No. 23-

IN THE

Supreme Court of the United States

LAURA COVINGTON,

Petitioner,

v.

CITY OF MADISONVILLE, TEXAS,

Respondent.

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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QUESTION PRESENTED

To obtain relief against a municipality under §1983, a plaintiff must show an official policy from a policymaker was the moving force behind a violation of a constitutional right. The question of whether an official is a policymaker is a matter of state law. Does this Court's precedent require a plaintiff to overcome a presumption that a police chief is *not* an official policymaker to prove the municipality delegated policymaking authority to the police chief over the discrete police activity that caused the constitutional violation?

LIST OF PARTIES

The Petitioner is Laura Covington, who was the Plaintiff-Appellant below.

The Respondent is City of Madisonville, Texas, who was the Defendant-Appellee below.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

Covington v. City of Madisonville, Case No. 4:13-CV-3300-ASH (S.D. Tex.) (June 2, 2022)

Covington v. City of Madisonville, Case No. 22-20311 (5th Circuit) (August 18, 2023)

Covington v. City of Madisonville, Case No. 18-20723 (5th Circuit) (May 15, 2020)

Covington v. City of Madisonville, Case No. 4:13-CV-3300-ASH (S.D. Tex.) (February 16, 2017)

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PETITION FOR A WRIT OF CERTIORARI

Laura Covington ("Ms. Covington") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The citation to the Fifth Circuit Opinion below is *Covington v. City of Madisonville*, No. 22-20311, 2023 U.S. App. LEXIS 21807, 2023 WL 5346375 (5th Cir. Aug. 18, 2023) (1a-5a). The citation to the District Court Order below is *Covington v. City of Madisonville,* No. 4:13-CV-03300-ASH, 2022 U.S. Dist. LEXIS 99651, 2022 WL 1910141 (S.D. Tex. June. 2, 2022), *aff'd*, 22-20311, 2023 U.S. App. LEXIS 21807, 2023 WL 5346375 (5th Cir. Aug. 18, 2023) (6a-23a).

JURISDICTION

The United States District Court for the Southern District of Texas had jurisdiction over this matter because the claims involve a federal question arising under 42 U.S.C. §1983 ("Civil action for deprivation of rights"). The Fifth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291. The jurisdiction of this Court is properly invoked under 28 U.S.C. §1254(1).

The United States Court of Appeals for the Fifth Circuit decided Covington's appeal on August 18, 2023. No petition for rehearing was filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> 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.

The Fourteenth Amendment, section 1, of the United States Constitution provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC §1983 provides:

> 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.

STATEMENT OF THE CASE

This case presents the important question of whether the precedent from this Court requires a plaintiff in a §1983 civil rights action to overcome a presumption that a police chief is not an official policymaker to prove the municipality delegated policymaking authority to the police chief over the discrete police activity that caused a constitutional violation.

Ms. Covington's constitutional right was violated by police department policy.

Unless otherwise noted, the facts recited here are set forth in the District Court's decision, attached as Appendix B (9a-12a), and a related decision from the Fifth Circuit, attached as Appendix C (27a-29a).

Ms. Covington's ex-husband Jeffrey Covington ("Jeffrey") was a police officer at the Madisonville police department. Madisonville is a small city of around 4,500 people. The police department employs a force of 6-8 officers. The Madisonville police chief hired Jeffrey despite his termination from a prior employer for

misconduct involving controlled substances. The chief later promoted Jeffrey to be a K-9 officer in charge of the police department's confidential informant program.

Ms. Covington and her ex-husband were involved in a bitter custody battle. During this time, Jeffrey began to concoct a scheme to have Ms. Covington arrested to assist him in his effort to gain custody of their children. Jeffrey urged his fellow police officers to find a reason to arrest Ms. Covington. Eventually, Jeffrey recruited one of the police department's confidential informants—over whom he exercised professional control—to plant illegal drugs on Ms. Covington's vehicle.

At some point, a Texas state trooper stopped Ms. Covington for speeding. Upon hearing Ms. Covington's name on the police radio, Jeffrey called the state trooper and told him to search her vehicle for drugs. Jeffrey told the state trooper exactly where to search: in a magnetic key holder hidden under the vehicle. The state trooper searched Ms. Covington's vehicle as Jeffrey instructed. He found methamphetamine in the key holder. Ms. Covington was arrested and charged, and a few days later she lost custody of her children upon Jeffrey's emergency petition.

At the time of the arrest, Ms. Covington accused Jeffrey of planting the drugs and stated that she knew "something like this was going to happen." The state trooper later concluded that Ms. Covington was correct and reported the incident to the district attorney and Texas Rangers. The charges against Ms. Covington were dropped and her children were returned to her. Jeffrey was eventually indicted, tried, and convicted for his scheme.

Ms. Covington asserts the police chief is an official policymaker.

Ms. Covington filed suit against Jeffrey (among other individual defendants) and Madisonville seeking damages under §1983. She asserted in her complaint that the Madisonville police chief is the final authority and policymaker with respect to supervising and hiring personnel at the police department, including the confidential informants.

According to Madisonville's governance documents, the police chief is hired by the City Manager, but he is not accountable to any Madisonville official. The police chief was solely responsible for internal police policy. Record on Appeal ("ROA") 3312-3313. The chief had authority and responsibility for the management, direction, and control of the department. ROA 3495. When the police chief at the time of the incident—Chief May—came into power, he created his own policy manual. ROA 1729-1730. Chief May's policy manual was promulgated and adopted by the City Council without comment. ROA 1729-1730.

The Madisonville police chief left Jeffrey completely in charge of managing the confidential informants. ROA 3443; 7685. The police chief relied on Jeffrey to interview informants, coordinate their testimony with the district attorney, and manage the patrol units. ROA 3445. Jeffrey solicited one of the informants to plant the drugs on Ms. Covington's vehicle in return for favorable treatment. ROA 3387.

The Fifth Circuit held the police chief is not an official policymaker.

Ms. Covington filed suit against Jeffrey (among other individual defendants) and Madisonville seeking damages under §1983. At trial, Ms. Covington obtained a monetary verdict against Jeffrey. Before trial, Madisonville moved to dismiss Ms. Covington's claim under Rule 12(b)(6) on the ground that her allegations failed to show there was a policy that caused a deprivation of Ms. Covington's constitutional right or that the police chief ratified Jeffrey's unconstitutional conduct after the incident. Madisonville did not challenge Ms. Covington's allegation that the police chief is an official policymaker for Madisonville.

The District Court granted Madisonville's motion and Ms. Covington appealed. The Fifth Circuit held that Ms. Covington's allegations were sufficient to show both a policy—premised on the "single incident" failure to supervise theory—and ratification by the police chief. As part of its analysis, the Fifth Circuit accepted Ms. Covington's allegation that the police chief is an official policymaker for Madisonville. The Fifth Circuit reinstated Ms. Covington's claim against Madisonville on the two limited grounds of the "single incident" theory and ratification.

Upon remand, Madisonville moved for summary judgment on an entirely different ground: that the police chief is not an official policymaker for Madisonville. Ms. Covington opposed the motion arguing that the police chief is a final policymaker under Madisonville's governing documents. In support, Ms. Covington pointed to testimony from officers and internal documents from

the police department indicating that the police chiefs had sole responsibility for the administration and management of the entire police organization. She also pointed to testimony that Jeffrey had control over the management of the confidential informant program.

Despite Ms. Covington's evidence, the District Court focused on the minutes of the City Council to conclude that the police chief lacked policymaking authority. Specifically, the District Court noted minutes indicating the Council would meet "to review and possibly approve" the new police chief's amended policy manual. In the District Court's view, the Council minutes showed that Madisonville did not acknowledge the policy chief as having the final say on police policy because his actions had to have council approval. The District Court also noted that there is no document that expressly authorizes the police chief to exercise policymaking authority. On this ground, the District Court granted Madisonville's motion and dismissed Ms. Covington's remaining §1983 claims.

Ms. Covington appealed the dismissal. In her briefs, she argued the District Court ignored a crucial distinction in the case law addressing the question of who amounts to a municipal policymaker: whether the alleged policymaker set policy in *all* areas of a particular municipal department or whether he had final authority over the policy that caused the constitutional harm. The distinction in this case leads to the question of whether the police chief set policy for Madisonville with respect to the use and management of the police department's confidential informants. Ms. Covington argued that the police chief who failed to supervise Jeffrey's use of the confidential informants to violate Ms. Covington's constitutional rights set such

policy on behalf of Madisonville because he had free rein to do so without any oversight from the Madisonville's governing body.

The Fifth Circuit affirmed the District Court's decision without any significant discussion of the underlying facts or Ms. Covington's arguments. Instead, the Fifth Circuit reasoned that "we find no error in the district court's evidentiary assessment."

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's decision conflicts with this Court's holding and reasoning in *St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

42 U.S.C.S. §1983 provides a private right of action to citizens injured "under color of any statute, ordinance, regulation, custom, or usage" through "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws…" In a landmark case, this Court held that a municipality may be held liable under section 1983 where "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury" on the plaintiff. *Monell v. Department of Social Services*, 436 U.S. 658, 698 (1978).

In the years following *Monell*, this Court has articulated three elements that must be established in order to impose liability on a municipality: a policymaker; an official policy; and a violation of constitutional rights whose "moving force" was the official policy. The reason for these three elements is the need to show that the

municipality's official policy was both deliberate and the direct cause of the constitutional violation. *Bryan County v. Brown*, 520 U.S. 397, 403 (1997). As the *Bryan County* court explained, "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id.*

This Court has not limited municipal liability under section 1983 to any particular type of policymaker. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). Instead, in another landmark decision, this Court held that it is a matter of state law to determine which official or body has the responsibility "for making law or setting policy in any given area of a local government's business." *City of St. Louis v. Praprotnik*, 458 U.S. 112, 124-125 (1988). The *Praprotnik* court made clear that "municipalities [can] be held liable only when an injury was inflicted by a government's 'lawmakers or by those whose edicts or acts may fairly be said to represent official policy.'" *Id.* at 121-122 (quoting *Monell*, 436 U.S. at 694)). This is because, as *Monell* articulated ten years earlier, the doctrine of respondeat superior cannot be applied to impose liability on a municipality under §1983. For this reason, the analysis of whether an official amounts to a policymaker requires an analysis of a state's determination of the distinct form that a local government takes. *Id.* at 124.

The *Praprotnik* court acknowledged that state law "will [not] always speak with perfect clarity." *Id.* at 125. Thus, it left open the possibility that "policymaking responsibility [might be] shared among more than one official or body." *Id.* at 126. Given the difficulty in

determining whether an official is a policymaker, the *Praprotnik* court set forth certain analytical principles. First, a local government should not be permitted to insulate themselves from liability by permitting certain conduct by officials despite their not being designated a policymaker. Second, the "authority to make municipal policy is necessarily the authority to make final policy." *Id*. at 127.

These two principles set the parameters of how to determine whether someone is an official policymaker. Though they have been refined since *Praprotnik*, this Court has never held that any particular type of official—such as a police or fire chief—cannot ever be considered an official policymaker.

In this case, Ms. Covington alleged the police chief is an official policymaker for Madisonville pursuant to an unspoken delegated authority to establish the municipality's policies with respect to the management and supervision both the police department and the confidential informants. Ms. Covington relied on specific provisions from Madisonville's governing documents, the police department policy manual, and testimony from the police chiefs themselves about the policymaking authority they exercised when they headed the police department. The District Court's decision, which the Fifth Circuit adopted without significant reasoning, effectively overrules the principles set forth in *Praprotnik* by concluding that a police chief that exercised policymaking authority can never be considered a policymaker unless the municipality issues a governing document that expressly names the police chief as a policymaker.

Such a conclusion was categorically rejected by this Court in *Praprotnik* when it held that a municipality cannot avoid liability by allowing an official to engage in known conduct while maintaining that the official's decisions regarding that conduct are not being made by a policymaker. To conclude here that the Madisonville police chief is not a policymaker despite the City Council's implied grant of authority to him to organized and manage the police department—including the confidential informant program—abrogates the reasoning and holding in *Praprotnik*. Yet that is what the Fifth Circuit held.

This Court should grant certiorari to resolve the conflict between the Fifth Circuit's decision here and the precedent articulated in *Praprotnik*.

II. This Court must decide the important question of whether a plaintiff must overcome a presumption that a police chief is *not* an official policymaker to prove the municipality delegated policymaking authority to the police chief over the discrete police activity that caused the constitutional violation.

