does not have any application to purely private conduct. Unless an individual

> officer acts under the color of official authority, § 1983 does not authorize any recovery against him. But if his relationship with his employer makes it appropriate to treat his conduct as state action for purposes of constitutional analysis, surely that relationship equally justifies the application of normal principles of tort law for the purpose of allocating responsibility for the wrongful state action.

471 U.S. at 839-840.

Thus, normal rules of tort law should apply. This Court, in its 2017 opinion in *Mendez*, held that Section 1983 "'creates a species of tort liability' informed by tort principles…" 581 U.S. at 431. Those principles recognized *respondeat superior* long before 1871.

In over two centuries of common law decisions and forty-four years since the *Monell* decision, no court has defined *Monell's* causation requirement of a "moving force" yet that term is what prevents the Waller family of an "innocent man" from a recovery against the municipality whose policies their officers were tragically carrying out to the letter on May 28, 2013. Texas, unlike California, as mentioned in *Mendez*, has no reimbursement statutes and no recovery under its tort claims statute or Constitution for violations of the state or federal Constitution. *See Daniels v. City of Arlington*, 246 F.3d 500 (5th Cir. 2001); *City of Arlington v. Randall*, 301 S.W.3d 896 (Tex. Civ. App. – Fort Worth 2009) (pet. denied). Part II of *Monell* should be reconsidered in light of the subsequent failure of Section 1983 absent the doctrine of *respondeat superior* to afford a tort remedy for violations of our Constitution

contrary to the clear intent of Congress to provide such a remedy in this historic statute. Part II of *Monell* should be laid to rest and municipalities made to compensate victims of unconstitutional action by municipal employees who violate the Constitution of the United States or its laws.

CONCLUSION

Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 27, 2022

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-10129

ANGIE WALLER; CHRIS WALLER,

Plaintiffs—Appellees,

TERRY WAYNE SPRINGER;
GAYLA WYNELL KIMBROUGH,

Intervenor Plaintiffs—Appellees,

versus

RICHARD HOEPPNER,

Defendant—Appellant,

CONSOLIDATED WITH

No. 21-10457

ANGIE WALLER; CHRIS WALLER,

Plaintiffs—Appellants,

TERRY WAYNE SPRINGER;
GAYLA WYNELL KIMBROUGH,

Intervenor Plaintiffs—Appellants,

versus

Appendix A

RICHARD HOEPPNER,

Defendant—Appellee,

CONSOLIDATED WITH

No. 21-10458

ANGIE WALLER; CHRIS WALLER,

Plaintiffs—Appellants,

TERRY WAYNE SPRINGER;
GAYLA WYNELL KIMBROUGH,

Intervenor Plaintiffs—Appellants,

versus

CITY OF FORT WORTH TEXAS,

Defendant—Appellee.

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 4:15-CV-670

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

PER CURIAM:*

* 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.

Appendix A

Defendant-police officer Richard Hoeppner shot and killed Jerry Waller. Waller's family (Plaintiffs) sued Hoeppner and the City of Fort Worth alleging excessive force and municipal liability. The district court denied Hoeppner's motion for summary judgment, in which he asserted qualified immunity but granted the City's motion for summary judgment concluding that it was not liable under *Monell v. Department of Social Services of the City of New York*.[1] Hoeppner and Plaintiffs appeal those determinations. Plaintiffs also appeal an independent Fourth Amendment claim. We affirm the district court's summary judgment orders on qualified immunity and municipal liability and dismiss the appeal as to the independent Fourth Amendment claim for lack of jurisdiction.

I

Around 1:00 a.m. on May 28, 2013, the Fort Worth Police Department dispatched officers Richard A. Hoeppner and Benjamin Hanlon in response to a potential burglary. Hoeppner and Hanlon were both rookies in their initial probationary year with the department. The call came across as an active residential burglary alarm. As they neared the call location, they turned off their vehicle's lights and parked in front of a neighboring home. Not realizing that even-numbered houses on are one side of the street and odd-numbered houses are on the other side, they went to the wrong house and walked around Waller's home. They scanned the perimeter of the home with their

1. 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

flashlights, and the Wallers' small dogs began barking inside the home. This awoke Jerry Waller. While Hanlon went around to the front of the house, Hoeppner stayed in the driveway and saw Waller enter the garage. Waller was carrying a gun. Hoeppner approached Waller with his gun aimed at him and shined his flashlight in Waller's eyes. Hoeppner repeatedly yelled "drop the gun." Hanlon heard the yelling, ran back to the driveway, and identified the officers as "Fort Worth Police!" or "Fort Worth PD!" Waller placed the gun on the trunk of the vehicle parked in the garage. What happened next is in dispute.

Waller was shot six times by Hoeppner. According to Plaintiffs and contrary to Hoeppner's account, Waller remained unarmed when he was shot. Plaintiffs emphasize that the officers have materially conflicting accounts of what happened. Hoeppner claims that he opened fire from a distance of seven yards, while Hanlon claims that Waller was shot at a distance of two or three feet. Hanlon claims that Waller had the gun in his left hand throughout the shooting until he fell on the gun, while Hoeppner claims Waller had the gun in both hands and never dropped it.

The medical examiner noted seven gunshot wounds from the six shots fired. Hoeppner shot Waller in the torso and through the outside of the left thumb and through the first and second fingers. Plaintiffs contend that the shot to the left hand, together with the direction of the shots to the torso, are consistent with Waller being shot while standing upright with his hands shading his eyes with the left hand in front of the right. The small handgun had no damage suggesting it was not held in the left hand or

in both hands. They contend that the gunshot wounds to the fingers, a blood spatter pattern on the left side of Waller's face, and an unsmeared blood spatter on his right hand, all of which are shown in crime scene and autopsy photographs, demonstrate that Waller was unarmed when he was shot.

Plaintiffs sued the City of Fort Worth and Officer Hoeppner as well as various other defendants, but the latter defendants are no longer parties to the litigation. Plaintiffs brought a wrongful death and declaratory judgment action under 42 U.S.C. § 1983, the Fourth and Fourteenth Amendments of the U.S. Constitution, and under similar provisions of the Texas Constitution. The parties filed a number of motions and amended pleadings, and, in the process, Plaintiffs dismissed various claims. The court stayed discovery and scheduled qualified immunity for prompt consideration. All individual defendants filed dispositive motions.

In April 2018, Judge Means issued two orders, resolving all dispositive motions. The court stated that "any claims that were intended to be brought by Plaintiffs against any defendant, but that the Court has not addressed . . . should be and hereby are dismissed." As to Hoeppner's motion for judgment on the pleadings based on qualified immunity, the court determined that taking Plaintiffs' allegations as true, Waller posed no immediate threat, and the motion should be denied. This court affirmed that order.[2]

2. *Waller v. Hanlon*, 922 F.3d 590, 601 (5th Cir. 2019).

On remand, the case was transferred to Judge Pittman. After conducting discovery, the City of Fort Worth and Hoeppner moved for summary judgment. Plaintiffs responded to these motions claiming that Hoeppner had also trespassed upon the curtilage of the Waller home, invading their privacy in violation of the Fourth Amendment. In January 2021, the district court denied Hoeppner's motion and granted the City's.

In ruling on the motions, the district court denied Plaintiffs' alleged illegal search claim as not being properly pled. Plaintiffs filed a motion to reconsider, which the district court denied. The district court noted that to the extent any mention of the claim can be found in the pleadings, it was couched in state law, not constitutional terms, and even if the complaint does contain this claim, it was dismissed in April 2018 by Judge Means. At Plaintiffs' request, the district court certified the issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). This court denied the petition. Plaintiffs then requested the district court issue judgment on the unpleaded claims pursuant to Rule 54(b). The district court denied this request stating that it cannot adjudicate claims it has not considered.

Hoeppner appealed the denial of his summary judgment motion. In April 2021, Plaintiffs filed two separate notices of appeal—one which stems from the grant of summary judgment as to the City and one which appears to stem from the observations made by the district court as to their illegal search claim and from the district court's denial of their motion for Rule 54(b) final judgment. We consolidated the three appeals.

II

The first issue concerns the district court's denial of Hoeppner's motion for summary judgment based on qualified immunity. Because the district court concluded that there was a genuine dispute of material fact, we do not have jurisdiction to challenge that determination.

"We review *de novo* a district court's denial of a motion for summary judgment on the basis of qualified immunity."[3] "A denial of a motion for summary judgment on the issue of qualified immunity is immediately appealable, to the extent that the district court's order turns on an issue of law."[4] Qualified immunity insulates public officials from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[5] Neither party makes an argument regarding whether a right at issue was "clearly established" at the time of the conduct; the only question is whether Hoeppner violated Waller's constitutional rights under the Fourth Amendment's reasonableness standard.

When a § 1983 defendant pleads a qualified immunity defense, the plaintiff then bears the burden to show that qualified immunity is not available.[6] "On appeal, we ask 'the purely legal question whether the defendants

3. *Kovacic v. Villarreal*, 628 F.3d 209, 211 (5th Cir. 2010).

4. *Id.*

5. *Id.* at 213 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)).

6. *See Pierce v. Smith*, 117 F.3d 866, 871-72 (5th Cir. 1997).

are entitled to qualified immunity on the facts that the district court found sufficiently supported in the summary judgment record.'"[7] "Where the district court finds that the summary judgment record presents a genuine dispute of material fact, we do not challenge its determination of 'whether there is enough evidence in the record for a jury to conclude that certain facts are true.'"[8]

In this case, the district court determined that the pretrial record set forth a "genuine" issue of fact for trial:[9] whether Waller was unarmed when he was shot.[10] This

7. *Dean v. Phatak*, 911 F.3d 286, 290 (5th Cir. 2018) (citation omitted); *see also Kovacic*, 628 F.3d at 211 ("A denial of a motion for summary judgment on the issue of qualified immunity is immediately appealable, to the extent that the district court's order turns on an issue of law.").

8. *Dean*, 911 F.3d at 290 (quoting *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004)); *see also Waller v. Hanlon*, 922 F.3d 590, 598 (5th Cir. 2019) (quoting *Hogan v. Cunningham*, 722 F.3d 725, 731 (5th Cir. 2013)) ("In hearing an appeal from an order denying summary judgment on qualified-immunity grounds, we have jurisdiction to 'review the materiality of any factual disputes, but not their genuineness.'").

9. *See Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 489 (5th Cir. 2001) ("An issue is '*genuine*' if it is real and substantial, as opposed to merely formal, pretended, or a sham.").

10. *Cf. Snyder v. Trepagnier*, 142 F.3d 791, 800 (5th Cir. 1998) (concluding that important issues of material fact related to immunity existed and, specifically, "the jury needed to determine what sequence of events occurred, and, in particular, whether [the plaintiff] had a gun—or, if he did not actually have a gun, whether [the defendant] reasonably believed he did"); *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009) ("[T]he existing evidence

court's jurisdiction "does not extend to the district court's . . . determination that a genuine issue of fact exists as to whether appellant engaged in a 'course of conduct' that is 'objectively unreasonable.'"[11] We do have jurisdiction to determine *materiality*,[12] but the disputed facts here are indeed "material" to the ultimate legal question. Whether Waller was armed when he was shot goes to the heart of whether his constitutional rights were violated.[13] We therefore affirm the district court's order denying summary judgment.

III

The second issue concerns the district court's grant of the City's motion for summary judgment. Because Plaintiffs cannot raise a genuine dispute of material fact, summary judgment was proper.

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raises unresolved questions about what occurred. We therefore hold that the evidence creates a genuine issue of material fact. . . .").

11. *Juarez v. Aguilar*, 666 F.3d 325, 331 (5th Cir. 2011) (quoting *Kinney*, 367 F.3d at 346-47).

12. *Bazan*, 246 F.3d at 490 ("[W]e have jurisdiction for this interlocutory appeal *if* it challenges the *materiality* of factual issues, but lack jurisdiction *if* it challenges the district court's *genuineness* ruling . . . .").

13. *See id.* at 489 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)) ("A fact is '*material*' if it '*might affect* the outcome of the suit under the governing law.'"); *see also id.* at 493 ("[B]ecause these factual issues control the outcome of the case (*are material*), we lack jurisdiction to consider the propriety of the summary judgment denial."); *Waller*, 922 F.3d at 599 ("[T]he sole question is whether . . . Waller was unarmed when Hoeppner shot him.").

We review a district court's grant of summary judgment *de novo*.[14] "Summary judgment is appropriate only 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'"[15]

The "two fundamental requirements for holding a city liable under § 1983 for inadequate hiring and training policies" are causation and culpability.[16] The municipal policy must have been the "moving force" behind the constitutional violation and the municipality must have adopted the policy with "deliberate indifference" to its "known or obvious consequences."[17] We have consistently "demanded a high standard of proof before imposing *Monell* liability on a municipality."[18] Plaintiffs allege four theories of liability under *Monell*: (1) illegal entry onto the curtilage; (2) failure to identify as an officer; (3) failure to verify address; and (4) failure of supervision of rookie officers on the night shift. Because Plaintiffs' theories fail on causation, we need not address deliberate indifference.

The City is correct that "any of the officers' actions leading up to the shooting are not relevant for the

14. *Peterson*, 588 F.3d at 844.

15. *Id.* (quoting Fed. R. Civ. P. 56(c)).

16. *Snyder v. Trepagnier*, 142 F.3d 791, 795 (5th Cir. 1998).

17. *Id.*

18. *Id.* at 796.

purposes of an excessive force inquiry in this Circuit."[19] This means that a city policy or custom had to directly influence the use of excessive force during the crucial forty-four seconds of the shooting. Plaintiffs allege policies or customs that relate to the series of events that precede that time frame.[20] We agree with the district court that, "[t]hese policies may be 'but for' causes, but they are not the moving force behind Hoeppner's use of force."

As for the failure to identify theory, the City and district court emphasize that there is "undisputed evidence that Hanlon did verbally identify as police." The policy is also likely premised on achieving cooperation and, according to Plaintiffs, Waller did put his gun down. The policy, therefore, achieved its goal and even if Hoeppner had also verbally identified himself, the outcome would not have changed. All of Plaintiffs' theories fail on the causation prong. The district court's order granting summary judgment to the City is affirmed.

IV

The last issue concerns an alleged illegal search claim. Plaintiffs appear to appeal this claim from one of three sources: (1) the April 2018 dismissal by Judge Means; (2) the January 2021 summary judgment order; or (3) the April 2021 denial of their Rule 54(b) motion. Under any of the three, we do not have jurisdiction.

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19. *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014).

20. *See Rockwell v. Brown*, 664 F.3d 985, 992 (5th Cir. 2011) ("[The plaintiffs] urge this Court to examine the circumstances surrounding the forced entry, which may have led to the fatal shooting . . . . This argument is unavailing.").

"A threshold question implicit in every case that comes before us is whether we have appellate jurisdiction."[21] "This court must examine the basis of its jurisdiction sua sponte."[22]

Any independent Fourth Amendment claim was dismissed in April 2018 by Judge Means in his order resolving all dispositive motions. The court stated in its order that "any claims that were intended to be brought by Plaintiffs against any defendant, but that the Court has not addressed . . . should be and hereby are dismissed." From this order, Plaintiffs failed to timely appeal any claims other than the excessive-force claim. As to the January 2021 summary judgment order, even if Plaintiffs could have taken an interlocutory appeal from this order, it would have had to be perfected within thirty days,[23] and this appeal was not.

Finally, Plaintiffs could not appeal the district court's denial of their Rule 54(b) motion, because courts of appeal do not have jurisdiction over such denials. We have held

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21. *Wilkens v. Johnson*, 238 F.3d 328, 329-30 (5th Cir. 2001).

22. *Wilkens v. Johnson*, 238 F.3d 328, 329-30 (5th Cir. 2001). *Rivera v. Salazar*, 166 F. App'x 704, 705 (5th Cir. 2005) (unpublished).

23. *See Kenyatta v. Moore*, 744 F.2d 1179, 1186 (5th Cir. 1984), *cert. denied*, 471 U.S. 1066, 105 S. Ct. 2141, 85 L. Ed. 2d 498 (1985) (quoting 9 J. Moore, B. Ward, J. Lucas, Moore's Federal Practice ¶ 110.21) ("The procedure for taking an appeal from an interlocutory order that is appealable as of right is precisely the same as that for taking an appeal from a final judgment."); Fed. R. App. P. 4(a)(1) ("[T]he notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.").

"that the denial of a motion for a Rule 54(b) judgment is not appealable by way of interlocutory appeal."[24] "[O]ur sister circuits have [also] repeatedly held that the denial of a Rule 54(b) certification is not appealable."[25] Accordingly, we dismiss Plaintiffs' Fourth Amendment claim for lack of jurisdiction.

* * *

The district court's rulings on the motions for summary judgment are AFFIRMED and the independent Fourth Amendment claim is DISMISSED for lack of jurisdiction.

24. *Lewis v. Sheriff's Dep't Bossier Par.*, 478 F. App'x 809, 814 (5th Cir. 2012) (unpublished).

25. *Id.*

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION, FILED JANUARY 25, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4:15-CV-670-P

ANGIE WALLER; and CHRIS WALLER,

Plaintiffs,

TERRY WAYNE SPRINGER;
and GAYLA WYNELL KIMBROUGH,

Intervenors,

v.