As Ms. Covington argued below, the District Court erred by concluding the police chief is not an official policymaker subject to §1983 liability in this case. The District Court's conclusion was error because it ignores an important distinction in the case law addressing the question of who amounts to a municipal policymaker: the pivotal issue is not whether the alleged policymaker set policy in *all* areas of a particular municipal department but whether he had final authority over the policy that caused the constitutional harm. In this case, the question becomes

whether the police chief set policy for Madisonville with respect to the use and management of the police department's confidential informants. The evidence shows that the police chiefs who failed to supervise Jeffrey's use of the confidential informants to violate Ms. Covington's constitutional rights set such policy on behalf of Madisonville because they had free rein to do so without any oversight from Madisonville's governing body.

In deciding otherwise, the District Court relied on an unstated presumption that the police chief is not a policymaker—and it required Ms. Covington to present evidence to prove otherwise. The Fifth Circuit adopted the presumptive analysis in affirming the District Court's decision without significant reasoning or discussion.

However, as discussed above, there is no categorical rule against concluding a police chief is a municipal policymaker. *Pembaur*, 475 U.S. at 480; *Praprotnik*, 458 U.S. at 124-127. Rather, a municipal officer is considered a policymaker when he exercises "final policymaking authority for the local government actor *concerning the action alleged to have caused the particular constitutional or statutory violation* at issue." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (clarifying what constitutes a policymaker for the purpose of holding a municipal entity liable under §1983) (emphasis added).

Here, Ms. Covington presented evidence, including deposition testimony from the police chiefs and other police officers as well as the police department's policy manual, show that the police chiefs were solely responsible for internal police policy and "had authority and responsibility for the management, direction, and

control of the department." ROA 3312-3313. The evidence also shows they had ultimate authority to implement the policies of the police department, and police policies and procedures could not be issued except with the signature of the chief. ROA 2940. Indeed, the police department orders setting forth guidelines for any particular issue started with a statement that it is a policy from the police department. ROA 2941.

Moreover, the police chief, who once said that his directives are municipal policy, promulgated his own policy manual that was binding on all officers. The policy manual was adopted by the City Council as municipal policy, but it was done so with no comment about any of the policies within it. ROA 2942. This evidence shows Madisonville's limited supervision over the police chiefs' creation of policy: if Madisonville believed it maintained control over the police department's policymaking, it would not have adopted a manual that granted the police chief even more authority over the conduct of its officers and the policies governing them.

Despite the evidence to the contrary, the District Court, and by adoption the Fifth Circuit, started with the premise that the police chief was not a policymaker and Ms. Covington was required to present compelling evidence to show that he was. But there is no hard evidence showing Madisonville exercised anything other than the final authority to remove or appoint the police chiefs, and there is no evidence Madisonville did anything other than approve, without comment, the policy manual drafted the police chief. Though the Fifth Circuit concluded that it could find "no error in the district court's evidentiary assessment," the analysis was flawed because it required

Ms. Covington to present more compelling evidence than that presented by Madisonville.

In short, the evidence compelled a conclusion that the police chief had final policymaking authority over matters arising within the police department's area of authority, including authority over management of the confidential informants, and the District Court and Fifth Circuit reached the opposite conclusion through imposing a presumption that has no basis in law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: November 16, 2023

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 18, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-20311

LAURA COVINGTON,

Plaintiff—Appellant,

versus

CITY OF MADISONVILLE, TEXAS,

Defendant—Appellee.

August 18, 2023, Filed

Appeal from the United States District Court
for the Southern District of Texas.
USDC No. 4:13-CV-3300.

Before DENNIS, ENGELHARDT, and OLDHAM, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Laura Covington ("Laura") appeals the district court's summary judgment dismissal

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

of her municipal liability claims, asserted pursuant to 42 U.S.C. § 1983, against Defendant-Appellee City of Madisonville. As detailed in our opinion in her previous appeal,[1] Laura seeks to hold the City liable for monetary damages and other relief relating to her unlawful arrest, which occurred after her ex-husband, Sergeant Jeffrey Covington of the Madisonville Police Department ("Jeffrey"), had a "confidential informant" plant methamphetamine in her vehicle in order to bring about her arrest, prosecution, and loss of child custody. On remand, the district court granted the City's motion for summary judgment, dismissing Laura's claims based on its determination that the City's Chief of Police lacks the "final policymaking authority" required for municipal liability under 42 U.S.C. § 1983. Having carefully reviewed the parties' submissions, applicable law, and relevant portions of the record in this matter, we AFFIRM.

"As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989); *see also Gros v. City of Grand Prairie*, 181 F.3d 613, 617 (5th Cir. 1999) ("[W]hether an official has been delegated final policymaking authority is a question of law for the judge, not [one] of fact for the jury."). Thus, the trial judge must

1. *See Covington v. City of Madisonville, Texas*, No. 18-20723, 812 F. App'x 219, 222 (5th Cir. May 15, 2020).

"review[] the relevant legal materials, including state and local positive law, as well as custom or usage having the force of law," to "identify those officials or governmental bodies who speak with final policymaking authority . . . concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Jett*, 491 U.S. at 737 (internal citations and quotations omitted).

"A municipality can be held liable only when it delegates policymaking authority, not when it delegates *decisionmaking* authority." *Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 271 (5th Cir. 2019). "The fact that an official's *decisions* are *final* is insufficient to demonstrate *policymaker* status." *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 167 (5th Cir. 2010) (emphasis added). Thus, "discretion to exercise a particular function does not necessarily entail final policymaking authority over that function." *Bolton v. City of Dallas, Tex.*, 541 F.3d 545, 549 (5th Cir. 2008).

Here, though acknowledging that both sides can point to evidence favorable to their positions, the district court found:

> [O]n balance, while Chiefs [of Police] Clendennen and May possessed some level of discretionary or decision-making authority, the summary judgment evidence fails to establish that the City Council expressly or impliedly delegated them policymaking authority. While the evidence cited by [Laura] suggests that the police chiefs at times claimed some level of

> authority to follow city policy or not, the fact that they did not follow the policies (or created their own unwritten policies) cannot serve as evidence of "policymaking" on behalf of the city. On the contrary, the minutes of the City Council strongly demonstrate that the Chiefs lacked final policymaking authority.

The district court also noted that that "the police chief's subordinate role and lack of final policymaking authority is corroborated by Chief May's declaration," which "suggests that the police chief was, at most, a "decisionmaker."

> Ultimately, the district court concluded:
>
> > The police chief's orders may set the tone and direct the day-to-day police activities, but he is not an official policymaker for the City. Absent final policymaking authority, neither the police chiefs' alleged decision not to supervise Jeffrey nor their alleged ratification of Jeffrey's unlawful conduct can qualify as official city policy. [Laura's] § 1983 municipal liability claims therefore fail as a matter of law.

As we previously have acknowledged, "there's a fine distinction between a policymaker and a decisionmaker." *Zarnow*, 614 F.3d at 167. At the same time, "the elements of the *Monell* test exist to prevent a collapse of the municipal liability inquiry into a *respondeat superior* analysis. *Id.* (citing *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 415 (1997)). On the instant

record, we find no error in the district court's evidentiary assessment. Accordingly, the district court's judgment is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED JUNE 3, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:13-CV-03300

LAURA COVINGTON,

Plaintiff,

VS.

CITY OF MADISONVILLE, TEXAS,

Defendant.

June 2, 2022, Decided;
June 3, 2022, Filed, Entered

ORDER

Before the Court is a Motion for Summary Judgment filed by Defendant City of Madisonville, Texas ("Defendant" or "the City") (Doc. No. 201). Plaintiff Laura Covington ("Plaintiff") filed a response in opposition (Doc. No. 231), and the City replied thereto (Doc. No. 236). After careful consideration, the Court grants Defendant's Motion.

Appendix B

I. Background[1]

A. Procedural History

In November 2013, Plaintiff filed suit against individual defendants and the City, seeking to recover damages under 42 U.S.C. § 1983, arising from her unlawful arrest and consequent temporary loss of child custody. (Doc. No. 1). Plaintiff was arrested and charged with a drug offense as a result of her ex-husband, Jeffrey Covington ("Jeffrey"), who at the time was an officer with the Madisonville Police Department ("MPD"), having had methamphetamine planted underneath her vehicle. The charges against Plaintiff were eventually dismissed over a year later, and she regained custody of the children. Following a lengthy investigation, Jeffrey and another former MPD officer, Justin Barham, were arrested. Jeffrey was indicted. A jury found Jeffrey guilty of retaliation for which he received a probated sentence of five years' confinement in the state prison, was required to surrender his peace officer license, and served thirty days' confinement in county jail.

In the instant civil matter, Plaintiff prevailed at trial on her claims against Jeffrey and other individual defendants and was awarded monetary damages. Prior to trial, however, this court's predecessor granted two Rule 12(b)(6) motions to dismiss filed by the City. The

1. This background section is largely adapted from the background set forth in the Fifth Circuit's panel opinion in *Covington v. City of Madisonville*, 812 F. App'x 219,220-22 (5th Cir. 2020) (per curiam). (Doc. No. 183, at 2-5).

motions argued, inter alia, that Plaintiff's allegations failed to satisfy the requirement of § 1983 liability that a policymaker have knowledge of a policy that caused a deprivation of a constitutional right. (Doc. Nos. 57, 103). The first motion was granted, but Plaintiff was allowed to amend her complaint. (Doc. No. 91, at 45). The court subsequently granted the second motion with prejudice, however, reasoning that Plaintiff had already had an opportunity to amend, and that any additional amendment would be futile. (Doc. No. 110, at 21). Thereafter, Plaintiff filed a motion for reconsideration, contending the court had not "specifically addressed" certain "critical allegations" in the Second Amended Complaint "establishing municipal liability." (Doc. No. Ill, at 1). The court denied the motion, stating that it had thoroughly considered the parties' arguments and relevant caselaw, and Plaintiff's motion did not identify any manifest error or law or fact. (Doc. No. 118, at 2).

Plaintiff appealed the court's dismissal of her claims against the City. (Doc. No. 164). On appeal, the three-judge panel affirmed in part, reversed in part, and remanded, holding that the court erred in dismissing Plaintiffs "single incident" failure-to-supervise claim and ratification claim asserted against the City pursuant to 42 U.S.C. § 1983. (Doc. No. 183, at 17).

On remand, the case was reassigned to the undersigned judge. The City has filed a motion for summary judgment on Plaintiff's two remaining § 1983 claims. (Doc. No. 201). Plaintiff filed a response in opposition (Doc. No. 231), and the City replied thereto (Doc. No. 236).

B. Factual Background

According to the Second Amended Complaint, Plaintiff and Jeffrey married in 2003, divorced in 2004, married a second time in 2007, and divorced again in 2010. (Doc. No. 98, at 3-6). Prior to their first marriage, Jeffrey was an officer of the MPD, which employs a force of six to eight persons for the City's population of approximately 4,500. (*Id.* at 3, 55). Between 2006 and 2009, however, Jeffrey was employed by DynCorp International, a private corporation headquartered in Dubai which served as a private security contractor to the United States Army's forces in Iraq. (*Id.* at 33). Jeffrey worked as a police advisor in Iraq. (*Id.*). In 2009, however, finding Jeffrey had violated United States Policies and Codes of Conduct (by attempting to improperly purchase Viagra from an Iraqi vendor), DynCorp terminated his employment. (*Id.* at 34).

Upon Jeffrey's return to Madisonville, Chief of Police Clendennen ("Chief Clendennen")[2] re-hired him and, in May 2010, promoted him to K-9 officer. (*Id.* at 35, 40). In July 2010, Jeffrey became a Patrol Sergeant. (*Id.* at 40, 44). In that role, he supervised all Patrol Officers and was in charge of the MPD's confidential informants. (*Id.* at 44).

During this period, Plaintiff and Jeffrey's relationship can fairly be described as troubled and acrimonious. The Second Amended Complaint describes a 2009 incident involving Plaintiff raising a baseball bat "as if to hi[t]

2. Chief Clendennen was replaced by Claude W. "Chuck" May ("Chief May") on September 19, 2011. (Doc. No. 98, at 13-14); *see* (Doc. No. 201, Ex. 2, at 1).

him but not hit him," when, according to Plaintiff, Jeffrey "'snapped,' grabbed [her] throat, threw her on the couch, [and] put his knee in [her] chest while choking her." (*Id.* at 4). The Madisonville police were called and responded. (*Id.* at 4-5). Apparently because the incident involved an MPD officer, a Texas Ranger was asked to investigate the matter. (*Id.* at 5). Eventually, prosecution was declined by the district attorney. (*Id.* at 6). Thereafter, Chief Clendennen required another officer to be present whenever Plaintiff and Jeffrey were together. (*Id.* at 18). Later, in 2010, Child Protective Services and the Texas Rangers investigated Jeffrey for allegedly improperly disciplining one of the children. (*Id.* at 7-8). The case was presented to a grand jury, but no charges were brought. (*Id.* at 8).

The incident concerning the planted methamphetamine occurred after the Covingtons' second divorce. The methamphetamine was discovered in a magnetic key holder hidden on the underside of Plaintiff's vehicle on November 9, 2011, when a Texas state trooper, Carl Clary, stopped her for speeding and conducted a consensual search of her vehicle. (*Id.* at 20). Although Trooper Clary did not initially intend to search the vehicle, he did so when Jeffrey, upon hearing Plaintiff's name over the police radio, called Trooper Clary's cell phone. (*Id.*). Jeffrey told Trooper Clary that Plaintiff had tried to run over Jeffrey's current wife that morning and had drugs hidden in a magnetic key holder hidden under her vehicle. (*Id.*). When Trooper Clary found the methamphetamine, Plaintiff denied that that it belonged to her, and accused Jeffrey of planting the drugs, stating that she knew "something

like this was going to happen." (*Id.* at 20, 22). Plaintiff was arrested, booked into jail on felony drug charges, and lost custody of her two young children to Jeffrey. (*Id.* at 21).

Suspecting that Plaintiff's claims that she was set up were likely correct, Trooper Clary reported the incident to the district attorney and another Texas Ranger for investigation. (*Id.* at 23). Ultimately, the charges against Plaintiff were dropped, the children were returned to Plaintiff's custody, and Jeffrey was eventually indicted, tried, and convicted. (*Id.* at 23, 52, 54).

In this Court, Plaintiff alleges that, after she and Jeffrey divorced in 2010 and he re-married, he sought to have her arrested in an effort to gain custody of their children. (*Id.* at 6).[3] According to the Second Amended Complaint, Jeffrey frequently complained about his ongoing custody battles with Plaintiff to other MPD officers and urged them to try to "find any reason to stop her and arrest her" in order to help his custody case. (*Id.* at 18). Eventually, Jeffrey sought to recruit one of the police department's CI's ("confidential informants") to plant illegal drugs in/on her vehicle. (*Id.* at 9-10). Plaintiff alleges that drugs were planted back in March 2011—but the novice officer searching her vehicle the first time, in August 2011, failed to find them. (*Id.* at 10, 15-16, 20). To avoid such failure the second time, Jeffrey

3. The Second Amended Complaint alleges that Jeffrey's second wife, April, demanded that he "get rid of Laura, even if that meant getting rid of his children with Laura, or April was going to leave him." (*Id.* at 8). Thereafter, "April and Jeffrey set out devising a plan to get rid of Laura so as to obtain custody of Laura's children." (*Id*).

allegedly told Trooper Clary—two months before the November 2011 traffic stop—exactly how and where the drugs were hidden underneath Plaintiff's vehicle. (*Id.* at 20-21). After drugs were found in her vehicle on November 9, 2011, Jeffrey filed an emergency ex parte petition seeking custody of the children. (*Id.* at 21). He succeeded on this motion. (*Id*). Ultimately, the children were returned to Plaintiff's custody, and on November 8, 2012, Jeffrey voluntarily relinquished his parental rights to the children. (*Id.* at 23).

II. Summary Judgment Standard

Summary judgment is warranted "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). "The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Once a movant submits a properly supported motion, the burden shifts to the non-movant to show that the Court should not grant the motion. *Celotex*, 477 U.S. at 321-25.

The non-movant then must provide specific facts showing that there is a genuine dispute. *Id.* at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict

for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The Court must draw all reasonable inferences in the light most favorable to the nonmoving party in deciding a summary judgment motion. *Id.* at 255. The key question on summary judgment is whether there is evidence raising an issue of material fact upon which a hypothetical, reasonable factfinder could find in favor of the nonmoving party. *Id.* at 248.

III. Discussion

As stated above, the two remaining claims in this case both arise under § 1983. The first claim is a "single incident" claim, focusing on Chiefs Clendennen and May's failure to supervise Jeffrey's misconduct relative to Plaintiffs November 2011 false arrest. The second claim is premised on Chief May's alleged ratification of Jeffrey's unlawful actions.[4]

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4. In addition to proving the basic elements to establish municipal liability, in order to prevail on her failure-to-supervise claim Plaintiff must prove that the policy was established with the "requisite official knowledge"—i.e., deliberate indifference. *Covington v. City of Madisonville*, 812 F. App'x 219, 225 (5th Cir. 2020) (per curiam). For deliberate indifference to be based on a single incident, "it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy." *Alvarez v. City of Brownsville*, 904 F.3d 382, 390 (5th Cir. 2018) (quoting *Burge v. St. Tammany Parish*, 336 F.3d 363, 373 (5th Cir. 2003)).

In order for her to prevail on her ratification claim, Plaintiff must establish that "a policymaker knowingly approved a subordinate's

Appendix B

Title 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... 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 ....

A municipality or other local government may be liable under § 1983 if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 692, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Nevertheless, under § 1983, local governments are responsible only for "their *own* illegal acts." *Pembaur v. Cincinnati*, 475 U.S. 469, 471, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) (emphasis in original) (citing *Monell*, 436 U.S. at 665-83). They are not vicariously liable under § 1983 for their employees' actions. *Id.* at 478.

Municipal liability under § 1983 requires three elements: (1) a policymaker; (2) an official policy; and (3) a violation of a constitutional right whose "moving force"

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actions and the improper basis for those actions." *Covington*, 812 F. App'x at 225 (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988); *Beattie v. Madison Cty. Sch. Dist*, 254 F.3d 595, 603 n.9 (5th Cir. 2001)).

is the policy or custom. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell*, 436 U.S. at 694). Regardless of which theory Plaintiff pursues, the law requires satisfaction of these elements "to distinguish individual violations perpetrated by local government employees from those that can be fairly identified as actions of the government itself." *Id.*

The existence of a policy is usually shown through evidence of an actual policy, regulation, or decision that is officially adopted by a policymaker or through evidence of a persistent, widespread practice of city officials or employees. *See Burge v. St. Tammany Parish*, 336 F.3d 363, 369 (5th Cir. 2003). Nonetheless, two alternate methods of fulfilling the policy requirement exist in the caselaw, both of which are at play here. First, "a single decision by a policy maker may, under certain circumstances, constitute a policy for which the [City] may be liable." *Brown v. Bryan County*, 219 F.3d 450, 462 (5th Cir. 2000). This "single incident exception" is extremely narrow and gives rise to municipal liability only if the municipal actor is a final policymaker. *Bolton v. City of Dallas*, 541 F.3d 545, 548 (5th Cir. 2008) (per curiam) (citing *Woodard v. Andrus*, 419 F.3d 348, 352 (5th Cir. 2005)). Second, "a policymaker's ratification or defense of his subordinate's actions" may establish a policy chargeable to the municipality. *World Wide St. Preachers F'ship v. Town of Columbia*, 591 F.3d 747, 755 (5th Cir. 2009). The theory of ratification has been limited to "extreme factual situations." *Peterson v. City of Fort Worth*, 588 F.3d 838, 848 (5th Cir. 2009). Both approaches require a policy instituted by a policymaker.

Appendix B

The City has moved for summary judgment on both of Plaintiffs remaining claims—the "single incident" failure-to-supervise claim and the ratification claim—on the basis that she has failed to meet her burden on the first element of § 1983 municipal liability, namely, that Chiefs Clendennen and May were policymakers. To satisfy this element, Plaintiff must adequately prove the Madisonville Chief of Police has "final policymaking authority." *Rivera v. Hous. Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988)). "[W]hether an official has been delegated final policymaking authority is a question of law for the judge, not of fact for the jury." *Gros v. City of Grand Prairie*, 181 F.3d 613, 617 (5th Cir. 1999).

State and local law controls the question whether a particular official has final policymaking authority. *Jett v. Dallas Indep. Sch. Dist*, 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989). "A 'policymaker' must be one who takes the place of a governing body in a designated area of city administration." *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (citing *Bennett v. City of Slidell*, 728 F.2d 762, 769 (5th Cir. 1984) (en banc)). "City policymakers not only govern conduct; they decide the goals for a particular city function and devise the means of achieving those goals." *Bennett*, 728 F.2d at 769. "Policymakers act in the place of the governing body in the area of their responsibility; they are not supervised except as to the totality of their performance." *Id.*

This Court must also consider "the difference between final decisionmaking authority and final policymaking authority, a distinction that this circuit recognized as fundamental." *Bolton*, 541 F.3d at 548-49 (citing *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1247 (5th Cir. 1993)). "[D]iscretion to exercise a particular function does not necessarily entail final policymaking authority over that function." *Id.* at 549. Instead, as the Supreme Court has explained,

> municipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered. *The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government policy* respecting such activity before the municipality can be held liable.

Pembaur v. City of Cincinnati, 475 U.S. 469, 481-83, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) (plurality opinion) (emphasis added) (footnotes and citation omitted); *see also Jett, 7* F.3d at 1246 (distinguishing between "those having mere *decisionmaking* authority and those having *policymaking* authority").

"A municipality can be held liable only when it delegates policymaking authority, not when it delegates

decisionmaking authority." *Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist*, 942 F.3d 258,271 (5th Cir. 2019) (emphasis removed). Policymaking authority may be delegated in one of two ways. First, the governing body may delegate policymaking authority "by an express statement, by a job description or by other formal action." *Bennett*, 728 F.2d at 769. Second, "it may, by its conduct or practice, encourage or acknowledge the agent in a policymaking role." *Id.* In either case, "[t]he governing body must expressly or impliedly acknowledge that the agent or board acts in lieu of the governing body to set goals and to structure and design the area of the delegated responsibility, subject only to the power of the governing body to control finances and to discharge or curtail the authority of the agent or board." *Id.*

Here, the parties agree that the Madisonville City Council is the relevant governing body. (Doc. No. 231, at 27-28) (Doc. No. 236, at 6). That, however, is where the agreement ends. Plaintiff contends that Chiefs of Police Clendennen and May were final policymakers for the City. (Doc. No. 231, at 25). The City disagrees. Thus, the pivotal question is "whether the city council had expressly or impliedly acknowledged that the [Chief of Police] could act in their stead to set goals and to structure and design the activities of the [Madisonville] Police Department." *See Webster*, 735 F..2d at 841.

To answer this question, the Court must take into account state law. *See Jett*, 491 U.S. at 737. The relevant sources of state law are "state and local positive law, as well as 'custom or usage' having the force of law." *Gros*,

181 F.3d at 616 (quoting *Jett*, 491 U.S. at 737). To support its position that the Madisonville Chief of Police was not a final policymaker, the City contends that the City Manager and City Council have the relevant authority over the police department. (Doc. No. 201, at 12-15). The City stresses that under Texas law, "[t]he governing body of a Type A general-law municipality [such as Madisonville[5]] may establish and *regulate* a municipal police force." Tex. Loc. Gov't Code § 25.029 (emphasis added). Moreover, the City points to local ordinances illustrating the subordinate relationship of the police chief to the City Council. *See* Madisonville, Tex., Code of Ordinances § 2-98(4) (2014) (identifying as duty of city manager "[t]o exercise supervision and control over all departments created by the city council"); *id.* § 2-129 (vesting in city manager power to appoint chief of police); *id.* § 2-132 (providing that the city manager directs and controls chief of police's term of office). In the City's view, these sources of law demonstrate that the relevant policymaker was either the City Council or the City Manager, never the chief of police. (Doc. No. 201, at 14). Moreover, the City contends, the minutes of the City Council demonstrate the council's exercise of its authority to act as exclusive policymaker for the city's law enforcement and personnel policies. (*Id.* at 14-15).

To support her position that the Madisonville Chief of Police possessed final policymaking authority, Plaintiff contends that Chiefs Clendennen and May were

5. The City contends, and Plaintiff does not dispute, that Madisonville is a Type A general-law municipality. *See* (Doc. No. 201, at 14).

each, during their respective tenures, the sole official responsible for internal police policy. Plaintiff fails to cite any official document by which the City Council delegated any of its policymaking authority to the chief of police. She does, however, adduce the testimony of several present or former MPD officers, including:

- former MPD officer Justin Barham's declaration testimony that the police chiefs "could and would create unwritten policies, which did not have to be reviewed or approved by the City Manager, or City Council for the City," (Doc. No. 231, Ex. 1, at 3);

- former MPD officer David Sims's deposition testimony that the chiefs had the "ultimate authority" to interpret and implement the policies and the police department, (Doc. No. 231, Ex. 5, at 13);

- Chief Clendennen's deposition testimony that the police chief "could change the whole policy manual" (Doc. No. 231, Ex. 3, at 19); and

- Chief May's deposition testimony asserting, "My directives are city policy," (Doc. No. 231, Ex. 6, at 8).

Plaintiff also points to internal documents of the MPD. For example, General Order 100-05 of the MPD gives the

chief of police "responsib[ility] for the administration and management of the entire police organization." (Doc. No. 231, Ex. 15, at 14, 174). The Policy Manual of the MPD reserved to the chief of police the "right to modify or rescind any of the provisions of this policy manual." (*Id.* at 3). Another internal document provided that "[n]o written directive establishing departmental policy or procedure shall be issued except under the signature of the Chief of Police." (*Id.* at 2).