CITY OF FORT WORTH TEXAS;
and RICHARD A. HOEPPNER,

Defendants.

January 25, 2021, Decided;
January 25, 2021, Filed

Appendix B

AMENDED OPINION AND ORDER [1]

Around 1:00 a.m. on May 27, 2013, Fort Worth Police shot and killed a 72-year-old man in his own home. Police were responding to a burglary alarm at a house across the street. Due to multiple mistakes, they instead responded to Jerry Waller's house, shined their flashlights in his windows, and woke him up. Thinking his house was being burglarized, Waller grabbed his gun and headed to his garage to investigate. There, although the parties disagree how it occurred, an innocent man lost his life.

This is an undeniably tragic case. But under the law, the City can only be liable for Waller's death if its policies were the moving force behind the officer's use of excessive force. The City argues that—as a matter of law—the undisputed facts show that the policies Plaintiffs complain of—failure to verify addresses, protocol on burglary calls, and staffing shifts with rookies—are too attenuated to the officer's use of force. After considering the City's Motion for Summary Judgment (ECF Nos. 306-09), Plaintiffs' Response (ECF Nos. 346-47), the City's Reply (ECF No. 367), and applicable law, the Court, restrained by precedent, is duty bound to agree with the City. Therefore, the City's motion is **GRANTED**.

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1. This Amended Opinion and Order replaces in its entirety the Opinion and Order issued in this case on January 22, 2021. ECF No. 389. This Amended Opinion and Order merely corrects non-substantive grammatical errors in the earlier Opinion and Order.

Appendix B

BACKGROUND

A. Material Facts

Early in the morning on May 27, 2013, the Fort Worth Police Department (FWPD) dispatched first-year officers Hoeppner and Hanlon to respond to a burglary-alarm call. Pls.' MSJ App'x at 61, ECF No. 314-1. Under the City's policies, more experienced officers get first pick of shifts, and their first choice is rarely the midnight shift, so it is not unusual for two rookie officers to get sent to this type of call at this hour. *Id.* at 49-51. Unfortunately, the officers went to the wrong house. *Id.* at 62-63. Following their training, the officers walked around the house and scanned the perimeter with their flashlights. *Id.* at 22. Hanlon then went to the front door and left Hoeppner in the back near the open garage door. *Id.* at 62-63. When Hanlon reached the front door, he radioed Hoeppner to join him in the front. It was 1:06 a.m. *Id.* at 63-64.

According to Plaintiffs, the officers' flashlights awoke the homeowner, 72-year-old Jerry Waller. Waller got out of bed and, still shirtless and without shoes, walked into his garage holding his gun. *Id.* at 64. Hoeppner saw Waller enter the garage, approached the garage with his gun aimed at Waller, shined his flashlight in Waller's eyes, and yelled repeatedly, "Drop the gun!" *Id.* at 63. Hearing the yells, Hanlon raced to the back of the house. *Id.* at 63-64. When he got there, he started yelling, "police!" or something similar. *Id.* at 64. After a few seconds of yelling, Waller put his gun on the trunk of the car in the garage. *Id.* Now defenseless, Waller raised his hands near his head

and used his left hand to block the flashlight from his eyes. Despite Waller's hands being empty and raised in the air, Hoeppner fired six shots into Waller. Hanlon radioed dispatch that an ambulance was needed at 1:06:50 a.m. *Id.*

B. Procedural History

On May 26, 2015, Plaintiffs filed their complaint in federal court alleging claims under 42 U.S.C. § 1983. Originally, the suit named as defendants most of the investigating officers and the City. By June 20, 2016, following the Court's scheduling order (ECF No. 140), the officers filed motions to dismiss based on their qualified-immunity defense. Because qualified immunity is unavailable to municipalities, the proceedings did not include the City. On April 12, 2018, the Court issued orders dismissing all claims except Plaintiffs' excessive-force claim against Hoeppner and a conspiracy to cover-up a crime against several officers. ECF Nos. 200, 201. The Fifth Circuit affirmed the excessive-force claim but reversed and dismissed the conspiracy claim. *Waller v. Hanlon*, 922 F.3d 590 (5th Cir. 2019) (ECF No. 221).

After the interlocutory appeal, Plaintiffs' sole remaining § 1983 theories were (1) excessive-force against Hoeppner and (2) municipal-liability against the City. On July 25, 2019, Plaintiffs confirmed this in a court-ordered status report. ECF No. 228. Plaintiffs described their claims against the City as follows:

> The Plaintiffs' claims against the City of Fort Worth are that it failed to properly train and

> supervise probationary and inexperienced officers knowing that their actions would lead to excessive use of force contrary to the Fourth and Fourteenth Amendments to the U.S. Constitution and that the City and its policy making officials were consciously indifferent to police coverups, particularly when the officer uses excessive use of force.

Joint Status Report at 12-13, ECF No. 228. In the same report, Plaintiffs represented their claim against Hoeppner as an excessive-force claim. Operating under these representations, the parties conducted discovery until the deadline for dispositive motions, October 9, 2020 (*see* ECF No. 284), when both Plaintiffs and the City filed cross motions for summary judgment regarding the City's liability. These motions are now before the Court.

ANALYSIS

A. Plaintiffs' Claims

The analysis of Plaintiffs' claims starts by determining what their claims are. Plaintiffs' summary-judgement briefing appears to argue for the City's liability under an invasion-of-curtilage or unconstitutional-entry-on-land theory. Pls.' MSJ Brief at 8, ECF No. 313. As the Court previously ordered, the only constitutional violation contained in Plaintiffs' complaint relates to Hoeppner's use of excessive force. ECF No. 388 at 1-3. For the reasons set out in that order, the Court maintains that Plaintiffs' pleadings only implicate one constitutional violation: excessive force.

Plaintiffs' claims against the City likewise center on its approval of excessive force. Their First Amended Complaint states that the City has "long been aware and publicly discussed this excessive use of force by probationary officers . . . ." Pls.' 1st Amend. Cmp't at ¶ 110, ECF No. 41. Again, Plaintiffs state that the City's "tolerance and approval of this use of excessive force is the custom and policy of the City of Fort Worth." *Id.* at ¶ 124; *see also* ¶¶ 125, 127, 128, and 132. Nowhere does Plaintiffs' complaint allege problems with the City's policies concerning invasion of curtilage or burglary-call protocol. Moreover, about 17 months ago, Plaintiffs specifically complained that the City's policies "lead to excessive use of force . . . ." Joint Status Report at 12-13, ECF No. 228. These representations are due respect, and the City was entitled to rely on them for discovery and summary-judgment briefing. *See Boswell v. Bush*, 138 F. Supp. 2d 782, 786 (N.D. Tex. 2000) (Mahon, J.) (finding that the confusing nature of plaintiffs' claims "forces [d]efendants to speculate as to the nature of [p]laintiffs' causes of action, handicapping [d]efendants and making them unable to defend themselves").

For these reasons, Plaintiffs' complaints about the City's policies are limited to those relating to Hoeppner's use of excessive force. Although there is a genuine dispute whether Hoeppner used excessive force (ECF No. 388), for purposes of this order, the Court assumes that Hoeppner in fact used excessive force.

Appendix B

B. Summary-Judgment Standard

Summary judgment is proper when the pleadings, depositions, admissions, disclosure materials on file, and affidavits, if any, "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a), (c)(1). A fact is material if the governing substantive law identifies it as having the potential to affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). An issue as to a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*; *see also Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 489 (5th Cir. 2001) ("An issue is 'genuine' if it is real and substantial, as opposed to merely formal, pretended, or a sham."). To demonstrate a genuine issue as to the material facts, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The nonmoving party must show that the evidence is sufficient to resolve issues of material fact in his favor. *Anderson*, 477 U.S. at 249.

When evaluating a motion for summary judgment, the Court views the evidence in the light most favorable to the nonmoving party. *Id.* at 255. However, it is not incumbent upon the Court to comb the record in search of evidence that creates a genuine issue as to a material fact. *See Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003). The nonmoving party must cite the evidence in the record

that establishes the existence of genuine issues as to the material facts. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "When evidence exists in the summary judgment record but the nonmovant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court." *Malacara*, 353 F.3d at 405.

C. Municipal Liability

In this case, the City did not violate Waller's constitutional right to be free of unreasonable seizure through excessive force—its employee, Officer Hoeppner, did. Under § 1983, a municipality cannot be liable, under the doctrine of *respondeat superior*, for merely employing a person that violated someone's rights. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Rather, a municipality, such as the City, can be liable under 42 U.S.C. § 1983 only for its own acts. *See Connick v. Thompson*, 563 U.S. 51, 59, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011). "To hold a municipality liable under § 1983 for misconduct of an employee, a plaintiff must show, in addition to a constitutional violation, that an official policy promulgated by the municipality's policymaker was the moving force behind, or actual cause of, the constitutional injury." *James v. Harris Co.*, 577 F.3d 612, 617 (5th Cir. 2009).

This standard has developed specific requirements regarding the causal link between the policy and the constitutional violation and the municipality's culpability in enacting the policy. These requirements must be

rigorously enforced. *Alvarez v. City of Brownsville*, 904 F.3d 382, 390 (5th Cir. 2018). "These requirements must not be diluted, for where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability." *James*, 577 F.3d at 618.

Plaintiffs argue that the City should be held liable for the following five policies:

(a) the City did not require its police officers to visually verify the address to which they had been dispatched on the scene;

(b) the City did not properly train its officers that there are odd-numbered addresses on one side of the street and even on the other;

(c) the City did not and does not require its officers to verbally identify themselves when confronting citizens and prior to using deadly force;

(d) the City policy is to allow its officers to enter and search the curtilage of residences without contacting or receiving permission of the homeowner; and

(e) the City had a policy of generally pairing rookie police officers with other rookie police officers after short field training experience and thus failing to provide

> sufficient supervision of the younger/ inexperienced officers.

Pls.' MSJ Resp. at 2, ECF No. 346. For purpose of this order, the Court assumes these policies existed and were promulgated by the correct policymaker. The Court makes these assumptions not because they are necessarily true, but because it is unnecessary to wrestle with those difficulties. For the independent reasons below, the City cannot be liable for these alleged policies.

1. None of the policies or customs were "moving forces" in Hoeppner's use of excessive force.

The first requirement that must not be diluted concerns the causal link between the policy and the constitutional violation. Originally, the Court stated the policy or custom must be a "moving force" in the plaintiff's constitution violation. *Monell*, 436 U.S. at 694. Since then, the Fifth Circuit has interpreted this phrase as requiring the plaintiff to "show direct causation, i.e., that there was 'a direct causal link' between the policy and the violation." *Alvarez*, 904 F.3d at 390. This requires "more than a mere 'but for' coupling between cause and effect." *Fraire v. City of Arlington*, 957 F.2d 1268, 1281 (5th Cir. 1992).

In this case, the constitutional violation was Hoeppner's excessive use of force. This is key because "there must be a direct causal link between the municipal policy and the constitutional deprivation." *Piotrowski v. City of Houston*, 237 F.3d 567, 580 (5th Cir. 2001). In an excessive force case, the issue is whether the officer's use of force was

reasonable. *Graham v. Connor*, 490 U.S. 386, 394-96, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). It is well-established that officers are justified in using deadly force whenever they reasonably fear serious bodily harm. *See e.g., Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009) ("An officer's use of deadly force is not excessive, and thus no constitutional violation occurs, when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or to others."). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Importantly, the inquiry focuses on the officer's decision to use deadly force, therefore "any of the officer's actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in [the Fifth] Circuit." *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014).[2]

Identifying the constitutional violation focuses the analysis. Hoeppner's decision to use excessive force occurred in the time between Hanlon's first radio call,

2. The Fifth Circuit has applied this principle numerous times. *See e.g., Rockwell v. Brown*, 664 F.3d 985, 992-93 (5th Cir. 2011) (holding that circumstances leading up to use of force were irrelevant and stating that the court "need not look at any other moment in time"); *Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 493 (5th Cir. 2001) ("The excessive force inquiry is confined to whether [the officer or another person] was in danger *at the moment of the threat* that resulted in [the officer's use of deadly force].") (emphasis added); *Fraire*, 957 F.2d at 1276 ("[R]egardless of what had transpired up until the shooting itself, [the suspect's] movements gave the officer reason to believe, *at that moment*, that there was a threat of physical harm.") (emphasis added).

before any yelling, and his second radio call for an ambulance—44 seconds. Therefore, any acts or events before that time are immaterial. It follows that the Court must ignore the case's most disturbing fact—that the officers were at the wrong house. The Court must focus solely on policies that would have affected Hoeppner's judgment in those 44 seconds.

Four of the policies (policies (a), (b), (d), and (e)) do not impact Hoeppner's thinking or judgment during those 44 seconds. They do no more than set the stage for the events that followed. These policies may be "but for" causes, but they are not the moving force behind Hoeppner's use of force. These policies are described below.

First, the policies concerning addresses (policies (a) and (b) above) are irrelevant because they would only have affected Hoeppner's acts before the shooting. *Harris*, 745 F.3d at 772 ("any of the officer's actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry"). Although the officers' errors and the City's failure to have a policy aimed at reducing such errors are clear and worthy of blame, they did not contribute to Hoeppner's use of excessive force.

Second, the City's policy of entering a house's curtilage is also irrelevant. That policy may be a "but for" cause for the shooting, but that is insufficient. *Fraire*, 957 F.2d at 1281 (causation requires "more than a mere 'but for' coupling between cause and effect"). How and why Hoeppner was there are irrelevant. The question is, once there, was Hoeppner's use of force reasonable? And this

policy does not make either answer more likely. This policy has no "direct causal link" to Hoeppner's decision making. *See Alvarez*, 904 F.3d at 390 (stating plaintiff must show "a direct causal link between the policy and the violation").

Finally, the City's policy of staffing rookie officers on the night shift cannot be a moving force of Hoeppner's use of excessive force. Plaintiffs argue that the policy causes problems because there are no senior officers around to help train or supervise the younger officers. Pls.' MSJ App'x at 51. But when Hoeppner met Waller in the garage, one-on-one, early in the morning, both armed with guns, there was no time for additional training. This was the moment his training was put to the test. The experience level of the officer running around the house as back up is irrelevant. Although a more experienced officer may have avoided getting Hoeppner in that difficult position, that hypothetical is irrelevant. *Harris*, 745 F.3d at 772 ("any of the officer's actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry"). Again, this policy could not have affected Hoeppner during the material time.

The last policy Plaintiffs identify, which gives officer's the option of verbally identifying as police as opposed to requiring it, fails to meet "but for" causation standards. *First*, there is undisputed evidence that Hanlon did verbally identify as police. Pls.' MSJ App'x at 64. *Second*, the goal of identifying as police is to achieve cooperation. In this case, that meant getting Waller to put down the gun. But Waller did put down his gun. Plaintiffs argue Hoeppner still shot. Accordingly, even if Hoeppner had

verbally identified himself, it would not have changed the outcome. *Finally*, this policy, like the others, is not concerned with use of excessive force. An officer has the right to defend himself if he is reasonably threatened. When an officer reasonably fears for his life, there may be no time to identify as police. Of course, Plaintiffs argue that Hoeppner did not fear for his life and that he shot a defenseless Waller. But if Hoeppner shot an unarmed man, why wouldn't he also violate a policy of identifying himself? This policy did not have any impact on Hoeppner's decision making in the relevant 44 seconds.

For these reasons, none of the identified policies have the required "direct causal link between the municipal policy and the constitutional deprivation." *Piotrowski*, 237 F.3d at 580. Accordingly, Plaintiffs "failed to provide evidence to the demanding standards required by *Monell* and its progeny to hold the City liable." *Peterson v. City of Fort Worth*, 588 F.3d 838, 852 (5th Cir. 2009).

2. The City did not enact the policies or customs with deliberate indifference to the known or obvious consequences that use of excessive force would result.

Even if Plaintiffs could demonstrate a fact issue on causation, or if they had pleaded an invasion-of-privacy violation, their arguments would still fail because the policies were not enacted with the requisite culpability. This is the second requirement that "must not be diluted." *Alvarez*, 904 F.3d at 390.

For the City to be liable, the policy must be either facially unlawful or, if the policy is facially lawful, enacted with "deliberate indifference as to its known or obvious consequences." *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 409-10, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). This is "a **stringent** standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* (emphasis added). It is a "degree of culpability beyond mere negligence or even gross negligence; it must amount to an intentional choice, not merely an unintentionally negligent oversight." *James*, 577 F.3d at 617-18. The policymaker must have "actual knowledge of the facts showing that a risk of serious harm exists as well as the [policymaker's] having actually drawn that inference." *Brown v. Callahan*, 623 F.3d 249, 255 (2010). The burden to show deliberate indifference falls on Plaintiffs. *Peterson*, 588 F.3d at 851-52. "Proof of deliberate indifference normally requires a plaintiff to show a pattern of violations." *Brown*, 623 F.3d at 255.

a. Policies (a) and (b) – Failure to Train Officers on Addresses

Regarding the failure to verify addresses or train officers regarding address numbering, Plaintiffs fail to cite any evidence that suggests the City enacted the policies with deliberate indifference. Plaintiffs failed to establish any pattern of prior problems. Plaintiffs asked then-Chief Kraus if he was aware that Fort Worth Police had responded to the wrong address before. He testified, "I'm not aware, but its reasonable." Pls.' MSJ App'x at 24. This is insufficient to raise a fact issue that

the City enacted the policy with deliberate indifference to constitutional violations. *See James*, 577 F.3d at 617-18 (requiring policy maker to have "actual knowledge of the facts showing that a risk of serious harm exists").