In sum, Plaintiff asserts that Chiefs Clendennen and May had plenary authority over police policy during their respective tenures, while the City maintains that the police chiefs lacked final policymaking authority. If this were a question of fact, the Court would submit this question to the jury, as both sides have evidentiary support. It is, however, a question of law that the Court must decide. *See Gros*, 181 F.3d at 617. The Court finds, on balance, while Chiefs Clendennen and May possessed some level of discretionary or decision-making authority, the summary judgment evidence fails to establish that the City Council expressly or impliedly delegated them policymaking authority.

While the evidence cited by Plaintiff suggests that the police chiefs at times claimed some level of authority to follow city policy or not, the fact that they did not follow the policies (or created their own unwritten policies) cannot serve as evidence of "policymaking" on behalf of the city. On the contrary, the minutes of the City Council strongly demonstrate that the Chiefs lacked final policymaking authority. For example, shortly after Chief May replaced

Chief Clendennen in late 2011, the City met to "[r]eview and possibly approve" Chief May's proposed overhaul of the MPD policy manual. (Doc. No. 201, Ex. 7, at 4). In Plaintiff's view, this evinces an express delegation of policymaking authority to Chief May. (Doc. No. 231, at 28). In the Court's view, this evidence cuts just the other way. It shows that the City did not acknowledge the police chief as having the final say on police policy. His actions had to have council approval. Thus, in this case it cannot be said that "[t]here is no evidence that the City Council has ever commented authoritatively on the internal procedures of the department." *See Zarnow*, 614 F.3d at 168.

The police chief's subordinate role and lack of final policymaking authority is corroborated by Chief May's declaration:

> The Madisonville City Council closely monitored the activity of the police department, as well as other City departments. I regularly presented reports regarding police operations and activities to Council at their meetings. I was well aware that I lacked authority to act contrary to City Council policy. Likewise, I knew that the City Manager was my supervisor and that I was required to consult with and obtain the approval of the City Manager before making any substantial decision or taking substantial action regarding the police department or any police employee. I certainly did not have free reign to operate the police department untethered from supervision by the City Manager and City Council.

(Doc. No. 201, Ex. 2, at 9). Chief May's testimony suggests that the police chief was, at most, a "decisionmaker." *See Jett*, 7 F.3d at 1246-48. The police chief's orders may set the tone and direct the day-to-day police activities, but he is not an official policymaker for the City.

Absent final policymaking authority, neither the police chiefs' alleged decision not to supervise Jeffrey nor their alleged ratification of Jeffrey's unlawful conduct can qualify as official city policy. Plaintiff's § 1983 municipal liability claims therefore fail as a matter of law.

IV. Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment (Doc. No. 201) is **GRANTED**. All other pending motions are **DENIED** as moot.

Signed at Houston, Texas, this 2nd day of June, 2022.

/s/ Andrew S. Hanen
Andrew S. Hanen
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 15, 2020

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20723

LAURA COVINGTON,

Plaintiff-Appellant

v.

CITY OF MADISONVILLE, TEXAS;
MADISONVILLE POLICE DEPARTMENT,

Defendants-Appellees

May 15, 2020, Filed

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:13-CV-3300

Before SOUTHWICK, GRAVES, and ENGELHARDT, Circuit Judges.

Appendix C

OPINION

PER CURIAM:*

Plaintiff-Appellant Laura Covington appeals the district court's Rule 12(b)(6) dismissal of her claims asserted under 42 U.S.C. § 1983 against Defendant-Appellee City of Madisonville, Texas ("City"). Finding reversible error only with respect to the district court's dismissal of Plaintiff-Appellant's "single incident" failure to supervise claim and ratification claim, we REVERSE IN PART, AFFIRM IN PART, and REMAND.

BACKGROUND

I. Procedural Background

In November 2013, Plaintiff-Appellant, Laura Covington ("Laura") filed suit against individual defendants and the City of Madisonville, Texas ("the City"), seeking to recover damages, under 42 U.S.C. § 1983, arising from her unlawful arrest on November 9, 2011, and consequent temporary loss of child custody. Laura was arrested and charged with a drug offense as a result of her ex-husband, Jeffrey Covington ("Jeffrey"), an officer with the Madisonville Police Department ("MPD"), having had methamphetamine planted underneath her vehicle. The charges against Laura eventually were dismissed in January 2013, and she regained custody of the children. In February 2013, following a lengthy

* Pursuant to 5TH CIR. R. 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 CIR. R. 47.5.4.

investigation, Jeffrey and former MPD officer Justin Barham were arrested. Jeffrey was indicted on February 25, 2013. In April 2014, a jury found Jeffrey guilty of retaliation for which he received a probated sentence of 5 years confinement in the state prison, was required to surrender his peace officer license, and served 30 days confinement in county jail.

In the instant civil matter, Laura prevailed at trial on her claims against Jeffrey and other individual defendants and was awarded monetary damages. Prior to trial, however, the district court granted two Rule 12(b)(6) motions to dismiss filed by the City. The first motion was granted with Laura being allowed to amend her complaint. The district court granted the second motion with prejudice, however, reasoning that Laura had already had an opportunity to amend, and that any additional amendment would be futile. Thereafter, Laura filed a motion for reconsideration, contending the district court had not "specifically addressed" certain "critical allegations" in the second amended complaint "establishing municipal liability." The district court denied the motion, stating that it had thoroughly considered the parties' arguments and relevant caselaw, and Laura's motion did not identify any manifest error or law or fact.[1] This appeal followed.

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1. Rather, the district court explained: "Plaintiff simply rehashes her previous arguments and takes issue with the Court's alleged failure to specifically address all of her 'critical allegations establishing municipal liability.'" The district court added: "The Court need not specially respond to every one of Plaintiff's allegations in order to conclude that she failed to meet the pleading standard for municipal liability." "Accordingly, the Court stands by its previous Opinion and Order."

II. Factual Background

According to the second amended complaint, Laura and Jeffrey married in 2003, divorced in 2004, married a second time in 2007, and divorced again in 2010. Prior to their first marriage, Jeffrey was an officer of the MPD, which employs a force of 6-8 persons for the City's population of approximately 4,500. Between 2006 and 2009, however, Jeffrey was employed by DynCorp International, a private corporation headquartered in Dubai, which served as a private security contractor to the United States Army's forces in Iraq. Jeffrey worked as a police advisor in Iraq. In 2009, however, finding Jeffrey had violated United States Policies and Codes of Conduct (by attempting to improperly purchase Viagra from an Iraqi vendor), DynCorp terminated his employment.

Upon Jeffrey's return to Madisonville, Chief of Police Clendennen re-hired him and, in May 2010, promoted him to K-9 officer. In July 2010, Jeffrey became a Patrol Sergeant. In that role, he supervised all Patrol Officers and was in charge of the MPD's confidential informants.

Laura and Jeffrey's relationship can fairly be described as troubled and acrimonious. The parties' briefs and the second amended complaint describe a 2009 incident involving Laura raising a baseball bat "as if to hit him but not hit him," when, according to Laura, Jeffrey "'snapped,' grabbed [her] throat, threw her on the couch, [and] put his knee in [her] chest while choking her." The Madisonville police were called and responded. Apparently because the incident involved an MPD officer,

Texas Ranger Stephen Jeter was asked to investigate the matter. Prosecution was later declined by the district attorney. Thereafter, Chief Clendennen required another officer to be present whenever Laura and Jeffrey were together. Later, in 2010, Child Protective Services and Texas Ranger Jeter investigated Jeffrey for allegedly improperly disciplining one of the children. The case was presented to a grand jury, but no charges were brought.

The methamphetamine found underneath Laura's vehicle on November 9, 2011, was discovered when a Texas state trooper, Carl Clary, stopped her for speeding and conducted a consensual search of her vehicle. Although Trooper Clary did not initially intend to search vehicle, he did so when Jeffrey, upon hearing Laura's name over the police radio, called Trooper Clary's cell phone. Jeffrey told Trooper Clary that Laura had tried to run over Jeffrey's current wife that morning and had drugs hidden in a magnetic key holder hidden under her vehicle. When Trooper Clary found the methamphetamine, Laura denied that that it belonged to her, and accused Jeffrey of planting the drugs, stating that she knew "something like this was going to happen." Concluding that Laura likely was correct, Trooper Clary reported the incident to the district attorney and Texas Ranger Andres De La Garza for investigation. Ultimately, the charges against Laura were dropped, the children were returned to Laura's custody, and Jeffrey was indicted, tried, and convicted.

Laura alleges that, after she and Jeffrey divorced in 2010 and he re-married, he sought to have her arrested

in an effort to gain custody of their young children.[2] According to the second amended complaint, Jeffrey frequently complained about his ongoing custody battles with Laura to other MPD officers and urged them to try to "find any reason to stop her and arrest her" in order to help his custody case. Eventually, Jeffrey sought to recruit one of the police department's CI's ("confidential informants") to plant illegal drugs in/on her vehicle. Laura alleges that drugs actually were planted twice—in March 2011 and November 2011—but the novice officer searching her vehicle the first time, in August 2011, failed to find them. To avoid such failure the second time, Jeffrey allegedly told Trooper Clary—two months before the November 2011 traffic stop—exactly how and where the drugs were hidden underneath Laura's vehicle. After drugs were found in her vehicle on November 9, 2011, Jeffrey filed an emergency ex parte petition seeking custody of the children. Ultimately, the children were returned to Laura's custody and, on November 8, 2012, Jeffrey voluntarily relinquished his parental rights to the children.

ANALYSIS

Considering the City's second motion to dismiss, filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the district court determined that

2. The second amended complaint alleges that Jeffrey's second wife, April, demanded that he "get rid of Laura, even if that meant getting rid of his children with Laura, or April was going to leave him." Thereafter, "April and Jeffrey set out devising a plan to get rid of Laura so as to obtain custody of Laura's children."

Jeffrey's fabrication of evidence against Laura caused her to be arrested, falsely charged with a drug offense, and temporarily deprived of custody of her children. The district court likewise was satisfied that the events violated Laura's Fourteenth Amendment constitutional rights. Additionally, the district court accepted as true Laura's allegations that the Madisonville Chief of Police acted as the official policymaker for the City relative to the MPD. Nevertheless, the district court concluded that Laura's allegations failed to satisfy the "policy" and "moving force causation" elements necessary to establish municipal liability under 42 U.S.C. § 1983. Accordingly, because Laura had already had an opportunity to amend her complaint, the district court dismissed her claim for municipal liability against the City with prejudice. On appeal, Laura challenges the district court's negative assessment of her "policy" and "causation" allegations.[3]

I. Rule 12(b)(6)

An appellate court conducts a *de novo* review of a federal court's dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6). *See Clyce v. Butler*, 876 F.3d 145, 148 (5th Cir. 2017). Rule 12(b)(6) of the Federal Rules of Civil Procedures authorizes the filing of motions to dismiss asserting, as a defense, a plaintiff's "failure to

3. Laura additionally argues that the district court erred by evaluating her motion for reconsideration pursuant to the standard for Federal Rule of Civil Procedure 59 (e) rather than the more lenient standard applicable to Federal Rule of Civil Procedure 54 (b). Even if such error occurred, it is harmless because it does not impact our resolution of the substantive aspects of Laura's appeal.

state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). Thus, claims may be dismissed under Rule 12(b)(6) "on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989). Dismissal under Rule 12(b)(6) also is warranted if the complaint does not 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)). Where the well-pleaded facts of a complaint do not permit a court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—"'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 678-79 (quoting Fed. Rule Civ. P. 8(a)(2)). Thus, a complaint's allegations "must make relief plausible, not merely conceivable, when taken as true." *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 186 (5th Cir. 2009); *see also Twombly*, 550 U.S. at 555 ("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).").

"The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. Factual allegations that are "merely consistent with a defendant's liability . . . stop[] short of the line between possibility and plausibility of entitlement to relief," and thus are inadequate. *Id.* (internal quotation marks omitted). Accordingly, the requisite facial plausibility

exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Determining whether a complaint states a plausible claim for relief" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. *See also Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008) (degree of required specificity depends on context, i.e., the type of claim at issue).

In evaluating motions to dismiss filed under Rule 12(b)(6), the court "must accept all well-pleaded facts as true, and [] view them in the light most favorable to the plaintiff." *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992). Further, "[a]ll questions of fact and any ambiguities in the controlling substantive law must be resolved in the plaintiff's favor." *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001). On the other hand, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986); *see also Iqbal*, 556 U.S. at 678 ("tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557); *see also Christopher v. Harbury*, 536 U.S. 403, 416, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002) (elements of a plaintiff's claim(s) "must be addressed by allegations in the complaint sufficient to give the defendant fair notice"). "Threadbare recitals of the elements of a

cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. "Though [a plaintiff] need not offer proof of her allegations at this stage, she still must plead facts that plausibly support each element of § 1983 municipal liability[.]" *Peña v. City of Rio Grande City*, 879 F.3d 613, 621 (5th Cir. 2018) (citing *Iqbal*, 556 U.S. at 678).

In determining whether a plaintiff's claims survive a Rule 12(b)(6) motion to dismiss, the factual information to which the court addresses its inquiry is limited to (1) the facts set forth in the complaint, (2) documents attached to the complaint, and (3) matters of which judicial notice may be taken under Federal Rule of Evidence 201. *See Norris v. Hearst Trust*, 500 F.3d 454, 461 n. 9 (5th Cir. 2007); *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 640 n. 2 (5th Cir. 2005). When a defendant attaches documents to its motion that are referred to in the complaint and are central to the plaintiff's claims, however, the court can also properly consider those documents. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). "In so attaching, the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 499 (5th Cir. 2000).

Appendix C

II. Municipal Liability under 42 U.S.C. § 1983

Title 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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[.]

A municipality or other local government may be liable under § 1983 if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 692, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). But, under § 1983, local governments are responsible only for "their *own* illegal acts." *Pembaur v. Cincinnati*, 475 U.S. 469, 471, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) (emphasis in original) (citing *Monell*, 436 U.S. at 665-683). They are not vicariously liable under § 1983 for their employees' actions. *Id.* at 478.

Municipal liability under § 1983 has three elements: (1) a policymaker; (2) an official policy; and (3) a violation of a constitutional right whose "moving force" is the policy or custom. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell*, 436 U.S. at 694). Requiring satisfaction of these elements is "necessary to distinguish

individual violations perpetrated by local government employees from those that can be fairly identified as actions of the government itself." *Id.*

An official policy "usually exists in the form of written policy statements, ordinances, or regulations, but may also arise in the form of a widespread practice that is 'so common and well-settled as to constitute a custom that fairly represents municipal policy.'" *James v. Harris Cty.*, 577 F.3d 612, 617 (5th Cir. 2009) (quoting *Piotrowski*, 237 F.3d at 579). Whatever its form, to yield municipal liability under § 1983, the policy must have been the "moving force" behind the plaintiff's constitutional violation. *Piotrowski*, 237 F. 3d at 580 (quoting *Monell*, 436 U.S. at 694). In other words, a plaintiff "must show direct causation, i.e., that there was 'a direct causal link' between the policy and the violation." *James*, 577 F.3d at 617 (quoting *Piotrowski*, 237 F.3d at 580). "Where an official policy or practice is unconstitutional on its face, it necessarily follows that a policymaker was not only aware of the specific policy, but was also aware that a constitutional violation [would] most likely occur." *Burge v. St. Tammany Par.*, 336 F.3d 363, 370 (5th Cir. 2003) (citing *Piotrowski*, 237 F.3d at 579).

On the other hand, where an alleged policy is facially innocuous, establishing the requisite official knowledges necessitates that a plaintiff demonstrate that the policy was promulgated or "implemented with 'deliberate indifference' to the 'known or obvious consequences' that constitutional violations would result." *See Alvarez v. City of Brownsville*, 904 F.3d 382, 390 (5th Cir. 2018) (quoting *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S.

397, 407, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)), *cert. denied*, 139 S. Ct. 2690, 204 L. Ed. 2d 1103 (2019); *Burge*, 336 F.3d at 370 (must show "facially innocuous" policy or custom was "promulgated with deliberate indifference to the known or obvious consequences that constitutional violations would result") (internal quotations omitted).

Establishing deliberate indifference generally requires a "'pattern of similar violations'" arising from a policy "so clearly inadequate as to be 'obviously likely to result in a constitutional violation.'" *Burge*, 336 F.3d at 370 (quoting *Thompson v. Upshur Cty.*, 245 F.3d 447, 459 (5th Cir. 2001)). A narrow "single incident" exception to the pattern requirement, however, has been recognized. *Id.* For deliberate indifference to be based on a single incident, "'it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy.'" *Alvarez*, 904 F.3d at 390 (quoting *Burge*, 336 F.3d at 373) (alleged facts must be such that "it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy or failure to train").

Mere negligence, even gross negligence, is not sufficient to establish deliberate indifference. *Brown v. Bryan Cty, OK*, 219 F.3d 450, 460-63 (5th Cir. 2000). The causal link "moving force" requirement and the degree of culpability "deliberate indifference" requirement must not be diluted, for "where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into responde at superior liability." *Alvarez*, 904 F.3d at 390 (internal quotations omitted).

III. Application of Legal Principles

On appeal, Laura argues the district court erred in finding her "policy" and "moving force causation" allegations insufficient to withstand Rule 12(b)(6) scrutiny. Specifically, she contends the allegations of her second amended complaint support three theories of municipal liability against the City: (1) the Chief of Police maintained a custom and practice of tolerating misconduct among officers in the MPD; (2) the Chief of Police failed to supervise Jeffrey's management of the confidential informants and control of all narcotic investigations; and (3) the Chief of Police failed to screen Jeffrey's application to the MPD, and, in particular, to be a K-9 narcotics officer, when he had a history of drug violations. She maintains that the facts alleged support an inference that Chief Clendennen and/or Chief May acted with deliberate indifference "either by ignoring the obvious risk that constitutional violations would occur, or a pattern of conduct that should put the Chief on notice there was a risk of constitutional violations by one of his officers."[4] Additionally, she contends, "the Chief of Police ratified Jeffrey's unconstitutional actions because, while both Chief Clendennen and Chief May were well aware of what Jeffrey was planning, they failed to intervene to stop it, and Chief May went so far as to cover up evidence of Jeffrey's culpability during the ensuing investigation and fallout after Jeffrey was indicted."

4. Chief May replaced Chief Clendennen in September 2011.

Although Laura's brief references "three theories" of municipal liability, her claims essentially allege deficiencies in Chief Clendennen's hiring policy, relative to hiring Jeffrey upon his 2009 termination from DynCorp, and Chief Clendennen's and Chief May's (allegedly inadequate) supervision policies. Regarding supervision, she attempts to allege both types of actionable "unofficial" supervision policies, i.e., a "widespread practice [of tolerating officer misconduct] that is so common and well-settled as to constitute a custom that fairly represents municipal policy" and a "single incident" municipal policy focused solely on Jeffrey's conduct.

A. Hiring Policy

Focusing first on hiring, we affirm the district court's dismissal of Laura's hiring policy claim without hesitation. Viewing Jeffrey's 2009 hiring as a "single incident policy" of inadequate screening, Laura's factual assertions regarding "deliberate indifference" and "moving force causation" are inadequate to state a legally viable claim for municipal liability. In other words, the allegations of the second amended complaint do *not* reasonably support an inference that "it should have been apparent [to Chief Clendennen] that the constitutional violations suffered by Laura were the 'highly predictable consequence'" of the Chief's lackluster screening practices relative to a former employee seeking to return to the MPD *or* that Chief Clendennen purposely chose to ignore that risk. For similar reasons, Laura's assertions fail to establish any connection between Chief Clendennen's hiring practice deficiencies and the constitutional violations she suffered,

much less the "moving force" direct causation that is required.

B. Supervision Policy - "Widespread Practice"

Regarding supervision, Laura's submissions outline various alleged infractions and instances of wrongdoing by other officers employed by the MPD in support of her "widespread practice" supervision claim. She adds: "nearly one-half of the City's police were fired or resigned in a six-month period." None of the conduct alleged, however, bears the necessary similarity to the purposeful fabrication and planting of evidence/false arrest misconduct involved here. Indeed, in many instances, the allegations reflect some disciplinary or other remedial actions being taken by the supervising police chief. Furthermore, a voluntary resignation is not itself indicative of an inadequate supervision policy. Finally, without more information, the departure numbers alleged by Laura are not particularly meaningful. For instance, no assertion of typical turnover rates is given, especially for a small-town police force of, at most, only 6-8 officers. Thus, the district court's rejection of these assertions as supporting an actionable claim warrants affirmance.

C. Supervision Policy - "Single Incident"

On the other hand, the propriety of the district court's dismissal of Laura's alleged "single incident" supervision claim—focusing solely on Jeffrey's misconduct relative to Laura's November 9, 2011 false arrest—presents a much

closer call. Laura's second amended complaint alleges: "Everybody at the police department (if not the entire community) knew about [Jeffrey's] battle with [Laura], and his efforts to conspire to have [Laura] wrongfully arrested and prosecuted." More importantly, Laura specifically alleges that, on separate occasions, two MPD officers—Officer Sims and Officer Jonathan Lawrenz—reported Jeffrey's intentions and efforts (relative to having Laura arrested based on planted illegal drugs) directly to Chief May. In response, rather than personally investigating the reports, or referring them to the Texas Rangers for investigation, Chief May allegedly did nothing to determine their validity. Instead, when Officer Sims purportedly told Chief May, in October 2011, that "*he was getting a lot of word from [his] snitches that Jeff is trying to find somebody to plant dope on Laura's car because of this custody battle*," Chief May only responded: "*Well, I don't believe it. It's just a bunch of crackheads*."

Viewing the allegations of the second amended complaint in Laura's favor, as we must, Officer Sims' "snitches" presumably refer to the confidential informants of which Jeffrey allegedly was "in charge," and from whom the MPD regularly sought to obtain information in aid of their drug investigations. Construed in this manner, Chief May's deliberate and outright rejection of the possible validity of what the "snitches" were saying—without conducting even a minimal investigation—arguably falls short. This is particularly so given Officer Sims' experience and credentials—his employment by the MPD since November 2004, and his twenty-six years with the United States Military Police/C.I.D., including active

service in Iraq as a military police officer (attached to the Drugs C.I.D.)—and his presumed credibility. Finally, had Chief May chosen to investigate the egregious and unlawful misconduct that his officers reported to him, he also likely would have discovered the "audio and video records of Jeffrey conspiring against Laura" that Jeffrey had saved on the MPD's computer system.

As set forth above, however, asserting an actionable failure to supervise § 1983 municipal liability claim requires allegations establishing a "direct causal link between the policy and the proclaimed violation." The policy also must have been implemented by the policymaker with the requisite culpability, i.e., "deliberate indifference" to the "known or obvious consequences " that constitutional violations would result.

Regarding causation, the asserted motivations for Jeffrey's conduct were purely personal. Nevertheless, construing the allegations of the second amended complaint in Laura's favor, had Chief May investigated the reports of Jeffrey's "false arrest" plot, a reasonable inference can be drawn—especially given the allegations regarding the number of persons aware of Jeffrey's plan—that Laura's arrest, criminal charges, and loss of child custody would have been prevented or at least promptly remedied. Thus, in that sense, the City caused the violation by not timely employing appropriate supervisory measures in order to prevent reasonably anticipated unlawful conduct by a city employee.

Similarly, the obvious likely consequence of a municipal supervisor's refusal to investigate a municipal employee's scheme—to plant evidence in order to bring about a false arrest and criminal charges—is that the plot works as planned, i.e. the evidence is planted, the false arrest is made, and criminal charges follow. What's more, the information provided by Officers Sims and Lawrenz is not the only information that Chief May had tending to support the likelihood that Jeffrey was trying to do exactly what the "snitches" said he was doing. Chief May allegedly was personally aware of the ongoing custody disputes between Laura and Jeffrey and their acrimonious history. Furthermore, Chief May had to realize that, if Jeffrey was attempting such a scheme, the likelihood of its success was fairly high. Given Jeffrey's position as senior narcotics investigator and his involvement with the MPD confidential informants, he presumably had access to illegal drugs and persons willing and able to plant them. And, as evidenced by Jeffrey's telephone call to Trooper Clary, which caused Trooper Clary to search Laura's vehicle for drugs when he otherwise would not, Jeffrey's law enforcement status at least potentially increased the likelihood that the planted drugs eventually would be discovered by another law enforcement officer and Laura arrested.

In short, construing Laura's allegations in the manner required for Rule 12(b)(6) motions, this close call is one that, at this stage of the proceeding, should have gone in Laura's favor. Although Laura's supervision claim ultimately may not withstand a motion for summary judgment filed after discovery, or prevail at trial, neither

scenario is determinative of this appeal. Accordingly, we find the district court erred in dismissing Laura's failure to supervise § 1983 claim with prejudice.

D. Ratification

Laura's final argument on appeal in support of municipal liability is her assertion that Chief May, a policymaker, ratified Jeffrey's unlawful actions. Ratification in this context requires that a policymaker knowingly approve a subordinate's actions and the improper basis for those actions. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988); *Beattie v. Madison Cty. Sch. Dist.*, 254 F.3d 595, 603 n.9 (5th Cir. 2001). Otherwise, unless conduct is "manifestly indefensible," a policymaker's mistaken defense of a subordinate who is later found to have broken the law is not ratification chargeable to the municipality. *Coon v. Ledbetter*, 780 F.2d 1158, 1161-62 (5th Cir. 1986) (sheriff's defense of deputies premised upon his acceptance of their version of events did not equate to county policy approving reckless police behavior).