Moreover, once the City became aware of their policies' deficiency, it corrected both training issues. After this incident, the City drafted a "Critical Police Incident" Report. Pls.' MSJ App'x at 70. The Report identified both issues as training deficiencies. *Id.* Apparently, this used to be required training but—for unknown reasons—fell off the City's syllabus. Pls.' MSJ App'x at 27. By July 30, 2013, these items were already added to the City's officers' training. *Id.* There is no evidence how or why it fell off, but it is Plaintiffs' duty to bring that evidence. *Peterson*, 588 F.3d at 844. Without additional evidence, it appears to be, at most, negligence. *James*, 577 F.3d at 617-18 (requiring municipal liability to be "beyond mere negligence or even gross negligence."). This does not show deliberate indifference.

b. Policy (c) – Failure to Verbally Identify

Next, Plaintiffs argue that the City's policy giving officer's the option to verbally identify themselves as police, as opposed to requiring it, was enacted with deliberate indifference to the obvious risk that the highly probable outcome would be its officers' use of excessive force. *See Peterson*, 588 F.3d at 850. There is no evidence to support this. Plaintiffs cite then-Chief Kraus's testimony that the City's policy required officers to identify themselves as police through their uniform, identifiable markings,

or "verbal identification." Pls.' MSJ App'x at 15. Kraus admitted that "ideally [Hoeppner] would [have] identified himself, but it was reasonable for him to demand that Mr. Waller put the weapon down." *Id.* at 38. All this shows is that the policy provides officers discretion, which seems reasonable when an officer's life is in danger. The Court determines that this evidence fails to raise a fact issue that the City was deliberately indifferent. Further, Plaintiffs did not attempt to show that this policy had resulted in any prior constitutional violations. *See Brown*, 623 F.3d at 255 ("Proof of deliberate indifference normally requires a plaintiff to show a pattern of violations."), and *Peterson*, 588 F.3d at 851-52 (holding that 27 prior excessive-force complaints in three years failed to establish a pattern). Without further evidence to support this requirement, Plaintiffs failed to raise a fact issue on whether the City enacted the policy with deliberate indifference.

c. Policy (d) – Curtilage

Next, Plaintiffs argue that the City's policy on residential burglary calls was unlawful. For these calls, the City's custom was to survey the house and surrounding area before contacting the occupants. Pls.' MSJ App'x at 22. Plaintiffs first argue this is facially unlawful. *See e.g., Collins v. Virginia*, 138 S. Ct. 1663, 1670, 201 L. Ed. 2d 9 (2018) (stating that the Fourth Amendment protects the home and the curtilage—area immediately surrounding the home) (internal quotations omitted). It is true that the area around a house is protected, but police have long had authority to enter a house's curtilage—or even a dwelling—to provide aid. *See e.g., Wayne v. U.S.*, 318 F.2d

205, 212, 115 U.S. App. D.C. 234 (D.C. Cir. 1963) (Burger, J.) ("The need to protect or preserve life or to avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."). Here, the City's policy only allowed officers to search the house's curtilage on suspicion of burglary. In such a situation, the Supreme Court has authorized police to enter a house and stated that "it would be silly to suggest that the police would commit a tort by entering [a dwelling] . . . to determine whether violence (or the threat of violence) has just occurred or is about to (or soon will) occur . . . ." *Georgia v. Randolph*, 547 U.S. 103, 118, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006). In this case, the officers were at the wrong house, but that is not the policy's fault. The officers negligently carried out the policy. For this reason, the Court finds the policy is facially lawful.

The only evidence Plaintiffs cite to support the City enacted this policy with deliberate indifference is an incident that occurred over five years after this incident. But this single incident does not show a pattern. *See Brown*, 623 F.3d at 255 ("Proof of deliberate indifference normally requires a plaintiff to show a pattern of violations."). Without more, two bad outcomes fail to show that it should have been obvious to the City that the use of excessive force was the policy's "highly predictable consequence." *Id.* at 849. Liability requires "sufficiently numerous ***prior*** incidents, as opposed to isolated instances." *Id.* at 851 (internal quotations omitted) (emphasis added). And finally, the other incident Plaintiffs cite occurred *after* this incident, not before. It could not provide notice anyway. Therefore, Plaintiffs failed to raise a fact issue.

d. Policy (e) – Pairing Rookie Officers

Last, Plaintiffs argue that the City's policy of pairing rookie officers together supports the City's liability. The policy allows more senior officers to pick shifts before more junior officers. But the policy's effect is to fill the midnight shift with rookie officers. Pls. MSJ App'x at 50. This is facially lawful, and Plaintiffs fail to cite to any evidence that the City enacted the policy when it was obvious that the policy's highly predictable outcome would be the use of excessive force.

Plaintiffs try to support this argument with three pieces of evidence. *First*, Plaintiffs again try to show a pattern with the same incident discussed above that occurred five years after this incident. For the reasons stated above, this is insufficient. *Second*, Plaintiffs cite a police-body-camera company's promotional video, showing a former FWPD Chief discuss a 2013 incident involving rookie cops using excessive force. *Id.* at 49-50. But when asked whether he was aware of this incident, Krause said, "no, sir." *Id.* at 50. It cannot be said that a policymaker is indifferent to something he is unaware of. *Last*, Plaintiffs cite then-Chief Kraus's deposition testimony. When asked whether this policy has caused problems regarding the use of excessive force, Kraus said, "I don't know that I can make that, paint that broad a brush that that is leading to uses of force." Pls.' MSJ App'x at 50. Then, when asked if the problem with putting mostly rookie officers on the same shift is the lack of experience, Kraus admitted that "that is the argument against [the policy], yes." *Id.* at 51.

Together, this evidence fails to show that the City's policy was enacted with deliberate indifference. At most, Plaintiffs cite two other incidents. For the reasons above, this is insufficient to raise a fact issue. *See Peterson*, 588 F.3d at 851-52 (holding that 27 prior excessive-force complaints in three years failed to establish a pattern). Further, it is not clear the City's policymaker was even aware of those incidents. *See James*, 577 F.3d at 617-18 (requiring policy maker to have "actual knowledge of the facts showing that a risk of serious harm exists").

3. The City did not ratify Hoeppner's use of excessive force.

Alternatively, Plaintiffs argue that, even if the policies were not enacted with deliberate indifference, the City ratified Hoeppner's use of excessive force. *See Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985). Plaintiffs rely on the City's failure to discipline Hoeppner for the shooting. Pls.' MSJ App'x at 44. Although there is authority allowing a municipality to be liable after a single incident, it is limited to "extreme factual situations." *Peterson*, 588 F.3d at 848. For example, in *Grandstaff*, police chased a suspect onto Grandstaff's rural property. *Id.* at 165. The police knew innocent people lived on the property. *Id.* at 167-68. When Grandstaff drove to the police, coming from a different direction than the suspect's abandoned car, the police "poured their gunfire at the truck and into the person of James Grandstaff." *Id.* at 168. Afterwards, the "officers and their supervisors denied their failures and concerned themselves only with unworthy, if not despicable, means to avoid legal liability." *Id.* at 166. The

Fifth Circuit held that the City's acts were so obviously reprehensible that the failure to admit any error ratified a policy of excessive force. *Id.* at 171.

But this case is not such an "extreme factual situation." *See Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998) (refusing to find ratification when officer shot a fleeing suspect in the back); *and Peterson*, 588 F.3d at 843-44 (refusing to find ratification when officers dragged a sleeping drunk out of a car and beat him until his femoral artery ruptured). Here, Hoeppner's acts, in the light most favorable to Plaintiffs, are comparable to shooting a fleeing suspect in the back, and that is not extreme enough. Moreover, the City performed a follow up investigation and made changes to their policies. This does not amount to a ratification of excessive force. This holds true even if the jury later finds Hoeppner used excessive force. *Peterson*, 588 F.3d at 848 (stating that "a policymaker who defends conduct that is later shown to be unlawful does not necessarily incur liability on behalf of the municipality").

CONCLUSION

For these reasons, the Court concludes that the policies Plaintiffs identify fail to provide a basis for the City's liability. This case is tragic and the circumstances of Mr. Waller's death are absolutely heartrending. This order is in no way an approval of the City's policies. The Court merely finds that Plaintiffs failed to produce evidence sufficient to raise a fact issue regarding the demanding standards required in establishing municipal liability.

Accordingly, the City's motion must be **GRANTED**.[3] And for the same reasons, Plaintiffs' motion for summary judgment (ECF No. 313) is **DENIED**.

SO ORDERED on this **25th day** of **January, 2021**.

/s/ Mark T. Pittman
Mark T. Pittman
UNITED STATES
DISTRICT JUDGE

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3. In reaching this holding, the Court notes its agreement with Judge Edward C. Burks of the Supreme Court of Virginia, who in 1878, writing in an equally heartrending opinion, stated:

> The unhappy condition of the appellee excites my commiseration; but courts of justice are not allowed to be controlled in their decisions by considerations of that character. "Compassion," said an eminent Virginia chancellor, "ought not to influence a judge, in whom, acting officially, apathy is less a vice than sympathy."

Harris v. Harris, 72 Va. 13, 32 (1878) (quoting Chancellor George Wythe, Commentary on *Field's Ex'x v. Harrison & wife, in* WYTHE'S REPORTS 282 (Minor's Ed. 1794)).

The Court is also reminded of an apropos observation by another prominent Virginia jurist, Brockenbrough Lamb:

> We regret that the conclusion reached will prevent a recovery and may thereby defeat the ends of justice in the particular case before us, but however that may be, we must declare the law as we find it written and comfort ourselves with the confident belief that in its results it will promote the ends of justice to all.

Brockenbrough Lamb, *The Duty of Judges: A Government of Laws and Not of Men, in* HANDBOOK FOR JUDGES 93 (Donald K. Carroll ed., 1961).

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION, FILED JANUARY 19, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:15-cv-670-P

ANGIE WALLER; AND CHRIS WALLER,

Plaintiffs,

TERRY WAYNE SPRINGER; AND
GAYLA WYNELL KIMBROUGH,

Intervenors,

v.

CITY OF FORT WORTH TEXAS;
AND RICHARD A. HOEPPNER,

Defendants.

January 19, 2021, Decided
January 19, 2021, Filed

MARK T. PITTMAN, UNITED STATES DISTRICT JUDGE.

ORDER DENYING HOEPPNER'S MOTION FOR SUMMARY JUDGMENT

Appendix C

Before the Court is Defendant Richard A. Hoeppner's Motion for Summary Judgment. ECF No. 303. After reviewing Hoeppner's motion and related documents (ECF Nos. 304, 305), Plaintiffs' response (ECF Nos. 352, 353), the reply (ECF No. 365), and the papers on file, the Court finds that there is a genuine dispute as to material facts. Accordingly, the motion should be and hereby is **DENIED**.

PLAINTIFFS' CLAIMS

Before analyzing Plaintiffs' claims, the Court must first determine what those claims are. In their summary-judgment response, Plaintiffs articulate two separate claims: (1) excessive force and (2) invasion of privacy. Pl.'s Resp. to Hoeppner's MSJ at 6, ECF No. 352. Hoeppner argues that Plaintiffs' only claim is for excessive force.

The Court agrees with Hoeppner. In reaching this conclusion, the Court started with Plaintiffs' First Amended Complaint. ECF No. 41. Rule 8 requires complaints to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). As already noted by then-presiding United States District Judge Terry R. Means, "Plaintiffs' stream-of-consciousness, argumentative, and hyperbolic complaint" fails to "follow even the spirit of Rule 8." ECF No. 200 at 2. Plaintiffs' complaint contains no headings that would assist in deciphering Plaintiffs' claims. *See* FED. R. CIV. P. 10. Although Plaintiffs' 47-page complaint includes the word privacy three times, those brief references hardly put the defendants on notice of an invasion-of-

privacy claim. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (stating that a complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."). For comparison, Plaintiffs' Amended Complaint includes the phrase "excessive force" 13 times. Moreover, Plaintiffs' Response to Hoeppner's motion for summary judgment describes the invasion-of-privacy argument as "the invasion of the curtilage of the Waller home . . . ." Pls.' Resp. to Hoeppner's MSJ at 6. Plaintiffs' First Amended Complaint does not use the word "curtilage" at all.

After scrutinizing Plaintiffs' complaint, the Court agrees with Judge Means that the amended complaint includes the following claims: excessive force, bystander liability, denial of access, conspiracy to deny access, and state-law violations. In determining this, the Court had to use some judgment. Plaintiffs' complaint contains phrases, such as "unreasonable search and seizure," that could be soil for any civil-rights claim—if read broadly enough. But these broad, ambiguous buzz words fail to notify the defendants of any particular claim. *See Twombly*, 550 U.S. at 555; *Boswell v. Hon. Governor of Tex.*, 138 F. Supp. 2d 782, 785-86 (N.D. Tex. 2000) (Mahon, J.) (describing plaintiffs" multi-page complaint as a "garbled morass" and dismissing it for failure to be "comprehensible and specific enough to draw the inference" of the elements of plaintiffs' claims while noting that "it is not the Court's place to speculate or imagine what the [plaintiffs'] claims may be.") (citations omitted). Of those claims, the only claim that survived the initial motions to dismiss and interlocutory appeal was the excessive-force claim.

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Until the summary-judgment deadline, Plaintiffs never disputed this. On October 22, 2015, Plaintiffs described their claims against Hoeppner for being an "active participant[] in using excessive force against an unarmed citizen, Jerry Waller, killing him in the process." Joint Status Report at 3, ECF No. 116. After the interlocutory appeal, on July 25, 2019, Plaintiffs described their claims against Hoeppner in the exact same language. Joint Status Report at 12, ECF No. 228. These status reports never assert any claim for privacy or invasion of curtilage. Hoeppner was entitled to rely on Plaintiffs' status reports during discovery and his summary-judgment briefing. *Cf. Boswell*, 138 F. Supp. 2d at 786 (finding that the confusing nature of plaintiffs' claims "forces [d]efendants to speculate as to the nature of [p]laintiffs' causes of action, handicapping [d]efendants and making them unable to defend themselves"). As a result, the Court does not consider Plaintiffs' invasion-of-privacy claim.

BACKGROUND

Early in the morning on May 27, 2013, Fort Worth Police dispatched Officers Hoeppner and Hanlon to respond to a burglary-alarm call. Hoeppner MSJ App'x 2, ECF No. 305. Unfortunately, they went to the wrong house. *Id.* at 115. After the officers walked around the house and scanned the perimeter with their flashlights, Hanlon went to the front door and left Hoeppner in the back near the open garage door. Hoeppner MSJ App'x at 4. When Hanlon reached the front door, he radioed Hoeppner to join him in the front. It was 1:06:06 a.m. Hoeppner MSJ App'x at 6.

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According to Plaintiffs, the officers' flashlights awoke the homeowner, 72-year-old Jerry Waller. Waller got out of bed and, still shirtless and without shoes, walked into his garage holding his gun. Hoeppner MSJ App'x 4. Hoeppner saw Waller enter the garage, approached the garage with his gun aimed at Waller, shined his flashlight in Waller's eyes, and yelled repeatedly to "drop the gun." *Id.* After some back and forth, Waller put the gun down on his car's trunk. *Id.* at 5. Hearing the yells, Hanlon raced around the house to the garage. *Id.* Now defenseless, Waller raised his hands near his head and used his left hand to block the flashlight from his eyes. Despite Waller's hands being empty and raised in the air, Hoeppner fired six shots into Waller. Hanlon radioed dispatch that an ambulance was needed at 1:06:50 a.m. Hoeppner MSJ App'x at 6.

Waller's body lay near the garage entrance, facedown. Hoeppner MSJ App'x at 200-208. His head was turned to the left and his face's left side had blood droplets. *Id.* Waller's left hand had multiple wounds from a bullet. Pls.' Resp. to Hoeppner's MSJ App'x at 221-222. The bullet entered the side of the thumb on the outside of the hand. It then exited the thumb and entered the index finger near the knuckle. Then it exited the index finger and scraped his middle finger's backside. Waller's right hand was found at his side with blood droplets in the palm. Hoeppner MSJ App'x at 207-08. Waller's gun had no damage and only small amounts of blood. Hoeppner's MSJ App'x 189-92. The other bullet wounds were to Waller's chest and abdomen. Hoeppner MSJ App'x 78-79. Each entered high on the front and exited lower in his back. *Id.*

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ANALYSIS

Summary-judgment procedure pierces the parties' pleadings and assesses the proof supporting the pleadings to determine whether a trial is needed. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine dispute requires more than some metaphysical doubt. *Matsushita*, 475 U.S. at 586-87. The evidence must be sufficient for a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If a genuine dispute of material fact exists, then the only way to resolve the dispute is a trial.

In an excessive force case, the issue is whether the officer's use of force was reasonable. *Graham v. Connor*, 490 U.S. 386, 394-96, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). It is well established that officers are justified in using deadly force whenever they reasonably feared serious bodily harm. *See e.g., Manis v. Lawson*, 585 F.3d 839, 843 (5th Cir. 2009) ("An officer's use of deadly force is not excessive, and thus no constitutional violation occurs, when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or to others."). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Importantly, the inquiry focuses on the

officer's decision to use deadly force, therefore "any of the officer's actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in [the Fifth] Circuit." *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014).

Thus, the dispositive issue is whether Hoeppner reasonably feared serious bodily harm when shot Waller. This narrows the material facts to the events between Hanlon's radio dispatches—44 seconds. Earlier in this case, when looking solely at the sufficiency of Plaintiffs' allegations, Judge Means said, and the Fifth Circuit echoed, that Plaintiffs' story—if true—entitled him to judgment. ECF No. 200 at pp. 14-16, ECF No. 221 at p. 10. Hoeppner now puts Plaintiffs to the test, arguing that Plaintiffs have no evidence to support their story.

Plaintiffs have the burden of proof on both their § 1983 claim and Hoeppner's qualified-immunity defense at trial and, for this reason, also have the burden of proof here. *Kovacic v. Villarreal*, 628 F.3d 209, 211-12 (5th Cir. 2010). As such, Plaintiffs must identify, cite, and articulate the precise way the submitted or identified evidence supports their claim. *Smith v. U.S.*, 391 F.3d 621, 625 (5th Cir. 2004). When considering the evidence, the Court views the evidence in the light most favorable to the Plaintiffs and makes all reasonable inferences in Plaintiffs' favor. *Liberty Lobby*, 477 U.S. at 255.

Although Plaintiffs do not articulate the evidence in these categories, they refer to three types of evidence to support their story:

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A. Physical Evidence

Plaintiffs argue that the physical evidence alone supports their story and shows that, at the time he was shot, Waller did not have a gun in his hand. The Fifth Circuit stated in this case that Hoeppner "did violate Waller's clearly established rights if Waller was not holding the gun" when he was shot. ECF No. 221 at 10. The following evidence, when making all inferences in Plaintiffs' favor, suggest Waller was not holding a gun.

First, Waller could not have held the gun in his right hand because his right palm had blood droplets. If the gun was in his right hand, it would have prevented blood from reaching his palm. Or at least, as the gun left his hand, the gun would have left any blood on the hand smeared. Although there are doubtless other explanations about how blood got onto Waller's right hand even though he was holding a gun, this evidence does support Plaintiffs' story. A rational juror could conclude that holding a gun would block blood droplets from getting onto Waller's palm, or that the gun would have smeared the blood around on his hand.

Second, Waller could not have held the gun in his left hand because its pattern of wounds. If the left hand were holding a gun, the bullet's path through Waller's left hand seems impossible. *See* Pls.' Resp. to Hoeppner MSJ App'x at 200. A bullet travels in a straight line, and there is no way to draw a straight line through the bullet holes if the hand was holding a gun. Also, given the bullet's necessary path between thumb and index finger, it is likely, if Waller's

left hand were holding the gun, that the gun would have damage. But the gun had no damage.

Finally, Waller's injuries are consistent with him holding his hands above his eyes when he was shot. Hoeppner was shining his flashlight into Waller's face, which would have affected Waller's vision. It seems reasonable that Waller would have used his hands to block the light from his eyes. The first shot may have hit Waller's left hand as he was holding it in front of his eyes. This also would explain the blood on the left-side of Waller's face. That blood may have been the splatter from his left hand that was held near his eyes. The remaining shots hit Waller's chest and abdomen in a downward direction, consistent with him falling forward.

Hoeppner argues that even if Plaintiffs' story fits the facts, it is just one of many stories—and not the most likely. That may be true, but it is beside the point. On a motion for summary judgement, the Court cannot determine which interpretation is most likely. The sole issue is whether, viewing all evidence in Plaintiffs' favor, any rational jury could find in Plaintiffs' favor. The Court finds that the physical evidence is consistent with Plaintiffs' story and that a rational jury ***could*** infer that Waller did not have a gun in his hands.

B. Officer's Lack of Credibility

Hoeppner argues that his and Hanlon's eye-witness testimony fits the physical evidence better and—compared to Plaintiffs' story—is "more logical." Hoeppner's MSJ at

p. 34. But this ignores the summary-judgment standard. The "judge's function at summary judgment is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Rogers v. Lee Co., Miss.*, 684 F. App'x 380, 386 (5th Cir. 2017). And in "making that determination, a court must view the evidence in the light most favorable to the opposing party." *Id.*

The Court finds that the physical evidence described above, in the light most favorable to Plaintiffs, creates a genuine issue for trial. Although the physical evidence may fit Hoeppner's story better, it "is impossible to find for [Hoeppner] without making a credibility call in [his] favor." *Id.* at 389. The physical evidence itself bears multiple interpretations. At this stage, the Court cannot credit Hoeppner's testimony when, in the light most favorable to Plaintiffs, there are conflicting inferences. For this reason, the Court declines to find Hoeppner's story "more logical" and, on that basis, discredit Plaintiffs' story.

C. Expert Opinion

Plaintiffs have also cited their experts' opinions as supporting their story. Generally, these experts use blood-spatter opinion, forensic reconstruction, and animations to show that the physical evidence is consistent with Plaintiffs' story. To survive a motion for summary judgment, this evidence is redundant. It merely bolsters and makes more credible the Plaintiffs' interpretation of the physical evidence. Although Plaintiffs undoubtably want that evidence to present to a jury, the physical

evidence alone suffices to clear the summary-judgment hurdle. For this reason, the Court does not comment further on the expert testimony.

CONCLUSION

For these reasons, the Court finds that there is a genuine dispute of material fact, and accordingly, Hoeppner's motion for summary judgment is **DENIED**.[1]

SO ORDERED on this **19th day** of **January, 2021**.

/s/ Mark T. Pittman
Mark T. Pittman
UNITED STATES DISTRICT JUDGE

1. As the late Judge Eldon B. Mahon frequently observed during his thirty years on this bench, "sometimes lawyers just have to deal with issues in open court."

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 24, 2019

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10561

ANGIE WALLER, INDIVIDUALLY AND IN HER CAPACITY AS INDEPENDENT EXECUTRIX OF THE ESTATE OF KATHLEEN MARGARET WALLER; CHRIS WALLER,

Plaintiffs-Appellees,

TERRY WAYNE SPRINGER;
GAYLA WYNELL KIMBROUGH,

Intervenor Plaintiffs-Appellees,

v.

BENJAMIN B. HANLON; RICHARD HOEPPNER;
B. S. HARDIN,

Defendants-Appellants.

April 24, 2019, Filed

Appeals from the United States District
Court for the Northern District of Texas.

Appendix D

Before KING, SMITH, and WILLETT, Circuit Judges.

KING, Circuit Judge:

Fort Worth Police Officer Richard Hoeppner fatally shot 72-year old Jerry Waller in Waller's own garage. Hoeppner insists he did so only out of reasonable fear for his life. Seeking recompense for Waller's death, Waller's survivors came to the district court alleging that forensic evidence substantially undermines Hoeppner's version of events. The district court concluded that the plaintiffs pleaded enough facts to plausibly allege that Hoeppner did not reasonably fear for his safety when he shot Waller. It likewise concluded they pleaded enough facts to allege that defendant police officers Benjamin Hanlon and B. S. Hardin conspired with Hoeppner to veil the true circumstances of Waller's death. It accordingly denied the defendants' motions for a judgment on the pleadings.

The defendants appeal that ruling. Exercising appellate jurisdiction under the collateral-order doctrine, we AFFIRM in part and REVERSE in part. We agree with the district court that the plaintiffs plausibly allege Waller was unarmed—and thus posed no reasonably perceivable threat—when Hoeppner killed him. But we conclude the plaintiffs' claims alleging the defendants denied them access to the courts are currently unripe. We also conclude the plaintiffs do not have standing to seek declaratory (as opposed to retrospective) relief for the past injury to Waller.

Appendix D

I.

A.

We draw the following facts from the plaintiffs' pleadings and the attachments thereto.

Defendants Richard Hoeppner and Benjamin Hanlon, both Fort Worth police officers on patrol during the early morning of May 28, 2013, were dispatched to 409 Havenwood Lane North to investigate a residential burglary alarm. Hoeppner and Hanlon arrived in separate vehicles and parked down the street from 409 Havenwood Lane North, so they could approach surreptitiously. The officers proceeded on foot to 404 Havenwood Lane North, erroneously believing it was 409 Havenwood Lane North, which was across the street. The officers looked around the outside of the house and noticed the garage door was open. Hanlon then went to knock on the front door while Hoeppner stayed by the open garage. Meanwhile, the officers' flashlights roused Jerry and Kathleen Waller, the residents of 404 Havenwood Lane North. Jerry Waller attributed the lights to his car alarm, so he went out to the garage to investigate.

What happened next is the subject of dispute. Hoeppner and Hanlon, the only surviving witnesses to the encounter, recounted the following version of events in a series of statements to investigators.[1] Holding a small

1. The plaintiffs attach these statements to their pleadings but disavow their accuracy.

gun, Waller entered the garage through a door that led in from the house. Hoeppner shined his 600-lumen flashlight in Waller's eyes specifically to conceal himself, drew his service weapon, and repeatedly ordered Waller to drop the gun. Hoeppner did not identify himself as a police officer, but Hanlon, upon hearing Hoeppner shouting in the garage, rushed to the garage while yelling "Fort Worth PD."

Waller ignored Hoeppner's repeated commands to drop his gun. Instead, Waller became combative and demanded that Hoeppner get the light out of his eyes. Waller eventually did put the gun down on the back of a car parked in the garage. Hoeppner moved toward the gun, but Waller suddenly lunged for the gun, retrieved it, and pointed it at Hoeppner. Fearing for his life, Hoeppner shot Waller five or six times, and Waller fell forward on top of the gun. Hanlon did not fire his weapon.

The plaintiffs accuse Hoeppner and Hanlon of fabricating this story to cover up an unjustified use of force. They allege that physical evidence shows that Waller could not have been holding a gun when he was shot. Rather, they say the autopsy report and blood-splatter patterns suggest that Waller was holding both his hands over his face when he was shot.

The autopsy report, which the plaintiffs attach to their pleadings, shows that one of Hoeppner's bullets went through Waller's left thumb and struck several of his fingers on his left hand. The plaintiffs maintain that the bullet's path through Waller's fingers and the blood

on the palm of his left hand suggest that he could not have been gripping a gun with his left hand when it was struck. Further, they say that Waller's gun was not damaged in the shooting and crime-scene photographs do not reveal any blood on the gun's handle, making it unlikely it was in Waller's left hand when he was struck.

Likewise, Waller had blood splatter on the palm of his right hand, which the plaintiffs cite as evidence that when he was shot, he was not holding anything in his right hand either. Waller also had blood splatter around his left ear, which, the plaintiffs posit, means he must have been holding his left hand above his face when the bullet hit it, likely because he was trying to shield the light from his eyes. And if the blood splatter on his right hand also came from the wound on his left hand, then his right hand must have also been at eye level when he was shot.

The events that allegedly followed further animate the plaintiffs' suspicions. They allege that defendant B. S. Hardin, another Fort Worth officer, arrived at the scene a few minutes after the shooting and conspired with Hoeppner and Hanlon to cover up Hoeppner's culpability. Hardin told investigators that he went to administer aid to Waller when he arrived on scene because he had prior experience as an EMT. Hardin said that Hoeppner told him there was a gun underneath Waller, so he lifted Waller's body and laid the gun off to the side before administering aid in case Waller could still fire the weapon. It was not until after removing the gun, Hardin said, that he discovered Waller did not have a pulse.

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The plaintiffs allege that Hardin lied about finding a gun under Waller's body. The plaintiffs assert that Hardin had no legitimate reason to move the gun from underneath Waller to about a foot from Waller's head, where it is later depicted in crime-scene photographs. They also point to inconsistent statements about the positioning of Waller's arms as evidence that Hardin fabricated his story. Hardin told investigators that Waller's arms were tucked underneath his chest when Hardin found him. But Kathleen Waller, who, according to Hardin, entered the garage around the same time as he arrived (and thus before he removed the gun), recalled that Jerry Waller's hands were at his sides in a "pushup"-like position. Subsequent crime-scene photographs show Waller with his left arm stretched perpendicular to his body and his right arm laying parallel at his side.

The plaintiffs additionally allege several procedural irregularities in the early stages of the investigation, which they contend to be further evidence of a conspiracy. They allege that the defendants took more than five hours to call the medical examiner in violation of a state law that requires police officers to report an unnatural death to the medical examiner "immediately" upon its discovery.[2] Tex. Code Crim. Proc. Ann. art. 49.25 § 7(a). They likewise argue that one of the officers violated state law by moving Waller's body without permission from the medical examiner. *See id.* § 8. And they allege someone stepped in Waller's blood and tracked it throughout the garage, further contaminating the crime scene.

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2. In contrast, the plaintiffs allege that a police-union attorney was "on the scene within minutes" of Waller's death.

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B.

Waller's survivors[3] brought 42 U.S.C. § 1983 claims against Hoeppner, Hanlon, Hardin, the City of Fort Worth, and several officers involved in the investigation into Waller's death. As relevant to this appeal, they alleged that Hoeppner used excessive force against Waller in violation of his Fourth and Fourteenth Amendment rights to be free from unreasonable seizures. They also claimed that Hoeppner, Hanlon, and Hardin conspired to cover up Hoeppner's use of excessive force in violation of their constitutional right to access the courts. And they sought declaratory relief for violations of analogous rights under the Texas Constitution.

Hoeppner, Hanlon, and Hardin each answered with a qualified-immunity defense to the § 1983 claims. On the district court's order, the plaintiffs then filed a reply addressing qualified immunity. Hoeppner, Hanlon, and Hardin subsequently moved for judgment on the pleadings, arguing that the plaintiffs' pleadings were insufficient to overcome their qualified-immunity defenses. The district court determined that the defendants were not entitled to qualified immunity based on the plaintiffs' well-pleaded allegations and thus denied the defendants' motions in

3. The original plaintiffs consist of Waller's two children, one of whom is acting in a dual capacity as the executrix of Kathleen Waller's estate, who died while this case was pending below. Waller's two additional children joined as intervenors. We refer to the plaintiffs and intervenors collectively as the "plaintiffs" throughout this opinion.

relevant part.[4] Specifically, it concluded that the plaintiffs' allegations, taken as true, established that Waller was not holding a weapon when Hoeppner shot him. Thus, it ruled that the plaintiffs plausibly alleged Hoeppner did not reasonably perceive a threat when he shot Waller in violation of clearly established law. The district court also concluded that the plaintiffs plausibly alleged the defendants conspired to tamper with the crime scene and give false statements in a manner that could prove fatally detrimental to the plaintiffs' claims against Hoeppner. These acts, the district court explained, violated the plaintiffs' clearly established rights to access the courts. Lastly, the district court ruled that state law authorized the plaintiffs to pursue declaratory relief for violations of the Texas Constitution. The defendants appeal these rulings.

II.

Before turning to the merits of the defendants' appeal, we must assure ourselves of our appellate jurisdiction. Congress has granted us jurisdiction over "final decisions of the district courts" within this circuit. 28 U.S.C. § 1291. Under the collateral-order doctrine, the Supreme Court has interpreted "final decisions" to include certain decisions that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration

4. The district court granted the motions as to several claims not at issue in this appeal and granted Officer A. Chambers's motion in its entirety.

be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). An order denying an officer's qualified-immunity defense is generally a collateral order subject to immediate appeal. *See Hinojosa v. Livingston*, 807 F.3d 657, 663 (5th Cir. 2015).

Despite the general rule, the plaintiffs argue that we do not have jurisdiction to review the district court's order denying the defendants' motions for a judgment on the pleadings because, in denying those motions, the district court determined that "genuine issues of material fact" precluded dismissal. This argument confuses the procedural posture of this case. In hearing an appeal from an order denying summary judgment on qualified-immunity grounds, we have jurisdiction to "review the materiality of any factual disputes, but not their genuineness." *Hogan v. Cunningham*, 722 F.3d 725, 731 (5th Cir. 2013) (quoting *Juarez v. Aguilar*, 666 F.3d 325, 331 (5th Cir. 2011)). But this appeal comes to us on the defendants' motions for judgment on the pleadings, not summary judgment. In reviewing the defendants' motions for judgment on the pleadings, the district court did not (and could not) consider whether the evidence created a genuine factual dispute. *See Bosarge v. Miss. Bureau of Narcotics*, 796 F.3d 435, 439 (5th Cir. 2015). We possess—and routinely exercise—jurisdiction to review a district court's determination at the pleadings stage that a plaintiff has alleged sufficient facts to overcome a qualified-immunity defense. *Id.* at 438-39; *see also, e.g., Shaw v. Villanueva*, 918 F.3d 414, 416 (5th Cir. 2019); *Doe v. Robertson*, 751 F.3d 383, 386-87 (5th Cir. 2014).

Accordingly, we have jurisdiction to review the district court's rulings on the defendants' qualified-immunity defenses to the plaintiffs' § 1983 claims.