Regarding ratification, Laura's brief argues that Chief May ratified Jeffrey's unconstitutional conduct by "fail[ing] to intervene to stop" him and by "cover[ing] up evidence of Jeffrey's culpability during the ensuing investigation and fallout after Jeffrey was indicted." In short, she maintains that Chief May tried to "cover up [Jeffrey's conduct] after it was clear what [he] had done." Relatedly, her second amended complaint alleges that Chief May failed to provide audio recordings, which he

and Sims discussed in late July 2012, to the Texas Ranger investigating Jeffrey's conduct, and failed to properly label and investigate a statement written by Toby Smith (a confidential informant) asserting that Jeffrey had offered to pay Smith to plant drugs in Laura's car, that "[m]onths later[,] she gets busted" and "[w]as set up." Construed in Laura's favor, and considered together with her assertions regarding Chief May's alleged failure to supervise Jeffrey prior to planted drugs being found in her vehicle in November 2011, we likewise conclude that Laura's ratification assertions, though cursorily stated, are sufficient to survive Rule 12(b)(6) attack. Thus, the district court also erred in dismissing Laura's § 1983 municipal liability claim insofar as it is premised upon Chief May's alleged ratification of Jeffrey's unlawful actions against Laura.

CONCLUSION

Applying governing legal principles, we hold that the district court erred in dismissing the "single incident" failure to supervise claim, and the ratification claim, asserted against the City of Madisonville, Texas, pursuant to 42 U.S.C. § 1983, by Plaintiff-Appellant Laura Covington. Finding no reversible error relative to the district court's dismissal of the remainder of the claims asserted herein, we REVERSE IN PART, AFFIRM IN PART, and REMAND.

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED FEBRUARY 16, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:13-CV-03300

LAURA COVINGTON,

Plaintiff,

VS.

JEFFERY COVINGTON, *et al*,

Defendants.

February 14, 2017, Decided;
February 16, 2017, Entered

OPINION AND ORDER

Pending in the above-referenced cause are Plaintiff Laura Covington's ("Laura" or "Plaintiff") Motion for Reconsideration of the Court's Order Dismissing her Claims against Defendants Barham and Covington ("Motion for Reconsideration"), Doc. 96, Defendant City of Madisonville, Texas's ("City") Motion to Dismiss Plaintiff's Claims ("Second Motion to Dismiss"), Doc. 103, and Plaintiff's Motion to Strike and Motion for Leave to

File a Sur-Rely to Defendant City's Reply to Plaintiff's Response to Their Motion to Dismiss ("Motion to Strike and for Leave to File Sur-Reply"), Doc. 108. Having considered the motions, responses, replies, relevant law, and for the reasons outline below, the Court concludes that Plaintiff's Motion for Reconsideration is moot, Defendant's Motion to Dismiss should be granted, and Plaintiff's Motion to Strike and for Leave to File Sur-Reply should be granted in part and denied in part.

I. Background

This case arises out of an acrimonious custody dispute between Plaintiff and her ex-husband, Jeffrey Covington ("Covington"). *See* Doc. 98. Covington was a police officer for the City of Madisonville at the time the events at the heart of this dispute took place. *Id.* at ¶ 12. Plaintiff and Covington's seven-year, off-and-on relationship produced two children. *Id.* ¶¶ 1, 6, 23. After their second marriage ended, Plaintiff alleges that Covington's desire to wrest custody of their two small children from her caused him to fabricate evidence and conspire with Defendant Justin Barham ("Barham"), Defendant Jeremy Kidd ("Kidd"), and others to have Plaintiff arrested and charged with felony drug possession. *See* Doc. 98. Covington's plan eventually succeeded and Plaintiff's children were removed from her possession for two months until a hair follicle test indicated that there were no drugs in her system. *Id.* ¶¶ 118-119,128. Eventually, the District Attorney dropped all charges against her. *Id.* ¶ 276.

Soon after Plaintiff's arrest, the officer who had arrested Plaintiff came forward with his suspicions that Plaintiff's arrest had been orchestrated by Covington. *Id.* ¶¶ 131-137. An investigation into Covington's culpability began, ending with his arrest and indictment on charges of official oppression, delivery of a controlled substance, and obstruction or retaliation. *Id.* ¶¶ 138-165, 277-278. Ultimately, he was only convicted of the retaliation charge. *Id.* ¶ 287.

After Covington's indictment but before his conviction, Plaintiff filed suit in this Court, alleging that Covington violated § 1983 by acting under color of state law and conspiring with other municipal officials in securing Plaintiff's false arrest. *See* Doc. 1. Plaintiff further alleges that the City was aware of, but "intentionally disregarded, ratified, protected, and directly allowed," Covington's actions. Doc. 98 at ¶ 408. Plaintiff also alleges that the City is liable because it demonstrated deliberate indifference to Plaintiff's constitutional rights by failing to supervise its officers and wrongfully hiring Covington. *Id.* ¶¶ 401-411.

In an Opinion and Order dated September 4, 2015, this Court granted the City's First Motion to Dismiss but allowed Plaintiff twenty days to amend her pleading to file a pleading that satisfies the requirements to state a claim against the City under § 1983. Doc. 91. On the deadline, September 24, 2015, Plaintiff filed her Opposed Motion for Extension of Time to Amend her Complaint and Move for Entry of Default or Supplement her Pleadings in Accordance with this Court's Opinion and Order. Doc. 92. On October 1 and 2, 2015, Plaintiff then filed her Second

and Third Motions for Extension of Time to Amend. Docs. 94, 95. This Court referred these motions to Magistrate Judge Stacy, Docs. 93, 101, and on October 19, 2015, Judge Stacy granted Plaintiff's Motion for Extension of Time, deeming Plaintiff's Second Amended Complaint timely. Doc. 102. Meanwhile, Plaintiff also filed a Motion for Reconsideration of the Court's earlier Opinion and Order. Doc. 96.

In her Second Amended Complaint, Plaintiff asserts claims against (1) Covington personally for (a) violation of her Fourth and Fourteenth Amendment rights and conspiracy to deprive her of these rights; (b) for supervisory liability for violation of her Fourth and Fourteenth Amendment rights and conspiracy to deprive her of these rights; (2) Barham personally for violation of her Fourth and Fourteenth Amendment rights and conspiracy to deprive her of these rights; (3) Kidd personally for (a) violation of her Fourth and Fourteenth Amendment rights and conspiracy to deprive her of these rights; (b) malicious prosecution; (c) assault; (d) intentional infliction of emotional distress; and (4) the City for (a) failure to adequately supervise; and (b) negligence in hiring.[1] Doc. 98 at ¶¶ 355-411.

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1. Plaintiff again labels her hiring claims as "negligent-hiring" claims. As this Court admonished in its previous Opinion and Order, such claims are not cognizable under § 1983:

> Laura Covington claims that the City is liable for "negligent hiring" and inadequate police training and supervision. # 72 at p. 19. "Negligent training will not support a § 1983 claim against a municipality, nor is it sufficient to show that 'injury of accident could have

In response, on November 2, 2015, the City filed its current Motion to Dismiss Plaintiff's Claims. Doc. 103. Plaintiff responded, the City replied, and Plaintiff then filed her Motion to Strike and for Leave to file Sur-Reply. Doc. 108. All of the pending motions are now ripe for adjudication.

II. Plaintiff's Motion for Reconsideration

Plaintiff urges this Court to reconsider its Opinion and Order of September 4, 2015, Doc. 91, which dismissed her official-capacity claims against Defendants Barham and Covington on the ground that they were duplicative of her claims against the City. Doc. 96. She argues that she did not sue Barham and Covington in their official government capacities, but "personally for their personal, direct and gross violation of her constitutional rights under color of

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> been avoided if an officer had better or more training'" because the statute requires that for liability "for the failure to take precautions to prevent harm must be an intentional choice and not merely a negligent oversight." *Boston v. Harris County, Texas*, No. Civ. A. H-11-1566, 2014 U.S. Dist. LEXIS 40785, 2014 WL 1275921, at *90 (S.D. Tex. March 26, 2014), citing *City of Canton*, 489 U.S. at 390. For the same reason it would be true of a claim for negligent hiring. The Court will presume that Covington's use of "negligent" was in error.

Covington, 2015 U.S. Dist. LEXIS 118238, 2015 WL 5178078, at *10. This Court will afford Plaintiff the benefit of the doubt yet again and assume that her failure to relabel her "negligent hiring" claims is simply the result of sloppy draftsmanship.

state law." *Id.* ¶ 5. She continues that, because she has pled specific facts demonstrating that the defendants were personally involved in the matters that form the basis for her § 1982 claims, "[t]his is not a case in which a government official or agency head is sued in name as an official for the governmental entity." *Id.* ¶ 8. Accordingly, she asks the Court to allow her to replead claims against Barham and Covington defendants personally. *Id.* ¶¶ 5, 13. Plaintiff also claims that she asserts valid claims against Barham and Covington for conspiracy to deprive her of her constitutionally protected rights and supervisory liability against Covington. *Id.* ¶¶ 9-10. The City does not respond to Plaintiff's motion.

Plaintiff misreads this Court's earlier Opinion and Order. In that directive, this Court granted the City's First Motion to Dismiss, but gave Plaintiff 20 days to file an amended pleading that satisfies the requirements to state a claim against the City under § 1983 and either an entry of default, voluntary dismissal, or amended pleading adequately stating state-law tort claims against Kidd in his individual capacity. *See Covington v. Covington*, CIV.A. H-13-3300, 2015 U.S. Dist. LEXIS 118238, 2015 WL 5178078, at *18 (S.D. Tex. Sept. 4, 2015), *abrogated on other grounds by Groden v. City of Dallas*, 826 F.3d 280 (5th Cir. 2016). No mention was made of granting leave to amend her pleadings to state claims against Barham and Covington individually because none was necessary. The Court recognized that Plaintiff was suing both of these defendants in their individual and official capacities. 2015 U.S. Dist. LEXIS 118238, [WL] at *1 (stating that Covington and Barnham "have been sued

in their individual and official capacities."). However, the Court never addressed the merits of Plaintiff's individual-capacity claims against Covington or Barham because it was only ruling on the City's motion to dismiss—which only addressed claims that implicated the City. *See* 2015 U.S. Dist. LEXIS 118238, [WL] at *13 ("[B]ecause the claims against Kidd in his individual capacity do not involve the City nor implicate its liability, they are not relevant to the City's motion to dismiss."). Accordingly, the Court only dismissed Plaintiff's official-capacity claims against Barham and Covington. 2015 U.S. Dist. LEXIS 118238, [WL] at *17 ("Because Laura Covington's claims against Jeffrey Covington and Barham *in their official capacities* are in actuality claims against the City, these claims against Jeffrey Covington and Barham in their official capacities are also DISMISSED as duplicative." (emphasis added)).

The Court declines to address the sufficiency of Plaintiff's individual-capacity claims at this time. None of those claims were addressed in the City's First Motion to Dismiss—or dismissed by this Court. Nor is there a pending motion to dismiss directed at these claims. Moreover, in its prior Opinion and Order, this Court granted Plaintiff an opportunity to amend her claims. 2015 U.S. Dist. LEXIS 118238, [WL] at *18. Plaintiff took advantage of this opportunity and submitted her Second Amended Complaint. Doc. 98. Because Plaintiff's individual-capacity claims were never dismissed and she has had an opportunity to clarify and supplement those claims in her Second Amended Complaint, Plaintiff's request to replead is moot.

III. The City's Motion to Dismiss

In its Second Motion to Dismiss, the City argues that Plaintiff's claims against it must be dismissed because she brings no cognizable Fourteenth Amendment claims, her official-capacity claims against individual defendants and her claims against the police department are duplicative of her claims against the City, and there are no factual allegations that the City caused any deprivation of Plaintiff's rights or was deliberately indifferent. Doc. 103 at ¶¶ 1-6. The Court will address each of the City's arguments in turn.

a. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) allows the court to dismiss a claim that fails "to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). In reviewing a motion to dismiss for failure to state a claim, the court must accept as true all well-pleaded facts in the complaint, and must view the allegations as a whole in the light most favorable to the non-movant. *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003). Although Federal Rule of Civil Procedure 8 mandates only that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief," this standard demands more than unadorned accusations, "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Bell Atl. v. Twombly*, 550 U.S. 544, 555-57, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal citations and quotation marks omitted). Thus, to survive

a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* at 570.

Facial plausibility is satisfied when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678 (citing *Twombly*, 550 U.S. at 555). Although "the plausibility standard is not akin to a 'probability requirement,'" there must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). Thus, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.'" *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)). Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to "draw on its judicial experience and common sense." *Id.* at 664-65.

b. Analysis

i. *Fourteenth Amendment claims*

Plaintiff brings her claims against Defendants for violations of her Fourth Amendment right to be free from unlawful arrest, and her Fourteenth Amendment due-process rights not to have evidence fabricated

against her and to maintain her family's integrity. Doc. 98 at ¶¶ 355-411. The City seeks dismissal of Plaintiff's Fourteenth Amendment claims on the ground that claims of unlawful arrest or detention are cognizable under the Fourth, not the Fourteenth Amendment. Doc. 103 at ¶ 10. The City further argues that Plaintiff "states no plausible allegations asserting a claim under the Fourteenth Amendment." *Id.* Plaintiff responds by citing a number of cases indicating that the Fifth Circuit recognizes that the due-process clause protects an individual's right to family integrity and not to have police deliberately fabricate evidence against them. Doc. 106 at 4-6.

There is no question that the right to "family integrity" is an acknowledged constitutional right—"a form of liberty guaranteed by the due process clause of the Fourteenth Amendment." *Morris v. Dearborne*, 181 F.3d 657, 667 (5th Cir. 1999) (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). The Constitution protects family relationships and a parent's right to the care, custody, control, and management of their children is well-established. The most essential basic aspect of familial privacy is "the right of the family to remain together without the coercive interference of the awesome power of the State." *Wooley v. City of Baton Rouge*, 211 F.3d 913, 921 (5th Cir. 2000) (citing *Hodorowski v. Ray*, 844 F.2d 1210, 1216 (5th Cir. 1988)). Likewise, "individuals have a due process right 'not to have police deliberately fabricate evidence and use it to frame and bring false charges against [them].'" *Robles v. Aransas Cnty. Sheriff's Dep't*, 2:15-CV-495, 2016 U.S. Dist. LEXIS 103119, 2016 WL 4159752, at *7 (S.D. Tex. Aug. 5, 2016)

(quoting *Cole v. Carson*, 802 F.3d 752, 771 (5th Cir. 2015)). To make a claim for deliberate fabrication, Plaintiff need not allege that fabricated evidence was used against her at trial, but only that it led to false charges being brought against her. *Cain v. Johnson*, A-16-CV-30-LY, 2016 U.S. Dist. LEXIS 101456, 2016 WL 4146196, at *4 (W.D. Tex. Aug. 3, 2016) (citing *Cole*, 802 F.3d at 771).

In her Second Amended Complaint, Plaintiff alleges that drug charges were falsely brought against her because Covington, Barham, and Kidd conspired to have her arrested and deliberately planted evidence to that end. Doc. 1 at ¶¶ 38-57, 115. Further, Plaintiff alleges that her children were removed from her custody as a result of the false charges. *Id.* at ¶¶ 118-119. These are adequate allegations of Fourteenth Amendment violations. Nevertheless, as discussed below, her claims against the City fail for other reasons.

ii. *Official-capacity claims*

Notwithstanding the fact that Plaintiff's Second Amended Complaint and her Response explicitly state that she is suing Barham, Covington, and Kidd in their personal capacities only, Docs. 98 at ¶¶ 355-397, 106 at 2-3, the City interprets Plaintiff's claims against these individuals as official-capacity claims and seeks dismissal, Doc. 103 at ¶¶ 11-12.

"Claims under § 1983 may be brought against persons in their individual or official capacity, or against a governmental entity." *Goodman v. Harris Cnty.*, 571

F.3d 388, 395 (5th Cir. 2009) (citing *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)). "Personal-capacity suits seek to impose liability on a government official as an individual, while official-capacity suits 'generally represent another way of pleading an action against an entity of which the official is an agent.'" *Id.* (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). Because the real party in interest in official-capacity suits is the governmental entity and not the named official, any claims against individual employees in their official capacities are duplicative of the claims against the governmental entity and must be dismissed, *Covington*, 2015 U.S. Dist. LEXIS 118238, 2015 WL 5178078, at *11 (citing *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991); *Kentucky v. Graham*, 473 U.S. 159, 167, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)).

When "it is not clear from allegations of the complaint whether a defendant has been sued in his official or individual capacity, the court must look to the substance of the claims, the relief sought, and the course of the proceedings to determine in which capacity the defendant is sued." *Senu-Oke v. Jackson State Univ.*, 521 F. Supp. 2d 551, 556 (S.D. Miss. 2007), *aff'd*, 283 Fed. App'x 236 (5th Cir. 2008) (citing *Forside v. Mississippi State Univ.*, 2002 U.S. Dist. LEXIS 29192, 2002 WL 31992181, *5 n.5 (N.D. Miss. 2002)). "To state personal-capacity claims under § 1983 plaintiffs must allege that while acting under color of state law defendants were personally involved in the deprivation of a right secured by the laws or Constitution of the United States, or that the defendants' wrongful

actions were causally connected to such a deprivation." *A.W. v. Humble Indep. Sch. Dist.*, 25 F. Supp. 3d 973, 1003 (S.D. Tex. 2014), *aff'd sub nom. King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754 (5th Cir. 2015) (citing *James v. Tex. Collin Cty.*, 535 F.3d 365, 373 (5th Cir. 2008)).

Here, Plaintiff has repeatedly stated that she is not asserting official-capacity claims. Docs. 98 at ¶¶ 355-397, 106 at 2-3. Moreover, her Complaint lays out facts that, if true, demonstrate Barham, Covington, and Kidd were personally involved in the alleged deprivations of her constitutional rights. *See* Doc. 1. The Court thus concludes that Plaintiff is only asserting individual-capacity claims against these individual defendants and there are no official-capacity claims to dismiss.

iii. *Claims against the Police Department*

The City argues that the City's police department lacks the capacity to be sued separately. Doc. 103 ¶¶ 13-15. Plaintiff does not respond to the City on this issue. *See* Doc. 106. This is likely because Plaintiff does not bring any separate claims against the police department—a conclusion bolstered by examining Plaintiff's allegations. *See* Doc. 98 at ¶¶ 398-411. Nevertheless, because the case caption indicates that the police department is still a party, the Court will address the City's argument.

In determining whether an entity has the capacity to sue and be sued, a federal district court looks to "the law of the state in which the district court is held." *Darby v. Pasadena City Police Dep't*, 939 F.2d 311, 313 (5th Cir.

1991) (quoting Fed. R. Civ. P. 17(b)) (internal quotation marks omitted). Under Texas law, a city may designate whether one of its own subdivisions can be sued as an independent entity. *Id.* at 313. Unless the political entity that created the department has taken "explicit steps to grant the servient agency with jural authority," the department lacks the capacity to sue or to be sued. *Id.*

Plaintiff has failed to show that the City of Madisonville ever granted its police department the capacity to engage in separate litigation. Thus, her suit, "seeks recovery from a legal entity that does not exist." *Id.* at 314. Accordingly, to the extent she is asserting any claims against the police department, those claims must be dismissed.

iv. *Claims against the City*

A municipality may not be held vicariously liable for the unconstitutional torts of its employees and is not liable merely for employing a tortfeasor under respondeat superior. *Monell*, 436 U.S. at 694; *City of Canton v. Harris*, 489 U.S. 378, 392, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). Unconstitutional conduct must be directly attributable to the municipality through official action. *Monell*, 436 U.S. at 690. "[I]solated unconstitutional actions by municipal employees will almost never trigger liability." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). Rather, to establish municipal liability under § 1983, a plaintiff must show that (1) a municipal policymaker promulgated (2) an official policy (3) that was the moving force behind the violation of a constitutional right. *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009).

Appendix D

1. Policymaker

The City initiates its attack on the sufficiency of Plaintiff's claims against it by arguing that Plaintiff identifies the wrong policymaker in her Second Amended Complaint because the city council, and not the Chief of Police, is the relevant policymaker for the City. Doc. 103 at ¶¶ 18-19. The City continues that even assuming Plaintiff has identified a policymaker for purposes of § 1983 liability, she has failed to allege that the City was deliberately indifferent to the need for a constitutionally adequate police-officer hiring or supervision program. *Id.* ¶¶ 20-26. Nor does she make any factual allegations that the City's policymaker ratified the unconstitutional actions of which Plaintiff complains. *Id.* ¶¶ 26-28.

Plaintiff responds that the case law does not foreclose the possibility that someone other than the city council can be a municipality's policymaker. Doc. 106 at 7-11. Plaintiff goes on to identify the allegations within her Second Amended Complaint that establish the City delegated its policymaking authority to the Chief of Police for all law enforcement matters and the administration of the department. *Id.* at 9-11. In support, she cites to and attaches relevant excerpts from the City of Madisonville Ordinances, Madisonville City Council Meeting Procedures, Madisonville Police Department Standard Operating Procedures, and Madisonville Police Department Policy Manual. *Id.* (citing Docs. 106-1-4).

In its Reply to Plaintiff's Response, the City raises objections to "Plaintiff's improper attempt to use exhibits

presented for consideration of the City's motion to dismiss," and cites *Scanlan v. Texas A&M University*, 343 F.3d 533 (5th Cir. 2003), for the proposition that the Court may not consider these exhibits. Doc. 107 at ¶ 1. The Court will address this issue first.

The City is correct to note that a court must generally limit itself to the contents of the pleadings and attachments thereto when ruling on a 12(b)(6) motion. *Brand Coupon Network, L.L.C. v. Catalina Mktg. Corp.*, 748 F.3d 631, 635 (5th Cir. 2014). This is so because if a court accepts evidence presented with a motion to dismiss under Rule 12(b)(6), it must then treated as a summary judgment motion. *See* Fed. R. Civ. P. 12(d) ("[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."). Notwithstanding this general rule, however, the Fifth Circuit has ruled that courts "may also consider documents attached to either a motion to dismiss or an opposition to that motion when the documents are referred to in the pleadings and are central to a plaintiff's claims." *Brand Coupon*, 748 F.3d at 635. "Although the Fifth Circuit has not articulated a test for determining when a document is central to a plaintiff's claims, the case law suggests that documents are central when they are necessary to establish an element of one of the plaintiff's claims." *Kaye v. Lone Star Fund V (U.S.), L.P.*, 453 B.R. 645, 662 (N.D. Tex. 2011).

The Court finds that Plaintiff's exhibits satisfy this test. Plaintiff's claims depend on the identification of a

policymaker. Moreover, although she did not attach the exhibits to her Second Amended Complaint, Plaintiff repeatedly references and cites these documents therein. *See* Doc. 98 at ¶¶ 336-354. The City's objections to Plaintiff's exhibits are overruled.

The Supreme Court has never identified a single body as the source of municipal policymaking authority. *Gros v. City of Grand Prairie*, 181 F.3d 613, 615 (5th Cir. 1999) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986)). To the contrary, the Court has remarked that "one may expect to find a rich variety of ways in which the power of [local] government is distributed among a host of different officials and official bodies." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124-25, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988). In eschewing a default rule for identifying a policymaker, the Court has made it clear that "state law . . . will *always* direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business." *Id.* at 125 (emphasis added).

Here, Plaintiff alleges that the Chief of Police is the official policymaker for the City and attaches exhibits to her Response that support these allegations. Docs. 98 at ¶ 399; 106-1-4. Accepting these allegations as true, Plaintiff has sufficiently alleged the existence of a policymaker. Dismissal on this basis is denied.

2. Policy or Practice

Plaintiff does not allege that the City has an official written policy or policy statement announced by the policymaker that deprived her of her constitutional rights. *See* Doc. 98. Rather, she claims that a practice has been established by the City's deliberate indifference to the need for adequate hiring and supervision of its police officers and that Covington, Barham, and Kidd's violations of Plaintiff's constitutional rights were ignored or ratified by the City's police chiefs. *Id.* ¶¶ 401-411.

The City contends that Plaintiff's only cited support for her failure-to-supervise claims—her allegation that nearly one-half of the City's police officers were fired or resigned in a six-month period—in fact undercuts her arguments. Doc. 103 at ¶ 21. Likewise, the City argues that the fact it complied with the Texas Commission on Law Enforcement ("TCOLE") guidelines for hiring officers dooms her wrongful-hiring claims. *Id.* ¶ 22. Further, the City points out that there are no allegations that indicate the City's alleged hiring-program inadequacies are linked to the particular injury alleged in this case. *Id.* ¶¶ 23-25. In response to Plaintiff's ratification claims, the City claims that the police chief's initial defense of Covington does not indicate that he ratified Covington's conduct. *Id.* ¶ 26-27. Finally, the City urges that its actions in firing Covington and cooperating with his prosecution illustrate that it did not ratify, but in fact responded appropriately to the situation. *Id.* ¶ 28.