Whether we have jurisdiction to review the portion of the district court's order addressing the plaintiffs' state-law declaratory-judgment claims is a separate question. As the plaintiffs point out, the defendants do not assert immunity from these claims—nor could they because qualified immunity applies only to claims for money damages. *See Morgan v. Swanson*, 659 F.3d 359, 365 n.3 (5th Cir. 2011) (en banc). We thus agree with the plaintiffs that, normally, the denial of a motion to dismiss a declaratory-judgment claim is not immediately appealable. But we may exercise pendent jurisdiction over interlocutory orders when, inter alia, "addressing the pendent claim will further the purpose of officer-immunities by helping the officer avoid trial" or "the claims involve precisely the same facts and elements." *Escobar v. Montee*, 895 F.3d 387, 392-93 (5th Cir. 2018) (footnotes omitted). Both situations are present here. It would undermine the purpose of qualified immunity if the defendants here were subject to trial on the declaratory-judgment claims despite immunity from the § 1983 claims. *Cf. Melton v. Phillips*, 875 F.3d 256, 265 n.9 (5th Cir. 2017) (en banc) ("[Q]ualified immunity is an immunity from suit that 'is effectively lost if a case is erroneously permitted to go to trial.'" (quoting *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009))). Further, the plaintiffs identify no differences between the facts or elements needed to prove their declaratory-judgment claims and those needed to prove their § 1983 claims.

Accordingly, we have jurisdiction to review the district court's rulings on the plaintiffs' declaratory-judgment claims.

III.

We review the defendants' motions for judgment on the pleadings de novo. *Edionwe v. Bailey*, 860 F.3d 287, 291 (5th Cir. 2017). The standard for Rule 12(c) motions for judgment on the pleadings is identical to the standard for Rule 12(b)(6) motions to dismiss for failure to state a claim. *See Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008). To survive a motion for a judgment on the pleadings, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). This involves a two-step inquiry. *See Robertson*, 751 F.3d at 388, 390. First, we must identify the complaint's well-pleaded factual content. *See id.* at 388. In doing so, we set aside "any unsupported legal conclusions," the truth of which "we cannot assume." *Id.*; *see also Iqbal*, 556 U.S. at 678-79. Second, we ask whether the remaining allegations "are sufficient to nudge the [plaintiff's] claim across the 'plausibility' threshold." *Robertson*, 751 F.3d at 390 (quoting *Iqbal*, 556 U.S. at 678). In other words, we ask whether we can reasonably infer from the complaint's well-pleaded factual content "more than the mere possibility of misconduct." *Iqbal*, 556 U.S. at 679. This is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

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Section 1983 provides a cause of action to an individual harmed by a state official's violation of federal law. A state official sued under § 1983 is entitled to qualified immunity from damages, which protects the official from liability for any act that was not objectively unreasonable at the time of the act. *See Lincoln v. Turner*, 874 F.3d 833, 847 (5th Cir. 2017). "The basic steps of our qualified-immunity inquiry are well-known: a plaintiff seeking to defeat qualified immunity must show: '(1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct.'" *Id.* at 847-48 (quoting *Morgan*, 659 F.3d at 371). When confronted with a qualified-immunity defense at the pleadings stage, the plaintiff must plead "facts which, if proved, would defeat [the] claim of immunity." *Westfall v. Luna*, 903 F.3d 534, 542 (5th Cir. 2018) (quoting *Brown v. Glossip*, 878 F.2d 871, 874 (5th Cir. 1989)).

A.

We first consider whether the plaintiffs allege sufficient facts to overcome Hoeppner's qualified-immunity defense to their excessive-force claim. The parties appear to agree that that Hoeppner did not violate Waller's rights if Waller was holding the gun at the time he was shot but did violate Waller's clearly established rights if Waller was not holding the gun. Neither party makes an argument under the second prong of the qualified-immunity test. Thus, only the first prong is at issue here, and the sole question is whether the plaintiffs' pleadings plausibly allege that Waller was unarmed when Hoeppner shot him.

We conclude the plaintiffs' claim is plausible based on the specific and detailed factual allegations they advance in support of their theory of events. Most notably, the plaintiffs' allegations about Waller's left-hand wounds and blood-spatter patterns support the reasonable inference that Waller was unarmed when he was shot. The path of the bullet through Waller's fingers appears to suggest his hand was not clenched, as it would have been if he had been holding a gun. Further, if Waller was holding a gun when the bullet struck his left hand, it seems unlikely the bullet would have hit three of his fingers without at all damaging the gun. Moreover, it is not clear how unsmeared blood splatter could have ended up on Waller's right palm if Waller was holding a gun in his right hand.

Hoeppner raises two specific challenges to the sufficiency of these allegations. First, he insists that the plaintiffs pleaded themselves out of court by attaching the autopsy report to their pleadings. On the face of their pleadings, the plaintiffs allege that the autopsy report shows Waller could not have been holding a gun when he was shot. But Hoeppner observes that the autopsy report does not opine on whether Waller could have been holding a gun when he was shot. Therefore, Hoeppner says, the autopsy report conflicts with the plaintiffs' pleadings and takes precedence over the pleadings. *Cf. Smit v. SXSW Holdings, Inc.*, 903 F.3d 522, 528 (5th Cir. 2018) ("[W]hen an 'allegation is contradicted by the contents of an exhibit attached to the pleading, then indeed the exhibit and not the allegation controls.'" (quoting *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 377 (5th Cir. 2004))).

We disagree. Hoeppner misunderstands the plaintiffs' reliance on the autopsy report. The plaintiffs do not allege that the autopsy report itself concluded that Waller could not have been holding a gun at the time he was shot. Rather, they allege that such an inference can be drawn from the information contained within the autopsy report—specifically, the descriptions of Waller's left-hand wounds. The contents of the autopsy report are consistent with the plaintiffs' allegations, so at this stage of the litigation, we accept those allegations as true.

Second, Hoeppner argues that these allegations raise only the possibility that he was not justified in shooting Waller. He asserts the plaintiffs' allegations about Waller's left-hand wounds and right-hand unsmeared blood spatter only show Waller was unarmed when he was hit by one of Hoeppner's five bullets. If Waller was armed when Hoeppner began to fire but dropped the gun sometime between being struck by Hoeppner's first and final shots, then Hoeppner argues his use of force would have been reasonable. In making this argument, Hoeppner ignores his own statement to investigators—attached to and quoted verbatim in the plaintiffs' pleadings—that he fired multiple shots specifically because Waller did not drop the gun and thus remained a threat. He explained:

> I know there was one delayed shot [be]cause I put rounds on him at first I kind of noticed he kind of . . . I mean, like he was taking them like that and then he kind . . . kind of hunched over. And I'm not sure if he was falling over or if he was bending over [be]cause it hurt so . . . and

> I saw *he still had the gun in his hand* and so I . . . so I . . . I put . . . I put one more round on him and that's when he fell forward.

(ellipses in original) (emphasis added).

Furthermore, even if Waller might have dropped the gun at some point during the shooting, this possibility, when weighed against the plaintiffs' detailed and specific factual pleadings, does not render implausible their allegation that Waller was unarmed when shot. Hoeppner demands too much at the pleadings stage; allegations need "not conclusively establish" the plaintiffs' theory of the case. *Robertson*, 751 F.3d at 389. For now, it suffices that the plaintiffs' allegations "are not 'naked assertions devoid of further factual enhancement.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678).

Hoeppner tries to compare the present facts to those in several police-shooting cases in which we held for the officers because the plaintiffs' evidence only permitted us to speculate about whether the officers' descriptions of events leading up to the shootings were untruthful. None of these cases is an apt comparison. In each case, the plaintiffs sought to rely on certain circumstantial evidence to create a genuine factual dispute on summary judgment, but the court in each instance found that the plaintiffs' evidence was consistent with the officers' versions of events. *See Small ex rel. R.G. v. City of Alexandria*, 622 F. App'x 378, 382-83 (5th Cir. 2015) (unpublished) (per curiam) (affirming summary judgment for officer because "no record evidence call[ed] into question [the officer's]

testimony about [the decedent's] behavior immediately prior to the shooting"); *Thomas v. Baldwin*, 595 F. App'x 378, 382 (5th Cir. 2014) (unpublished) (explaining that autopsy report suggesting decedent was shot in his side did not support plaintiffs' "bare assertion that [the decedent] was fleeing at the time he was shot"); *Manis v. Lawson*, 585 F.3d 839, 844 (5th Cir. 2009) (reversing denial of qualified immunity on summary judgment because plaintiffs did "not dispute the *only* fact material to whether [the officer] was justified in using deadly force: that [the decedent] reached under the seat of his vehicle and then moved as if he had obtained the object he sought"); *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 383 (5th Cir. 2009) (explaining that plaintiffs were "attempting to use . . . undisputed facts to imply a speculative scenario that ha[d] no factual support"). Here, by contrast, the hand wounds and blood splatter provide at least some support for the plaintiffs' allegation that Waller was not holding a gun, which, if true, contradicts Hoeppner's and Hanlon's explanations for the shooting.

In sum, the plaintiffs' specific and detailed factual pleadings about the crime-scene evidence make plausible their allegation that Waller followed Hoeppner's commands, put down his weapon, and was unarmed when Hoeppner shot him. If this allegation is true, then qualified immunity would not shield Hoeppner from the plaintiffs' excessive-force claim. *See, e.g., Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 493 (5th Cir. 2001). Accordingly, we affirm the district court's order denying Hoeppner's motion for judgment on the pleadings on the plaintiffs' excessive-force claim.

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B.

We next consider whether the plaintiffs sufficiently allege that Hoeppner, Hanlon, and Hardin conspired to cover up the true circumstances of Waller's death in violation of the plaintiffs' clearly established right to access the courts. We have recognized a right of access to the courts, which is founded in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, and the Fifth and Fourteenth Amendment Due Process Clauses. *See Ryland v. Shapiro*, 708 F.2d 967, 971-73 (5th Cir. 1983). Denial-of-access claims take one of two forms: forward-looking claims alleging "that systemic official action frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time," and backward-looking claims alleging that an official action has "caused the loss or inadequate settlement of a meritorious case, the loss of an opportunity to sue, or the loss of an opportunity to seek some particular order of relief." *Christopher v. Harbury*, 536 U.S. 403, 413-14, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002) (citations omitted). The plaintiffs alleged both forward- and backward-looking denial-of-access claims against each of the defendants, but only the backward-looking claims are at issue on this appeal.

"To maintain a backward-looking claim, a plaintiff must identify (1) a nonfrivolous underlying claim; (2) an official act that frustrated the litigation of that claim; and (3) a remedy that is not otherwise available in another suit that may yet be brought." *United States v. McRae*, 702 F.3d 806, 830-31 (5th Cir. 2012). From our conclusion above that the plaintiffs state a claim against Hoeppner for excessive

force, it follows that the plaintiffs have satisfied the first of these elements. For present purposes, although disputed, we will assume the plaintiffs' allegations satisfy the second element as well by alleging that the defendants conspired to sabotage the crime scene and lie to investigators to cover up the fact that Waller was unarmed when Hoeppner shot him. Nevertheless, the plaintiffs' claims fail on the third element: they have not explained what relief the defendants' alleged misdeeds have cost them. The plaintiffs premise their backward-looking denial-of-access claims on the theory that the defendants' alleged coverup frustrated their excessive-force claim against Hoeppner. Yet the plaintiffs are actively—and, so far, successfully—litigating that claim. They filed hundreds of pages of pleadings in the district court supported by dozens of exhibits containing detailed forensic evidence in support of their claim. They survived Hoeppner's pleadings-stage assertion of qualified immunity first in the district court and now on appeal. In short, there is no reason to believe the remedy the plaintiffs seek "is not otherwise available" in their active lawsuit against Hoeppner. *Id.* at 831.

In reaching the contrary conclusion, the district court explained that the plaintiffs' "ability to prove their [excessive-force claim] may have been permanently compromised." That might turn out to be the case, but it is too early to say. *See Christopher*, 536 U.S. at 414 ("These cases do not look forward to a class of future litigation, but backward to a time when specific litigation ended poorly, or could not have commenced, or could have produced a remedy subsequently unobtainable." (footnotes omitted)). Unless and until the plaintiffs' claim against

Hoeppner suffers some concrete setback traceable to the defendants' alleged coverup, their allegation that the defendants impaired their effort to bring that claim is no more than speculation about an event that may or may not come to pass. *See id.* at 415 ("There is, after all, no point in spending time and money to establish the facts constituting denial of access when a plaintiff would end up just as well off after litigating a simpler case without the denial-of-access element.").

The plaintiffs argue that their delay in bringing this lawsuit can, on its own, constitute the prejudice necessary to state their denial-of-access claims. We disagree. True, we have suggested in dicta that "[c]onduct by state officers which results in delay in the prosecution of an action in state court may cause such prejudice." *Ryland*, 708 F.2d at 974. But as we later clarified:

> *Ryland* stands for the proposition that if state officials wrongfully and intentionally conceal information crucial to a person's ability to obtain redress through the courts, and do so for the purpose of frustrating that right, and that concealment and the delay engendered by it *substantially reduce the likelihood of one's obtaining the relief* to which one is otherwise entitled, they may have committed a constitutional violation.

Crowder v. Sinyard, 884 F.2d 804, 812 (5th Cir. 1989) (emphasis added), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed.

2d 112 (1990). Thus, showing delay alone is not enough; the plaintiffs must likewise show the delay caused some further harm to their cause of action. And here the plaintiffs run into a familiar problem—any harm caused by the delay in filing their excessive-force claim has yet to manifest.

Therefore, the plaintiffs are left with pleadings that do not adequately allege a necessary element of their backward-looking denial-of-access claims. But the possibility remains that they will be able to state such claims in the future if their excessive-force claim goes south in later stages of this litigation. Faced with similar facts, the Ninth Circuit has repeatedly ordered backward-looking denial-of-access claims dismissed without prejudice as unripe. *See Delew v. Wagner*, 143 F.3d 1219, 1222-23 (9th Cir. 1998) ("To prevail on their claim, the Delews must demonstrate that the defendants' cover-up violated their right of access to the courts by rendering 'any available state court remedy ineffective.' However, because the Delews' wrongful death action remains pending in state court, it is impossible to determine whether this has in fact occurred." (citation omitted) (quoting *Swekel v. City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997))); *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 625 (9th Cir. 1988) ("Because the ultimate resolution of the present suit remains in doubt, Karim-Panahi's cover-up claim is not ripe for judicial consideration."); *cf. Lynch v. Barrett*, 703 F.3d 1153, 1157 (10th Cir. 2013) (concluding denial-of-access claim ripened once plaintiff lost underlying lawsuit). We agree this is the proper resolution. *See Choice Inc. of Tex. v. Greenstein*,

691 F.3d 710, 715 (5th Cir 2012) ("[A] case is not ripe if further factual development is required." (quoting *New Orleans Pub. Serv., Inc. v. Council*, 833 F.2d 583, 587 (5th Cir. 1987))). Accordingly, we reverse the district court's order declining to dismiss the plaintiffs' denial-of-access claims and remand with instruction to dismiss those claims without prejudice.[5]

IV.

Lastly, we conclude the plaintiffs do not have standing to seek declaratory relief for violations of Waller's rights under the Texas Constitution. "'In a case of actual controversy within its jurisdiction,' the Declaratory Judgment Act allows a federal court to 'declare the rights and other legal relations of any interested party seeking such declaration.'" *Hosein v. Gonzales*, 452 F.3d 401, 403 (5th Cir. 2006) (quoting 28 U.S.C. § 2201). But the Declaratory Judgment Act does not vest the federal courts with jurisdiction broader than Article III's "case or controversy" limitation. *Id.* "In order to demonstrate that a case or controversy exists to meet the Article III standing requirement when a plaintiff is seeking injunctive or declaratory relief, a plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future." *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003). "To obtain [declaratory]

5. The parties do not address this issue in terms of ripeness. But because ripeness implicates the district court's subject-matter jurisdiction, we raise it sua sponte. *See Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 802 (5th Cir. 2011); *Lopez v. City of Houston*, 617 F.3d 336, 341 (5th Cir. 2010).

relief for past wrongs, a plaintiff must demonstrate either continuing harm or a real and immediate threat of repeated injury in the future." *Id.*

The plaintiffs here allege only past injury to Waller. Faced with similar circumstances, the Supreme Court ruled that a plaintiff had no standing to seek declaratory relief finding his son was fatally shot by police in violation of the Fourth Amendment. *See Ashcroft v. Mattis*, 431 U.S. 171, 172, 97 S. Ct. 1739, 52 L. Ed. 2d 219 (1977) (per curiam). Accordingly, we reverse the portion of the district court's order declining to dismiss the plaintiffs' claims for declaratory relief and remand with instruction to dismiss those claims without prejudice.

V.

For the foregoing reasons, we AFFIRM the portion of the district court's order denying Hoeppner's qualified-immunity defense against the plaintiffs' excessive-force claim, but we otherwise REVERSE and REMAND with instructions to dismiss the plaintiffs' denial-of-access and declaratory-judgment claims without prejudice.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION, FILED APRIL 12, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4:15-CV-670-Y

ANGIE WALLER, *et al.*

VS.

CITY OF FORT WORTH TEXAS, *et al.*

ORDER RESOLVING MOTIONS

Pending before the Court are motions for judgment on the pleadings[1] under Federal Rule of Civil Procedure 12(c) filed by defendants Benjamin B. Hanlon, Richard A. Hoeppner, B.S. Hardin, and A. Chambers (docs. 151, 152, 157) and motions to strike (docs. 179, 180) filed by Hanlon and Hoeppner. After review of the motions, responses, related briefs, appendices, and applicable law, the Court PARTIALLY GRANTS and PARTIALLY DENIES

1. The Plaintiffs and Intervenors are collectively referred to as "Plaintiffs" and all factual assertions have been taken from Plaintiffs' First Amended Complaint (doc. 41) and Intervenors' Second Amended Complaint (doc. 45). Plaintiffs have acknowledged that both complaints "are identical in all relevant allegations" and have filed joint responses, replies, etc. (Pls.' Resp. to Mot. Summ. J. (doc. 176) 1 n. 1.)

Defendants' Rule 12(c) motions and DENIES the motions to strike.

I. COMMENTARY ON PLAINTIFFS' PLEADINGS UNDER THE FEDERAL RULES OF CIVL PROCEDURE

Federal Rule of Civil Procedure 8(a)(2) requires that a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 10(b) provides that "[i]f doing so would promote clarity, each claim founded on a separate transaction or occurrence . . . must be stated in a separate count . . . ." At the very least, Plaintiffs have failed to plead in a short and plain manner, and thus, follow even the spirit of Rule 8. Accordingly, the Court finds it necessary to explain how it determined what facts the plaintiffs have actually alleged. It did so by teasing out from Plaintiffs' stream-of-consciousness, argumentative, and hyperbolic complaint Plaintiffs' view of what happened (with some care being given to deem as conclusory those allegations that are unsupported by personal knowledge or fair inference, and thus are speculative). The Court has reckoned as true, for the purposes of its Rule 12(c) analysis, facts that are admitted or at least not denied by the defendants, even if they are pled without apparent personal knowledge or cannot be fairly inferred from undisputed facts.

Thus, the Court concludes that any claims that were intended to be brought by Plaintiffs against any defendant, but that the Court has not addressed because it was unable to decipher such claims, should be and hereby are

DISMISSED. *See Gordon v. Green*, 602 F.2d 743, 746 (5th Cir. 1979)(noting that "the underlying purpose of Rule 8, which is 'to [e]liminate prolixity in pleading and to achieve brevity, simplicity, and clarity'" and "the law does not require, nor does justice demand, that a judge must grope through [numerous] pages of irrational, prolix and redundant pleadings").

II. FACTUAL BACKGROUND

On May 28, 2013, just before 1:00 a.m., ADT Security Services ("ADT") received notice of a burglar-alarm activation at 409 Havenwood Lane North in Fort Worth, Texas, the residence of a Mrs. Bailey. Unable to reach Bailey, ADT contacted one of Bailey's neighbors. The neighbor informed ADT that Bailey had recently undergone a medical procedure and asked ADT to send someone to check on Bailey. The ADT operator then contacted the Fort Worth Police Department ("FWPD"), stating that ADT had received a burglar-alarm notification at 409 Havenwood Lane North, the Bailey residence.

In response, the FWPD dispatched two newly trained police officers, Richard Hoeppner and Benjamin Hanlon, to respond to the burglar alarm at the Bailey residence. Though they believed that they were at the correct address, 409 Havenwood Lane North, the officers actually began investigating the residence of Jerry and Kathy Waller at 404 Havenwood Lane North. Upon exiting their patrol cars, the officers walked up the Wallers' driveway together and then into the back yard. After both officers surveyed the back of the house, Hanlon went by himself to

the front of the house to knock on the door. Hanlon heard dogs barking and saw a light come on inside the home and radioed Hoeppner to come around to the front at 1:06:06 a.m. Instead of waiting on Hoeppner, however, Hanlon went to the back of the house because he heard someone yelling, and there he allegedly encountered Hoeppner with his gun drawn on Jerry Waller inside the garage. The subsequent actions of Waller and the officers are in dispute and have precipitated the present lawsuit.

According to Plaintiffs, Jerry Waller was awakened by blinking lights coming from outside his home. Waller raised his overhead garage door to turn off the alarm on his vehicle, which was in the driveway, believing it to be the source of the blinking lights. When Waller raised the garage door, he encountered Hoeppner, who shined a bright light into Waller's eyes and yelled "drop the gun." Hoeppner did not, however, identify himself as a police officer to Waller. Plaintiffs do not dispute that Waller had a gun when he entered the garage. At 1:06:50 a.m., forty-four seconds after Hanlon's first radio transmission, he contacted the police dispatcher and stated, "The guy came out with a gun, wouldn't put the gun down and pointed it at Hoeppner and Hoeppner fired."

According to Plaintiffs, Hanlon's statement does not comport with the autopsy performed by the Tarrant County Medical Examiner's office. Hoeppner told investigators that Waller placed the gun on the back of the car inside the garage and told Hoeppner to "[g]et the light out of my eyes, get the light out of my eyes." Hoeppner and Hanlon maintain, however, that thereafter

Waller grabbed the gun and turned towards Hoeppner just before being shot. And although Plaintiffs concede that Jerry Waller likely armed himself before raising the garage door, Plaintiffs claim that the autopsy report shows that Jerry Waller could not have been holding a gun when Hoeppner shot him.

Plaintiffs further claim that Hanlon's statements are contradicted by the autopsy report and do not completely match Hoeppner's statements. Hanlon claims that Hoeppner shot Waller from three feet away, but Hoeppner claims he was at least seven yards away, which Plaintiffs say is supported by the autopsy report. Hanlon also claims–-and Plaintiffs allege--that he did not fire his weapon because Hoeppner was in Hanlon's line of fire. Plaintiffs question the veracity of Hanlon's statements and further note that the wounds Waller sustained and the crime-scene photographs contradict Hoeppner and Hanlon's account of events. According to Plaintiffs, the blood spatter on the left side of Waller's face, combined with the entry and exit wounds sustained by Waller on his left hand, support the inference that Waller was unarmed and shielding his eyes from the bright lights when he was shot.

The first officers to arrive after Waller was shot–-between six and ten minutes later--were B.S. Hardin and A. Chambers. Plaintiffs aver that Hardin told investigators that he had EMS experience and approached Waller to see if there were any signs of life, and that Waller's hands were underneath him when he moved Waller's body to check for signs of life. Hardin also stated, according to Plaintiffs,

that he removed the gun from underneath Waller's body and placed it a few feet away for the safety of others at the crime scene.

Plaintiffs insist that the crime-scene photographs contradict Hardin's statements. Plaintiffs claim that, had the gun been under Waller's body, the gun would have had a large amount of blood on it given the amount of blood that Waller was lying in. According to Plaintiffs, though, the crime-scene photographs do not reveal any blood on the gun, and that later photographs that show blood on the gun appear to have come from being in contact with a bloody glove.

Plaintiffs note that before Hardin checked to see if Jerry Waller was still alive, Kathy Waller entered the garage. She claims that her husband was was lying face down with his hands "at his shoulders." Kathy Waller claims to have heard a male voice shout, "Get her out of here!" She was then taken out of the garage and turned over to Chambers, who grabbed Kathy Waller by the arm and placed her in the back of a police car with the windows up and the doors locked. Plaintiffs claim that the officers had no probable cause "to arrest, take into custody and falsely imprison Kathy Waller." Plaintiffs also claim that Chambers denied Kathy Waller medical attention. Kathy Waller was later examined and taken to the hospital.

In response to Plaintiffs' amended complaints, officers Hoeppner, Hanlon, Hardin, and Chambers have filed motions for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), asserting that they are entitled

to qualified immunity from Plaintiffs' claims. The Court must now consider whether Plaintiffs have sufficiently pled enough facts–-taken as true--to overcome each officer's qualified-immunity defense.

III. STANDARD OF REVIEW

A. Judgment on the Pleadings under Fed. R. Civ. P. 12(c)

Rule 12(c) states that "[a]fter the pleadings are closed—but early enough not to delay trial--a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "The standard for dismissal under Rule 12(c) is the same as that for dismissal for failure to state a claim under Rule 12(b)(6)." *Johnson v. Johnson*, 385 F.3d 503, 528 (5th Cir. 2004) (citing *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 n.8 (5th Cir. 2002)). "Thus, the 'inquiry focuses on the allegations in the pleadings' and not on whether the 'plaintiff actually has sufficient evidence to succeed on the merits.'" *Ackerson v. Bean Dredging, LLC,* 589 F.3d 196, 209 (5th Cir. 2009) (quoting *Ferrer v. Chevron Corp.*, 484 F.3d 776, 782 (5th Cir. 2007)).

Federal Rule of Civil Procedure 12(b)(6) authorizes the dismissal of a complaint that fails "to state a claim upon which relief can be granted." This rule must, however, be interpreted in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim for relief in federal court. Rule 8(a) calls for "a short and plain statement of the claim showing that the pleader is entitled to relief."

Fed. R. Civ. P. 8(a); *see Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (holding Rule 8(a)'s simplified pleading standard applies to most civil actions). As a result, "[a] motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983) (quoting Wright & Miller, *Federal Practice and Procedure* § 1357 (1969)). The Court must accept as true all well pleaded, nonconclusory allegations in the complaint and liberally construe the complaint in favor of the plaintiff. *Kaiser Aluminum*, 677 F.2d at 1050.

The plaintiff must, however, plead specific facts, not mere conclusory allegations, to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). Indeed, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," and his "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)." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 & 1974 (2007). The Court need not credit bare conclusory allegations or "a formulaic recitation of the elements of a cause of action." *Id.* at 1955. Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liabile for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

In considering a motion to dismiss for failure to state a claim, "courts must limit their inquiry to the facts stated

in the complaint and the documents either attached to or incorporated in the complaint." *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996). Documents attached to or incorporated in the complaint are considered part of the plaintiff's pleading. *See* FED. R. CIV. P. 10(c); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000); *Paulemon v. Tobin*, 30 F.3d 307, 308-09 (2d Cir. 1994); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). "Where the allegations in the complaint are contradicted by facts established by documents attached as exhibits to the complaint, the court may properly disregard the allegations." *Martinez v. Reno*, No. 3:97-CV-0813-P, 1997 WL 786250, at *2 (N.D. Tex. Dec. 15, 1997) (citing *Nishimatsu Const. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)); *accord Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974). Similarly, documents of public record can be considered in ruling on a 12(b)(6) motion to dismiss. *Davis v. Bayless*, 70 F.3d 367, 372 n.3 (5th Cir. 1995).

B. Qualified-Immunity Standard

When a plaintiff seeks monetary damages directly from a defendant in an individual capacity for actions taken under the color of law, the defendant may invoke his right to qualified immunity. *See Hafer v. Melo*, 502 U.S. 21, 26 (1991); *Doe ex rel. Magee v. Covington Cty. School Dist.*, 649 F.3d 335, 341 n. 10 (5th Cir. 2011)(only natural persons sued in their individual capacities are entitled to qualified immunity). The doctrine of qualified immunity protects public officials "from liability for civil damages

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The doctrine balances the important interests of holding "public officials accountable when they exercise power irresponsibly" on the one hand and, on the other, "the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231. Because an official is entitled to immunity from suit, not merely from liability, immunity questions should be resolved at the earliest possible stage in the litigation. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

In determining whether a government official is entitled to qualified immunity, this Court must undertake a two-pronged analysis, inquiring: (1) whether the facts that the plaintiff has alleged make out a violation of a constitutional or statutory right; and (2) whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Pearson*, 555 U.S. at 232 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Courts have discretion, however, in deciding which of the two prongs to address first based upon the circumstances of the case. *See Pearson*, 555 U.S. at 236 (rejecting *Saucier*'s mandatory two-step sequence); *Lytle v. Bexar Cty. Tex.*, 560 F.3d 404, 409 (5th Cir. 2009), *cert den'd*, 130 S.Ct. 1896 (2010).

The right the official is alleged to have violated must be "clearly established" in a particularized sense to

the context of the case. *Saucier*, 533 U.S. at 202. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id*. The inquiry turns on the "objective legal reasonableness of the action, assessed in the light of the legal rules that were clearly established at the time it was taken." *Pearson*, 555 U.S. at 244 (quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999)).

Because qualified immunity is an affirmative defense that provides immunity from both suit and liability, the plaintiff has the burden to negate the defense once it has been properly raised. *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008); *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002)(en banc). "The defendant official must initially plead his good faith and establish that he was acting within the scope of his discretionary authority." Brumfield, 551 F.3d at 326 (quoting *Bazan ex rel. Bazan v. Hidalgo Cty.*, 246 F.3d 481, 489 (5th Cir. 2001)). Once he does, the burden shifts to the plaintiff to rebut the qualified-immunity defense.

IV. DISCUSSION AND ANALYSIS

A. Excessive-Force Claim

Although Plaintiffs have not placed their claims under specific headings, it appears that Plaintiffs are bringing an excessive-force claim against Hoeppner under 42 U.S.C. § 1983, claiming that Hoeppner violated Jerry Waller's Fourth Amendment rights by using unnecessary (and

deadly) force. (See Am. Compls. (docs. 41 & 45) 3-4, ¶¶ 14, 19.) Section 1983 imposes liability upon those who, while acting under the color of state law, deprive "any citizen of the United States . . . of any rights, privileges, or immunities secured by the Constitution and laws . . . ." 42 U.S.C. § 1983. "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris Cty. Flood Control Dist.*, 869 F.2d 1565, 1574 (5th Cir. 1989). "Thus, an underlying constitutional or statutory violation is a predicate to liability under § 1983." *Id.*

The Supreme Court has held that "*all* claims that law enforcement officers have used excessive force--deadly or not–-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395, (1989). "A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.' " *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n. 16(1968)). And a police officer's "use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Sanchez v. Fraley*, 376 F. App'x 449, 451 (5th Cir. 2010)(quoting *Tennessee v. Garner*, 471 U.S. 1, 7 (1985)). "[T]o state a violation of the Fourth Amendment's prohibition on excessive force, [a] plaintiff must allege: (1) an injury that (2) resulted directly and only from the use of force that was excessive to the need, and (3) the use of force that was objectively unreasonable." *Bush v. Strain*, 513 F.3d 492, 500-01 (5th Cir. 2008)(citing *Flores v. City of Palacios*, 381 F.3d 391, 396 5th Cir. 2004)).

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Plaintiffs allege that Hoeppner "entered upon [the] Wallers' property and house, and invaded the privacy of their home, . . . without a warrant [or] . . . probable cause," and used unlawful deadly force against Jerry Waller. (Pls.' 2d Am. Compl. (doc. 45-1) 23, ¶¶ 82-83.) Thus, Plaintiffs contend, Hoeppner "violat[ed] . . . the Fourth and Fourteenth Amendments to the U.S. Constitution." *Id.* Plaintiffs also claim that, although Jerry Waller entered his garage with a gun, he placed the gun on the trunk of his car when told to do so by Hoeppner and did not grab the gun before being shot. But according to Hoeppner, Waller grabbed the gun and turned towards Hoeppner just before being shot. Plaintiffs claim, however, that the Tarrant County Medical Examiner's autopsy report shows that Waller could not have held a gun when he was shot. In fact, Plaintiffs claim that the autopsy report shows that Waller's hands were by his face when he was shot, which seems to be supported by what Plaintiffs say was Hoeppner's recollection of what Waller said: "Get the light out of my eyes." (See Pls.' Rule 7(a) Reply (doc. 149) 43.) Plaintiffs also claim that the blood spatter on the left side of Waller's face shows he was unarmed when shot and that their assertion is supported by the findings in the autopsy report. Plaintiffs further claim that "the blood present in the palm of the left hand [of Waller] is inconsistent with having been holding a gun." (*Id.* at 20.)

In response, Hoeppner maintains that he was justified in the use of deadly force and even states "I was almost positive that [Waller] was going to shoot me and kill me." (Def.'s Mot. for J. Pldgs. (doc. 152) 5.) Hoeppner also claims that Waller made "a real quick motion for the car, grab[bed] the gun," then turned towards Hoeppner while

raising the gun. (Id.) Hoeppner maintains that "once confronted by the armed Waller, . . . Hoeppner had no reasonable time or opportunity to do anything other than fire his weapon in self defense." (Id.)

After reviewing the alleged facts in the light most favorable to Plaintiffs, the Court must first determine whether Plaintiffs have plausibly alleged that Hoeppner's conduct violated a constitutional right. *See Saucier*, 533 U.S. at 201 ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?"). If, after considering the alleged facts, the Court determines that Hoeppner violated no such right, then no further analysis will be needed. He will be entitled to qualified immunity and, accordingly, dismissal of Plaintiffs' complaint for failure to state a claim. *See id.*

But if the Court determines that Plaintiffs have pled enough facts to plausibly allege that Hoeppner violated a statutory or constitutional right, then the Court must move to the second prong of the qualified-immunity analysis and determine whether such a right was clearly established at the time of Hoeppner's actions. Plaintiffs allege that Waller placed his gun on the trunk of the car and was not holding the gun when shot by Hoeppner. Hoeppner maintains, however, that Waller grabbed the gun and turned towards Hoeppner just before being shot.[2]

2. The Court recognizes that if the facts are as Hoeppner states, then no constitutional violation has occurred, ending the

But if Plaintiffs' allegations are taken as true, Plaintiffs have plausibly alleged that Hoeppner violated the Fourth Amendment when he shot an unarmed Jerry Waller in his garage. *See Bazan ex rel. Bazan v. Hidalgo Cty.*, 246 F.3d 481, 493 (5th Cir. 2001)(citation omitted)(noting that "[t]he excessive force inquiry is confined to whether the [officer] was in danger *at the moment of the threat* that resulted in the [officer's) shooting" of the deceased, regardless of what transpired beforehand)(emphasis in original); *see also id.*, at 487-88 ("Deadly force is a subset of excessive force . . . [and] violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.")(citation and internal quotation marks omitted).

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inquiry. *See, e.g., Cole v. Carson*, 802 F.3d 752, 759 nn. 25, 34 (5th Cir. 2015)(giving examples of cases where an individual's actions were deemed threatening enough to allow the court to grant qualified immunity to the officer), *vacated and remanded sub nom. For further consideration by Hunter v. Cole*, 137 S.Ct. 497 (2016); *see also Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991) (holding that an officer was justified in using deadly force where the suspect refused the officer's commands to raise his hands and appeared to be reaching for a weapon). But here, Plaintiffs have specifically alleged enough facts to overcome Hoeppner's qualified-immunity defense at the pleading stage, especially since Plaintiffs assert that the autopsy report shows Waller was not and could not have been holding a gun when he was shot. At the very least, this creates a material fact issue and a Rule 12(c) motion should not be granted when material facts are in dispute. *See Great Plains Trust*, 313 F.3d at 312 (citations omitted) (noting that a Rule 12(c) motion "is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts").

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It has long been established that a police officer may not use deadly force against a person who does not pose an immediate threat to the officer or others. *See Tennessee v. Garner*, 471 U.S. 1, 11 (1985)("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."). And no reasonable officer would have concluded that it was permissible to shoot an unarmed person who had his hands in the air and was not reaching for a gun.

Again, taking Plainiffs' allegations as true, Jerry Waller–-at the moment he was shot--did not pose an immediate threat to Hoeppner or anyone else. Thus, Hoeppner's use of deadly force would have been unlawful, which should have been apparent to him at the time he fired his weapon. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987)(noting that "in light of pre-existing law the unlawfulness [of the officer's actions] must be apparent."). Accordingly, the Court concludes that Hoeppner's 12(c) motion based on Plaintiffs' excessive-force claim should be and hereby is DENIED.

To the extent Plaintiffs intend to allege an excessive-force claim against Hanlon, such a claim is DISMISSED. The excessive-force inquiry is focused on the moment the excessive force–-or in this case deadly force--was used. Plaintiffs do not allege that Hanlon fired his weapon at Waller, nor do Plaintiffs allege that Hanlon seized Waller

or restrained his liberty in any way.[3] *See Terry*, 392 U.S. at 19 n. 16(noting that a seizure under the Fourth Amendment occurs when government actors have, "by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen."). Plaintiffs contend that Hanlon did not fire his weapon because he knew not to shoot or, that he was not there at the time shots were fired. (See Pls.' 2d Am. Compl. (doc. 45) 21; Pls.' Reply (doc. 149) 64.) Either way, Hanlon did not seize Waller, and therefore did not violate the Fourth Amendment by using excessive force. The events leading up to any use of excessive force by Hoeppner are of no consequence to the excessive-force inquiry. *See Bazan*, 246 F.3d at 493 (noting that "[t]he excessive force inquiry is confined to whether the [officer] was in danger *at the moment of the threat* that resulted in the [officer's) shooting" of the deceased, regardless of what transpired beforehand)(citation omitted).

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3. In their Rule 7(a) Reply, Plaintiffs claim that Hanlon fired his weapon, but seem to make this allegation to support their premise that the Fort Worth Police Department mishandled the evidence based upon the fact that two cartridges were missing from Hanlon's gun. (See Pls.' Reply (doc. 149) 150.) To the extent Plaintiffs are now attempting to raise a new claim that Hanlon actually shot or attempted to shoot Waller, such a claim is dismissed as not being properly before the Court. *See Fisher v. Metro. Life Ins. Co.*, 895 F.2d 1073, 1078 n. 3 (5th Cir. 1990)(dismissing claims that had not been raised in the amended complaint, but instead asserted in a response to motion for summary judgment). Plaintiffs have maintained throughout both of their amended complaints that Hanlon never fired his weapon. Therefore, the Court has accepted that allegation as true in considering Hanlon's Rule 12(c) motion.

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B. Bystander-Liability Claim

Next, Plaintiffs appear to assert a bystander-liability claim against Hanlon for not intervening to prevent Hoeppner's use of excessive force. The Court must now decide whether Hanlon is entitled to qualified immunity based on the pleaded facts. To make that decision, the Court must once again determine: "(1) whether the defendant's conduct violated a constitutional right, and (2) whether the defendant's conduct was objectively unreasonable in light of clearly established law at the time of the violation." *Terry v. Hubert*, 609 F.3d 757, 761 (5th Cir. 2010)(citation omitted). This Court has already held that Plaintiffs have pled enough facts to state a claim that Hoeppner violated the Fourth Amendment by using deadly force against Jerry Waller. The Fifth Circuit 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 use of excessive force may be liable under section 1983." *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995). The bystander-liability inquiry requires a court to determine whether the bystander officer had "a reasonable opportunity to realize the excessive nature of the force and to intervene to stop it." *Id.*

Here, the question is whether Plaintiffs have sufficiently alleged that Hanlon failed to take reasonable measures to protect Waller from the deadly force used by Hoeppner. Plaintiffs claim that Hanlon and Hoeppner went to the Wallers' back yard to examine the house. (Pls.' 2d Am. Compl., ¶ 39.) After a few minutes, they say, Hanlon went to the front of the house to knock on the

door. (Id., ¶ 44.) But Hanlon heard yelling at the back of the house and ran towards the garage where he allegedly encountered Hoeppner with his gun drawn on Waller, telling him to drop his weapon. (Pls.'s Reply (doc. 149) pp. 106-07.) Hanlon claims to have stated "Fort Worth Police put the gun down." (Id., at 106.) Hoeppner also claims that Hanlon identified the officers as "Fort Worth P.D." (Id., at 57.) And although Plaintiffs mention in passing that Hanlon's gun was missing two cartridges, (see id., at 64), Plaintiffs have admitted that Hanlon "did not fire [his weapon] because he did not think it was necessary or he was not present when the shooting took place." (Id.) Either way, based on the pleadings, Hanlon cannot be liable for excessive force even under a bystander theory. For if Plaintiffs plead that Hanlon wasn't present when Hoeppner shot Waller, he cannot be said to have failed to prevent the shooting. *See Whitley v. Hanna*, 726 F.3d 631, 646 (5h Cir. 2013)(noting that bystander "liability will not attach where an officer is not present at the scene of the constitutional violation"). And if they plead that Hanlon was present but did not think it necessary to fire, they do not thereby allege how he unreasonably failed to prevent Hoeppner from shooting Waller.

Further, the facts alleged against Hanlon are distinguishable from facts in other cases where an officer could have, but failed, to take reasonable measures to prevent another officer's use of excessive force. *See, e.g.*, *Hale,* 45 F.3d at 919 (holding that an officer who stood by while another officer beat a suspect could be liable under § 1983 for bystander liability for another officer's use of excessive force); *Malone v. Tidwell*, 615 F. App'x

189, 189 (5th Cir. 2015)(affirming this Court's denial of qualified immunity where officers watched as a canine officer's dog needlessly attacked a suspect). Plaintiffs have failed to plead facts alleging that Hanlon, even if he was present when Hoeppner shot Waller, unreasonably failed to intervene--or that he had a reasonable opportunity to intervene--at the moment Hoeppner used deadly force.[4]

Even if the Court were to find that the pleaded facts allege that Hanlon acted unreasonably in failing to prevent Hoeppner from shooting Waller, the law was not clearly established under the fact scenario presented in this case. See *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015)(citation omitted)("The relevant inquiry is whether existing precedent placed the conclusion that [the officer] acted unreasonably **in these circumstances** 'beyond debate.'") (emphasis added). Consequently, the Court concludes that Plaintiffs' bystander-liability claim against Hanlon should be and hereby is DISMISSED.

To the extent Plaintiffs are attempting to assert a bystander-liability claim against Hardin and Chambers for failing to prevent Hoeppner's alleged use of excessive force, such a claim is also DISMISSED because there is no allegation that either officer was present when Waller was shot and could have prevented the use of deadly force. *See Whitley,* 726 F.3d at 646.

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4. *See Vasquez v. Chacon*, Civ. A. No., 3:08-CV-2046-M-BH, 2009 WL 2169017, at *6 (N.D. Tex. July 20, 2009), *aff'd*, 390 F. App'x 305 (5th Cir. 2010) ("An officer must have had a reasonable opportunity to realize the excessive nature of the force and a realistic opportunity to stop it in order for the duty to intervene arise.")(citations omitted).

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C. Denial-of-Access Claim

The Supreme Court has recognized two types of denial-of-access claims: (1) a forward-looking claim, and (2) a backward-looking claim. *See Christopher v. Harbury*, 536 U.S. 403, 413 (2002). Under a forward-looking claim, the remedy sought is to enjoin the "official action [that] is presently denying an opportunity to litigate . . . ." *Id.* at 413. "The justification for recognizing that claim, is to place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition has been removed." *Id.* But under a backward-looking claim, the plaintiff seeks redress for the official action that caused "the loss of an opportunity to sue." *See id.*, at 414. "These cases do not look forward to a class of future litigation, but backward to a time when specific litigation ended poorly, or could not have commenced, or could have produced a remedy subsequently unobtainable." *Id.* "It follows that the underlying cause of action, whether anticipated or lost, is an element that must be described in the complaint, just as much as allegations must describe the official acts frustrating the litigation." *Id.* at 415.

Plaintiffs have pled both forward-looking and backward-looking denial-of-access claims against Hoeppner, Hanlon, and Hardin. (See generally, 2d Am. Compl. 24-28 (doc. 45); also, Pls.' Resp. (doc. 168) 23-24.) First, Plaintiffs plead a forward-looking claim: that their right of access to the courts was delayed for eight months because the officers' statements, the crime-scene photographs, and the autopsy report were withheld from them while the shooting was being investigated further.

Defendants respond by pointing out that any impediment to the filing of a lawsuit based on the withholding of evidence was removed once the evidence was given to Plaintiffs (as they admit it was) through their public-information requests. Thus, Defendants insist that long before Plaintiffs filed this lawsuit, they ceased any official action that could be said to deny Plaintiffs an opportunity to litigate a claim for excessive force under Section 1983. After all, Defendants point out, Plaintiffs are here, before this Court, adducing into evidence the very items they objected to being withheld. The Court agrees. Under these facts, which are essentially agreed to by the parties, Plaintiffs have no valid forward-looking claim for an unconstitutional denial of access to the courts, so it is DISMISSED.

Plaintiffs' backward-looking claim is another matter. They plead that the defendants tampered with evidence at the crime scene in an effort to escape responsibility for a wrongful-death prosecution, whether civil, criminal, or both. Plaintiffs' pleadings are specific: Defendants moved evidence at the crime scene, repositioned Waller's body, and gave false statements. If so, and at this stage the Court must assume so, Plaintiffs have alleged a plausible claim that Hoeppner, Hanlon, and Hardin denied Plaintiffs' First and Fifth Amendment rights to meaningful access to the courts. Plaintiffs are before this Court seeking redress, true enough, but if their pleadings are also true, their ability to prove their cause of action under Sec. 1983 for excessive force may have been permanently compromised. That is not meaningful access to court. Defendants' motion to dismiss Plaintiffs'

backward-looking claim must therefore be denied unless Plaintiffs have also alleged enough to defeat the defendants' assertion of qualified immunity. The Court concludes that they have. The law as to denial of access to the courts is sufficiently established for it to be clear to a reasonable officer in the shoes of these defendants that he would be violating the law if he did what they are alleged to have done. *See Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983)("The right to access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution."); *see id.*, at 972 ("Interference with the right to access to the courts gives rise to a claim for relief under section 1983."); *S.L. ex rel. Lenderman v. St. Louis Metro. Police Dep't Bd. of Police Comm'rs*, 725 F.3d 843, 853 (8th Cir. 2013)(concluding "that conspiring to prevent a plaintiff from bringing a viable § 1983 action by covering up a false arrest therefore may amount to a violation of a clearly established right."); *Hadley v. Gutierrez*, 526 F.3d 1324, 1332 (11th Cir. 2008)("Covering up the use of excessive force may hinder a criminal defendant's access to the courts to redress a constitutional violation, a right protected by several constitutional provisions."). Qualified immunity for Hoeppner, Hanlon, and Hardin on Plaintiffs' denial-of-access claim must be denied, as must their motion to dismiss.

D. Conspiracy to deny access to the courts under 42 U.S.C. § 1983

"A conspiracy may be charged under section 1983 as the legal mechanism through which to impose liability

on all defendants without regard to who committed the particular act, but 'a conspiracy claim is not actionable without an actual violation of section 1983.'" *Morrow v. Washington*, 672 F. App'x 351, 353 (5th Cir. 2016)(quoting *Hale,* 45 F.3d at 920). Accordingly, when addressing a conspiracy claim in the qualified-immunity context, the Court must "first . . . determine the objective reasonableness of the state action [that] is alleged to have caused harm to the plaintiff." *Id.*(citation omitted). "Only if that action was not objectively reasonable should the court then 'look to whether the officer's actions were taken pursuant to a conspiracy.'" *Id.* (quoting *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir. 1990), *abrogated on other grounds by Martin v. Thomas*, 973 F.2d 449, 455 (5th Cir. 1992)).

The Court has found that Plaintiffs have stated a claim that Hoepnner violated § 1983 by unlawfully using deadly force against Jerry Waller. Now, the Court must now determine whether Plaintiffs have plausibly pled that Defendants conspired to deny the plaintiffs of their constitutionally protected right of access to the courts by covering up the unlawful shooting. To prevail on a claim for conspiracy under § 1983, "a plaintiff must establish (1) the existence of a conspiracy involving state action and (2) a deprivation of civil rights in furtherance of the conspiracy by a party to the conspiracy." *Pfannstiel*, 918 F.2d at 1187. "A claim for civil conspiracy has five elements: (1) two or more persons; (2) have an objective to be accomplished; (3) a meeting of the participants' minds on the objective or course of action; (4) one or more unlawful, overt acts; and, (5) resulting damages." *Meineke Discount Muffler, v. Jaynes*, 999 F.2d 120, 124 (5th Cir. 1993)(citation omitted).

Appendix E

To support their conspiracy claim, Plaintiffs assert that the officers intentionally compromised the evidence by altering and failing to preserve the crime scene. (See Pls.' Reply (doc. 149) 22.) Specifically, they assert that the crime-scene photographs show bloody footprints and that the photographs depict "clear evidence of Mr. Waller's body being re-positioned post mortem from the bloodstains present on the garage floor." (Id., at 24.) They insist that there was no blood on the gun allegedly used by Waller, and from the lack of blood, they infer first that the gun could not have been in Waller's hand when he was shot and second, not underneath his body after he was shot. (2d Am. Compl. 12-14.) Plaintiffs point to the amount of blood on the garage floor underneath Waller's body versus the lack of blood on the gun to support their second inference. (Id.; Pls.' Reply 36.) Plaintiffs also refer to blood smears on the garage floor that may imply that Waller's left arm–-the one allegedly holding the gun–-was moved laterally post mortem. Plaintiffs' version of the facts directly contradicts the statements given by Hoeppner, Hanlon, and Hardin. Hoeppner and Hanlon claim that Waller was holding a gun when shot, and Hardin claims to have removed the gun from underneath Waller's body and tossed it a few feet away. (See id., at 13, 17-19.) All three officers claim that the gun was underneath Waller's body after he was shot.

Plaintiffs insist, however, that Waller was not holding a gun when shot, and that the officers' statements are contradicted by the crime-scene photographs and the autopsy report. Taking Plaintiffs' facts as true, they have alleged that Waller did not have a gun in his hand when he was shot, that Hoeppner, Hanlon, and Hardin have been untruthful in their statements, and thus, that they have

committed overt acts in furtherance of a conspiracy to deny access to the courts for the unlawful use of deadly force by Hoeppner. Hardin maintains that he "secured" the gun by removing it from under Waller's body and moving it "two or three feet away from him," for the safety of those around. (Pls.' Reply Appx. (doc. 150) 262-67.) Hardin contends that he acted reasonably by removing the gun from underneath Waller's body for safety purposes.

The Court agrees with Hardin that, if Waller had a gun underneath him, then Hardin's actions were reasonable in moving it away from the reach of a person who could still be living. But the crux of Plaintiffs' claim is that Waller did not have a gun when he was shot. Thus, Plaintiffs reason, there was no gun underneath Waller's body for Hardin to remove. Plaintiffs also point to the lack of blood on the gun as shown by the crime-scene photographs to support their claim, which directly contradicts Hardin's statements. Plaintiffs further claim that Hardin "knowingly and intentionally" altered the evidence to cover up Hoeppner's unlawful use of deadly force. (2d Am. Compl. ¶¶ 95-98.) Therefore, Plaintiffs have alleged enough facts to support an inference that at least a tacit agreement existed between Hoeppner, Hanlon, and Hardin to cover up the shooting.

Under the facts alleged, the giving of false statements and the rearranging of evidence are overt acts in furtherance of a conspiracy. And it would be objectively unreasonable for an officer to commit such overt acts in an effort to deprive the decedent's family of the right to seek redress in court for an alleged unlawful use of deadly

force. *See Ryland*, 708 F.2d at 971-972; *Lenderman,* 725 F.3d at 853; *Hadley,* 526 F.3d at 1332. Accordingly, the Defendants' Rule 12(c) motions as they relate to the claim for conspiracy to deny access to the courts are DENIED as to Hoeppner, Hanlon, and Hardin.

Next, Plaintiffs attempt to assert a claim against Chambers by alleging that she joined the conspiracy. But unlike as to the three officers above, Plaintiffs fail to make any nonconclusory allegations against Chambers that she joined the conspiracy or committed any overt acts in furtherance of one. See *Priester v. Lowndes Cty.*, 354 F.3d 414, 420 (5th Cir. 2004)(citation omitted)("Allegations that are merely conclusory, without reference to specific facts, will not suffice.") Based on the facts alleged, other Fort Worth police officers, including Chambers and Hardin, arrived "five to ten minutes" after the shooting. (2d Am. Compl. at 12, ¶ 47.) When Hardin and Chambers arrived, Hardin allegedly examined Waller because Hardin had "six years of EMS experience." (Pls.' Appx. (doc. 150) 134.) According to Plaintiffs, Chambers witnessed the cover up. But Plaintiffs also allege that Hoeppner and Hardin were the only officers in the garage when Kathy Waller entered the garage to inquire about her husband. (See 2d Am. Compl., ¶¶ 48-47.) After being told to get Kathy Waller out of the garage, another officer escorted Waller out of the garage and "handed her off" to Chambers. Chambers then escorted Kathy Waller to a police car, where she remained until the paramedics attended to Kathy Waller's medical needs. The sequence of events is significant because Plaintiffs allege that Hardin removed the gun from underneath Jerry Waller's body **after** Kathy

Waller was removed from the garage. (Pls.' Am. Compls. (docs. 41 & 45) ¶ 50.) And Plaintiffs state that Kathy Waller entered the garage just before Hardin checked for Jerry Waller's pulse. According to Plaintiffs' timeline, Chambers escorted Kathy Waller to the police car before Hardin repositioned the body or moved the gun, which is supported by Kathy Waller's claim that her husband's hands were up by his shoulders when she entered the garage. (2d Am. Compl. p. 15, ¶ 56.) Thus, Plaintiffs fail to aver sufficient facts to allege that Chambers was aware of or agreed to join the conspiracy.

Finally, although not alleged in their amended complaints or even mentioned in their Rule 7(a) Reply, Plaintiffs claim in their response to Chambers's Rule 12(c) motion that "Chambers actively participated in the cover up by removing Kathy Waller from the scene . . . in order to defend the guilty officers." (Pls.' Resp. (doc. 173) 23.) Such a claim is dismissed as not being properly before the Court. *See Fisher,* 895 F.2d at 1078 n. 3 (dismissing claims that had not been raised in the amended complaint, but asserted in a response to motion for summary judgment). Accordingly, to the extent Plaintiffs intend to bring a conspiracy claim against Chambers, such a claim is DISMISSED.

E. Kathy Waller's Fourth Amendment Claim against Chambers

Plaintiffs allege that Chambers violated the Fourth Amendment when she detained Kaller Waller by "forcibly" escorting Ms. Waller away from the crime scene and

placing her in the back of the police car. (Pls' Am. Compls. (docs. 41 & 45) 13; id., at 15.) Chambers acknowledges that she escorted Kathy Waller to the police car, and another officer's response form indicates the same. (See Pls.' Appx. (doc. 150) 253.) Plaintiffs further claim that Kathy Waller was locked in a squad car "[d]espite her protests and obvious emotional state," and even denied medical attention (2d Am. Compl. at 16), but that Chambers lacked probable cause "to arrest, take into custody and falsely imprison Kathy Waller." (Id. at 27.)

Although not persuaded, the Court will assume that Plaintiffs have sufficiently alleged a Fourth Amendment violation by Chambers and determine whether she acted unreasonably under the circumstances in light of clearly established law. *See Pearson*, 555 U.S. at 236 (concluding that a court may exercise its discretion in determining which of the two-prong analysis should be analyzed first); *see also Saucier*, 533 U.S. at 202 ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."). To determine whether Chambers acted reasonably, the Court must "look to the totality of the circumstances, balancing 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.'" *Stephenson v. McClelland*, 632 F. App'x 177, 184 (5th Cir. 2015)(quoting *Graham v. Connor*, 490 U.S. at 396–97)). The Court must analyze Chambers's actions taken from the perspective of a reasonable officer on the scene, not from "the 20/20 vision of hindsight." *See id.*

According to Plaintiffs, Chambers forcibly escorted Kathy Waller away from the garage area after another officer–-who was investigating the crime scene--stated, "Get her out of here!" (2d Am. Compl. 15.) Chambers then took Kathy Waller and locked her in the back of a police car while Chambers stood outside. Plaintiffs admit, however, that when Kathy Waller entered the garage and saw her husband lying on the floor in a pool of blood, she was "extremely distraught" and in an "obvious emotional state." (Id., at 16.) And the officers in the garage were investigating a crime scene–-the place where a police shooting occurred. After Kathy Waller came into the garage and ran over to her husband's body, Chambers then followed an order to remove Kathy Waller from the crime scene. *See Stephenson*, 632 F. App'x at 183 (concluding that a reasonable officer could have determined that detention of a suspect's parents in the back of a police car was necessary to prevent further interference with the crime scene). And it is not unreasonable for an officer to believe that an "extremely distraught" spouse was capable of doing something irrational when confronted with the sight of her deceased spouse lying in a pool of blood. Therefore, for the safety of the officers and Kathy Waller, it was not objectively unreasonable to briefly detain her in the police car. *See Keith v. Schuh*, 157 F.3d 900, 1998 WL 611207, at *3 (5th Cir.1998) (unpublished) (holding that detention of a woman was reasonable because the officer believed that she might pose a security threat if left unsecured and unsupervised).

Plaintiffs seem to ask the Court to infer Chambers acted unreasonably when she "denied" Kathy Waller

medical attention despite such repeated requests by Waller. (2d Am. Compl. 16.) To support their assertion, Plaintiffs claim that "Defendant Chambers was aware of Mrs. Waller's condition and that EMTs were on the scene, but she did not notify the EMTs of Mrs. Waller's presence or need for medical attention or her requests for her medication." (Id.) This assertion by Plaintiffs, however, is contradicted by some of the exhibits Plaintiffs attached in their Rule 7(a) Reply Appendix. Paramedic Gonzalez stated in his incident report that, after he confirmed that Jerry Waller was deceased, he was contacted by another officer who notified him that spouse of the deceased needed medical attention. (See Pls.' Reply App'x (doc. 150) 147-48.) After examining Kathy Waller, Paramedic Gonzalez and his partner then transported her to Harris Hospital. (See id.) Gonzalez's report is supported by Detective Baggott's account of events in his incident report. (See id. 258-59.) Baggott's report indicates that he was contacted at 1:30 a.m. and told to go to the scene, but while in route, he was contacted and told to go to Harris Hospital to meet with Kathy Waller. (See id.)

As the defendants have pointed out, "[w]here there is a conflict between allegations in a pleading and exhibits thereto, it is well settled that the exhibits control." *Simmons v. Peavy-Welsh Lumber Co.*, 113 F.2d 812, 813 (5th Cir. 1940); *see id.* ("This is not a case where the plaintiff has pleaded too little, but where he has pleaded too much and has refuted his own allegations by setting forth the evidence relied on to sustain them."). The exhibits attached by Plaintiffs contradict the claim that Chambers denied Kathy Waller needed medical attention.

In fact, the exhibits seem to show just the opposite—that Kathy Waller received medical attention from the first-responding paramedics, who transported her to Harris Hospital. In sum, Plaintiffs have failed to sufficiently allege any facts that would show Chambers acted objectively unreasonably under the circumstances. Accordingly, Chambers is entitled to qualified immunity, and Kathy Waller's Fourth Amendment and false-imprisonment[5] claims are DISMISSED.

F. State-Law Claims

In their amended complaints, Plaintiffs cite several provisions under Texas law, including: "art., I, §§ 8,9,13 and 19, and art. XVI § 26 [of the Texas Constitution,]" "the Texas Tort Claims Act," "the Texas Declaratory Judgment Act," and "the Texas Wrongful Death Statute." (See generally, Pls.' Am. Compls. (docs. 41 & 45).) Plaintiffs clarify in their responses to Defendants' 12(c) motions that they are not seeking relief under the Texas Tort Claims Act, but Plaintiffs do claim to seek a declaratory judgment for violations of the Texas Constitution that would "clear [Jerry Waller's] name." (See Pls.' Resp.

5. To the extent Kathy Waller intends to assert a false-imprisonment claim against Chambers, such a claim is dismissed because the Court has concluded that Chambers did not act objectively unreasonably under the circumstances, and thus, was acting within her authority as a police officer, which is fatal to an essential element of Kathy Waller's claim. *See Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995) ("The essential elements of false imprisonment are: (1) willful detention; (2) without consent; and (3) without authority of law.") .

(doc. 168) 24-25; Pls.' Resp. (doc. 171) 25; Pls.' Resp. (doc. 173) 23-24.) Plaintiffs further acknowledge that citizens are barred from recovery of monetary damages against public officials who violate the Texas Constitution. See id.; *see also Daniels v. City of Arlington, Tex.,* 246 F.3d 500, 507 (5th Cir. 2001)(noting that "tort damages are not recoverable for violations of the Texas Constitution.") (citing *City of Beaumont v. Bouillon*, 896 S.W.2d 143, 147 (Tex. 1995)). Accordingly, any intended claims for monetary damages under the Texas Constitution or the Texas Tort Claims Act are DISMISSED.

Under Texas law, Plaintiffs may seek declaratory relief for violations of the Texas Constitution. *See City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007)(noting that the Texas Supreme Court has "held that while there is no cause of action for damages for the violation of state constitutional rights, a plaintiff whose constitutional rights have been violated may sue the state for equitable relief."); *see also City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995)("[S]uits for equitable remedies for violation of constitutional rights are not prohibited.") *City of Arlington v. Randall*, 301 S.W.3d 896, 904 (Tex. App.–-Fort Worth 2009) *disapproved of on other grounds by Texas Dep't of Aging & Disability Servs. v. Cannon*, 453 S.W.3d 411 (Tex. 2015)(concluding that declaratory relief for violations of the Texas Constitution may be maintained notwithstanding dismissal of claims under the Texas Tort Claims Act). Accordingly, Defendants' Rule 12(c) motions are DENIED to the extent they seek dismissal of Plaintiffs' claims for declaratory relief for alleged violations of the Texas Constitution.

Finally, the Court understands Plaintiffs to seek damages permitted under the Texas Wrongful Death Act by its incorporation through 42 U.S.C. § 1988. (See 2d Am. Compl. at ¶ 6)("[Plaintiffs] bring this action pursuant to the Texas Wrongful Death Act, as the statutory beneficiaries of said act [] which specifically permits them to bring such an action pursuant to § 71.004(a)(b), Tex. Civ. Prac. & Rem. Code."); *see also Rodgers v. Lancaster Police & Fire Dep't*, 819 F.3d 205, 209 (5th Cir.), *cert. denied*, 137 S. Ct. 304, *reh'g denied*, 137 S. Ct. 545 (2016)(concluding "that a litigant . . . [may] sue under §§ 1983 and 1985 for injuries to another, because § 1988 incorporates wrongful-death statutes."). In this regard, it appears that Plaintiffs cite Texas's wrongful-death statute to establish their standing to bring their claims under 42 U.S.C. § 1983. *See Rodgers*, 819 F.3d at 209 n. 8 (noting that a plaintiff must have standing under the state's wrongful-death statute to bring a claim under § 1983, etc.). Under the Texas Wrongful Death Statute, "A person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default." Tex. Civ. Prac. & Rem. Code § 71.002(b). And "[a]n action to recover damages as provided by this subchapter is for the exclusive benefit of the surviving spouse, children, and parents of the deceased." *Id.* § 71.004(a). "The surviving spouse, children, and parents of the deceased may bring the action or one or more of those individuals may bring the action for the benefit of all." *Id.* at 71.004(b). Each defendant seems to rely on the election-of-remedies provisions under the Texas Tort Claims Act to warrant dismissal

of all state-law claims against them. *See* Tex. Civ. Prac. & Rem. Code § 101.106(a),(f). The election-of-remedies provisions, however, has no bearing on Plaintiffs' standing to bring suit under § 1983. Thus, the Court concludes that Plaintiffs may seek relief for damages permitted under the Texas Wrongful Death Act by its incorporation through 42 U.S.C. § 1988.

G. Motions to Strike

Also, before the Court are the motion the strike (doc. 179) filed by Hoeppner and the motion to strike (doc. 180) filed by Hanlon. Hanlon and Hoeppner request that the Court strike Plaintiffs' Rule 7(a) Reply Appendix, arguing that the evidence included as exhibits in the appendix are outside of the pleadings and should not be considered by the Court in ruling on Defendants' Rule 12(c) Motions. Plaintiffs claim, however, that they obtained the various documents and exhibits attached to their complaints and appendices eight months after the shooting through "the Texas Public Information statute." (2d Am. Compl. (doc. 45) 33, ¶ 113.) Plaintiffs inform the Court that the documents were obtained through "public information requests." (Pls.' Reply (doc. 149) 4.) "Federal courts are permitted to refer to matters of public record when deciding a 12(b)(6) motion to dismiss." Davis, 70 F.3d at 372 n. 3 (5th Cir. 1995)(citation omitted). And although Defendants claim that the documents are outside of the pleadings, the documents attached directly support or contradict Plaintiffs' claims. It should be noted, however, that the Court did not consider Kathy Waller's Affidavit in the appendix when considering Defendants' Rule

12(c) motions. Accordingly, the Court concludes that Defendants' motions to strike (docs. 179, 180) should be and hereby are DENIED.

V. CONCLUSION

Based on the foregoing, the Court GRANTS in part and DENIES in part Defendants' Rule 12(c) motions (docs. 151, 152, 157), and the Court DENIES Defendants' motions to strike (docs. 179, 180). More specifically, the Court DENIES qualified immunity to Hoeppner on the claims of unlawful use of deadly force; DENIES qualified immunity to to Hoeppner, Hanlon, and Hardin as to conspiring to deny Plaintiffs access to the courts by covering up the unlawful shooting of Jerry Waller; but GRANTS qualified immunity to Hanlon for bystander liability under 42 U.S.C. § 1983. Further, Plaintiffs' claims against defendant Chambers are DISMISSED.

SIGNED April 12, 2018.

/s/
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX F — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED NOVEMBER 15, 2022

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-10129

ANGIE WALLER; CHRIS WALLER,

Plaintiffs—Appellees,

TERRY WAYNE SPRINGER;
GAYLA WYNELL KIMBROUGH,

Intervenor Plaintiffs—Appellees,

versus

RICHARD HOEPPNER,

Defendant—Appellant.

CONSOLIDATED WITH

No. 21-10457

ANGIE WALLER; CHRIS WALLER,

Plaintiffs—Appellants,

Appendix F

TERRY WAYNE SPRINGER;
GAYLA WYNELL KIMBROUGH,

Intervenor Plaintiffs—Appellants,

versus

RICHARD HOEPPNER,

Defendant—Appellee.

CONSOLIDATED WITH

No. 21-10458

ANGIE WALLER, CHRIS WALLER,

Plaintiffs—Appellants,

TERRY WAYNE SPRINGER;
GAYLA WYNELL KIMBROUGH,

Intervenor Plaintiffs—Appellants,

versus

CITY OF FORT WORTH TEXAS,

Defendant—Appellee.

Appendix F

APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
USDC NO. 4:15-CV-670

ON PETITION FOR REHEARING
AND REHEARING EN BANC

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

PER CURIAM:

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.

APPENDIX G — RELEVANT STATUTORY PROVISIONS

Fourth Amendment

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

§1983. Civil action for deprivation of rights

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

(R.S. §1979; Pub. L. 96–170, §1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, §309(c), Oct. 19, 1996, 110 Stat. 3853.)

Appendix G

Codification

R.S. §1979 derived from act Apr. 20, 1871, ch. 22, §1, 17 Stat. 13.

Section was formerly classified to section 43 of Title 8, Aliens and Nationality.

Amendments

1996—Pub. L. 104–317 inserted before period at end of first sentence ", except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable".

1979—Pub. L. 96–170 inserted "or the District of Columbia" after "Territory", and provisions relating to Acts of Congress applicable solely to the District of Columbia.

Effective Date of 1979 Amendment

Amendment by Pub. L. 96–170 applicable with respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after Dec. 29, 1979, see section 3 of Pub. L. 96–170, set out as a note under section 1343 of Title 28, Judiciary and Judicial Procedure.