Plaintiff responds that she has sufficiently detailed how the City's police chiefs were aware of but disregarded Covington's actions and the conspiracy to arrest Plaintiff and deny her custody of her children. Doc. 106 at 13-14, 16-19. She goes on to restate a number of the allegations from her Second Amended Complaint. *Id.* at 14-19. She also points to allegations that she claims detail "the long list of crimes and misconduct known to the Chief by officers and supervisors." *Id.* at 14-15. Finally, she argues that her wrongful-hiring claims are sufficient because she outlined how the City failed to adhere to statutory mandated rules for the screening of officers. *Id.* at 15.

To show an official policy, there must be a written policy or policy statement announced by the policy maker, or "'a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.'" *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (per curiam), *rev'd in part en banc on other grounds*, 739 F.2d 993 (5th Cir. 1984). The plaintiffs must also show that the custom or practice caused the constitutional violation. *See, e.g., Lewis v. Pugh*, 289 F. App'x 767, 775 (5th Cir. 2008) (per curiam) (unpublished) (citing *Fraire v. City of Arlington*, 957 F.2d 1268, 1281 (5th Cir. 1992)). A claim of a violation of section 1983 pursuant to the latter form of official policy—a persistent, widespread practice of city officials or employers—may encompass allegations that a policymaker failed to act affirmatively, including [by failing to supervise or wrongfully hiring an individual. *Burge v. St. Tammany Par.*, 336 F.3d 363, 369 (5th Cir. 2003).

"Knowledge on the part of a policymaker that a constitutional violation will most likely result from a given official custom or policy is a *sine qua non* of municipal liability under section 1983." *Id.* at 370. Accordingly, for a municipality to be liable under section 1983, "a plaintiff must demonstrate that actual or constructive knowledge of the custom or policy is attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority." *Id.* (quoting *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984) (per curiam)) (internal quotation marks omitted). "Where an official policy or practice is unconstitutional on its face, it necessarily follows that a policymaker was not only aware of the specific policy, but was also aware that a constitutional violation will most likely occur." *Id.* (citing *Piotrowski*, 237 F.3d at 579). However, where an alleged policy or custom is facially innocuous, establishing the requisite official knowledge requires that a plaintiff establish that an official policy was "promulgated with deliberate indifference to the 'known or obvious consequences' that constitutional violations would result." *Id.* (quoting *Piotrowski*, 237 F.3d at 579) (internal quotation marks omitted).

This "knowledge requirement applies with equal force where a section 1983 claim is premised on a failure to train or to act affirmatively." *Id.* "Usually, failure to supervise gives rise to section 1983 liability only in those situations in which there is a history of widespread abuse." *Bowen v. Watkins*, 669 F.2d 979, 988 (5th Cir. 1982). "Then knowledge may be imputed to the supervisory official, and he can be found to have caused the later violation

by his failure to prevent it." *Id.* Thus, an official is liable under section 1983 for a failure to supervise only where the plaintiff establishes that: (1) the official failed to train or supervise the officers involved; (2) there is a causal connection between the alleged failure to supervise or train and the alleged violation of the plaintiff's rights; and (3) the failure to train or supervise constituted deliberate indifference to the plaintiff's constitutional rights." *Thompson v. Upshur Cnty.*, 245 F.3d 447, 459 (5th Cir. 2001) (citing *Smith v. Brenoettsy*, 158 F.3d 908, 911-12 (5th Cir. 1998); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452-54 & nn.7-8 (5th Cir. 1994)). Similarly, "[o]nly where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.'" *Brown*, 520 U.S. at 411.

"Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and do not divest officials of qualified immunity." *Alton v. Tex. A&M Univ.*, 168 F.3d 196, 201 (5th Cir. 1999) (citing *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 218 (5th Cir. 1998). "To satisfy the deliberate indifference prong, a plaintiff usually must demonstrate a pattern of violations and that the inadequacy of the supervision or hiring is 'obvious and obviously likely to result in a constitutional violation.'" *Cousin v. Small*, 325 F.3d 627, 637 (5th Cir. 2003) (per curiam) (citing *Thompson*, 245 F.3d at 459).

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A plaintiff may also satisfy the knowledge requirement and recover under a municipal-ratification theory if a subordinate municipal employee commits a constitutional violation and a policymaker later approves that subordinate's actions. *Praprotnik*, 485 U.S. at 127. Nevertheless, the Fifth Circuit has limited this theory of ratification to "extreme factual situations." *Peterson*, 588 F.3d at 848 (citing *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir. 1985)) (internal quotation marks omitted). To succeed under a ratification theory, a plaintiff must show that an investigation found constitutional violations and that the policymaker then knowingly approved of them. *Coon v. Ledbetter*, 780 F.2d 1158, 1162 (5th Cir. 1986). Alternatively, even if a plaintiff is unable to show knowledge on the policymaker's part, a successful claim can still be brought if the subordinate's conduct is "manifestly indefensible." *Id.* This is only available in extreme circumstances and does not give a plaintiff a remedy every time a policymaker defends his subordinates and those subordinates are later found to have broken the law. *Id.*

Here, Plaintiff fails to sufficiently allege facts that satisfy the requirement of § 1983 liability that a policymaker have knowledge of a policy. The Court does not believe that Plaintiff's allegations concerning the alleged misdeeds of a number of other individuals on the police force suffice to show a pattern that demonstrates deliberate indifference. There must be more than a list of instances of officer misconduct in order to establish a pattern. *Peterson*, 588 F.3d at 851. The number of incidents requires the context provided by, for example,

the department's size or the number of its arrests. *Id.* at 852. "The incidents must also be sufficiently similar to warrant an inference of a pattern." *Alfaro v. City of Houston*, CIV.A. H-11-1541, 2013 U.S. Dist. LEXIS 95209, 2013 WL 3457060, at *13 (S.D. Tex. July 9, 2013). While Plaintiff provides the size of the City of Madisonville and its police force, she goes no further. She then launches into a laundry list of alleged wrongdoings that are in no way similar to the constitutional deprivation she allegedly suffered. *See* Doc. 98 at ¶¶ 290-335.

Plaintiff's allegations regarding the conduct of other officers are largely conclusory and based on hearsay. Nevertheless, taken at face value, they still do not show ratification of a municipal policy of inadequate supervision or hiring. Although Plaintiff may not have agreed with the police department's handling of the alleged cases of officer misconduct she cites in her Second Amended Complaint, her allegations clearly indicate that the department conducted investigations or inquiries into a number of these incidents. *See id.* Likewise, her allegations that the police chief initially defended Covington are insufficient to show ratification. "[A] policymaker who defends conduct that is later shown to be unlawful does not necessarily incur liability on behalf of the municipality." *Peterson*, 588 F.3d at 848 (citing *Coon*, 780 F.2d at 1161-62).

3. Moving Force

The parties do not directly address the sufficiency of Plaintiff's allegations with regard to the third element of municipal liability under § 1983. *See* Docs. 103, 106.

Nevertheless, for municipal liability to attach under § 1983, "[i]n addition to culpability, there must be a direct causal link between the municipal policy and the constitutional deprivation." *Piotrowski*, 237 F.3d at 580. The threshold of proof here is high, requiring that the policy be the "moving force" behind the violation. *Id.* (citing *Monell*, 436 U.S. at 694; *Canton*, 489 U.S. at 389).

Where, as here, there are no allegations indicating that additional investigation into or supervision of Covington—or other officers—would have revealed specific information about a history of or clear propensity for misusing their offices to frame individuals or fabricate evidence, there can be no inference of a causal link between the City's hiring and supervision process and Covington's misdeeds. *See e.g., Brown v. Bryan Cnty.*, 219 F.3d 450, 461 (5th Cir. 2000) ("the failure to train or to provide supervision must be 'the moving force' that had a specific causal connection to the constitutional injury"); *Brown*, 520 U.S. at 411 (holding that the link between an officer's background and his subsequent constitutional violations must be "plainly obvious" and concluding that officer in question's record of misdemeanors did not suffice to establish the necessary causal link to excessive force claims); *Alfaro*, 2013 U.S. Dist. LEXIS 95209, 2013 WL 3457060, at *15 (concluding that city's background check must have revealed specific information about officer's propensity for misusing his position to commit rape to hold the city liable for wrongful hiring); *Kincheloe v. Caudle*, A-09-CA-010 LY, 2010 U.S. Dist. LEXIS 28110, 2010 WL 1170604, at *5 (W.D. Tex. Mar. 22, 2010) (stating that scrutiny of officer's background must have revealed

that the plainly obvious consequence of hiring him would be to violate Plaintiff's rights by using excessive force). Plaintiff's allegations regarding Covington's termination for drug-related issues and other officers' misdeeds have absolutely no relation to Plaintiff's alleged constitutional deprivations. Accordingly, her allegations are woefully insufficient to establish the necessary causal link to impose municipal liability.

Plaintiff's allegations against the City cannot support the second or third element of a claim for municipal liability. Accordingly, Plaintiff's Second Amended Complaint fails to state a claim for relief against the City. Plaintiff's claims against the City are, therefore, dismissed.

IV. Plaintiff's Motion to Strike and Motion for Leave to File a Sur-Reply

In her Motion to Strike and for Leave to File Sur-Reply, Plaintiff argues that the City improperly made new arguments in its Reply to Plaintiff's Response. Doc. 108. She urges this Court to strike the City's Reply because it newly asserts (1) objections to Plaintiff's claims against Barham and Covington, and (2) argues that all Fourteenth Amendment claims are barred even though its Second Motion to Dismiss was only based on Fourteenth Amendment claims for unlawful arrest or detention. Doc. 108 ¶¶ 2-4. Alternatively, she requests that she be afforded an opportunity to respond. *Id.* ¶ 5.

"In principle, the Court should not consider arguments raised for the first time in a Reply brief." *Blanchard & Co.,*

Inc. v. Heritage Capital Corp., CIV.A.3:97-CV-0690-H, 1997 U.S. Dist. LEXIS 19395, 1997 WL 757909, at *1 (N.D. Tex. Dec. 1, 1997) (citation omitted). However, in this case, Plaintiff misreads the City's Reply; no new arguments are advanced. *Compare* Doc. 103 ¶¶ 9-12, *with* Doc. 107 ¶¶ 2-3. The City's Reply simply reiterates that the official capacity claims against Covington and Barham and the earlier Fourteenth Amendment claim for unlawful arrest were dismissed by the Court and urges this Court to bar Plaintiff from reasserting those claims. *See* Doc. 107 ¶¶ 2-3. It neither mentions individual-capacity claims nor challenges Plaintiff's Fourteenth Amendment claims for fabrication of evidence and violation of the right to family integrity. Accordingly, Plaintiff's request to strike the City's Reply is denied. Nevertheless, because full and complete briefing is useful to the adjudication of this case and Plaintiff's motion is unopposed, the Court will grant her leave to file her Sur-Reply.

V. Amendment

Plaintiff requests leave to amend if her Second Amended Complaint succumbs to the City's Second Motion to Dismiss. Doc. 106 at 20.

Federal Rule of Civil Procedure 15(a) states that "[t]he court should freely give leave [to amend] when justice so requires." The Fifth Circuit has held that Rule 15(a) "evinces a bias in favor of granting leave to amend." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 (5th Cir. 1981). "However, it is by no means automatic." *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d

663, 666 (5th Cir. Unit A July 1981) (citing *Layfield v. Bill Heard Chevrolet Co.*, 607 F.2d 1097, 1099 (5th Cir. 1979) (per curiam)). "A decision to grant leave is within the discretion of the court, although if the court lacks a substantial reason to deny leave, its discretion is not broad enough to permit denial." *Louisiana v. Litton Mortg. Co.*, 50 F.3d 1298, 1302-03 (5th Cir. 1995) (per curiam) (citation and internal quotation marks omitted). In exercising its discretion, "the district court may consider such factors as 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment.'" *Whitaker v. City of Houston*, 963 F.2d 831, 836 (5th Cir. 1992) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)).

Here, Plaintiff has already been afforded an opportunity to amend her claims against the City and has again failed to state claims capable of surviving the City's motions to dismiss. *See* Doc. 91. As a result, the Court concludes that granting her leave to amend yet again would be futile. Accordingly, the Court declines to grant Plaintiff leave to amend and dismisses all claims against the City with prejudice.

VI. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Plaintiff's Motion for Reconsideration, Doc. 96, is **MOOT**. It is further

ORDERED that Plaintiff's Motion to Strike and for Leave to File Sur-Reply, Doc. 108, is **GRANTED IN PART AND DENIED IN PART**. Finally, it is

ORDERED that the City's Motion to Dismiss, Doc. 103, is **GRANTED** and all claims against the City and its police department are hereby **DISMISSED WITH PREJUDICE**.

The Clerk of the Court is further

ORDERED to remove the City of Madisonville, Madisonville Police Department, and any individual defendants in their "official-capacities" from the caption of this case.

SIGNED at Houston, Texas, this 14th day of February, 2017.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE