No. 24-_____

# In the Supreme Court of the United States

ERIN WADE; JANIE TORRES; BRISENIA FLORES; MAXSTAR MCDONALD; EMILY PAYTON; NICHOLAS NABORS; JOSE DONIS; VICTORIA GARCIA; ERNEST ALUMANAH; LORENZO JOHNSON,

*Petitioners*,

versus

CITY OF HOUSTON, TEXAS; ART ACEVEDO,

*Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether this Court should correct the Fifth Circuit's departure from the accepted and usual course of judicial proceedings by selectively eliminating key factual allegations in order to reach its desired conclusion.

2. Whether this Court should correct the Fifth Circuit's departure from the other Circuit Courts of Appeals with respect to the pleading standards in civil rights cases, effectively creating a new and unique requirement for civil rights plaintiffs to affirmatively prove the absence of probable cause at the pleading stage.

3. Whether this Court should correct the Fifth Circuit's conflict with the Texas Court of Criminal Appeals' decision with respect to the application of the First Amendment in mass arrest and protest cases.

4. Whether this Court should revisit the propriety and scope of the qualified immunity defense.

## PARTIES TO THE PROCEEDINGS

Petitioners Erin Wade, Janie Torres, Brisenia Flores, MaxStar McDonald, Emily Payton, Nicholas Nabors, Jose Donis, Victoria Garcia, Ernest Alumanah, and Lorenzo Johnson were the plaintiffs in the district court proceedings, and the appellants in the appellate court proceedings. Respondents City of Houston, and Art Acevedo were the defendants in the district court proceedings and appellees in the appellate court proceedings.

## RELATED CASES

*Wade v. City of Houston*, No. 4:22-cv-1357, United States District Court for the Southern District of Texas. Judgment entered January 18th, 2024.

*Wade v. City of Houston*, No. 24-20026, United States Court of Appeals for the Fifth Circuit. Judgment entered August 6th, 2024.

*Wade v. City of Houston*, No. 24-20026, United States Court of Appeals for the Fifth Circuit. Rehearing denied September 4th, 2024.

## TABLE OF CONTENTS

## TABLE OF CONTENTS OF THE APPENDIX

## TABLE OF AUTHORITIES

CASES

## OPINIONS BELOW

The Fifth Circuit's opinion is reported at *Wade v. City of Houston*, 110 F.4th 797 (5th Cir. 2024), and reproduced at 1a–4a. The Fifth Circuit's denial of petitioner's petition for rehearing *en banc* is reproduced at 7a. The opinions of the District Court for the Southern District of Texas are reproduced at 11a–20a.

## JURISDICTION

The Court of Appeals entered judgment on August 6th, 2024. 5a. It then denied a timely petition for rehearing *en banc* on September 4th, 2024. 7a. It also denied a motion to supplement the record on appeal with two videos of the incident in question submitted alongside the petition for rehearing *en banc* on September 4th, 2024. 9a. This petition is timely filed on or before December 3rd, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

**U.S. Const. amend. I**

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to

petition the Government for a redress of grievances.

**U.S. Const. amend. IV**

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.

**42 U.S.C. § 1983**

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 . . .

**Texas Penal Code § 42.03**

(a) A person commits an offense if, without legal privilege or authority, he intentionally, knowingly, or recklessly:

(1) obstructs a highway, street, sidewalk, railway, waterway, elevator, aisle, hallway, entrance, or exit to which the public or a substantial group of the public has access, or any other place used for the passage of persons, vehicles, or conveyances, regardless of the means of creating the obstruction and whether the obstruction arises from his acts alone or from his acts and the acts of others; or

(2) disobeys a reasonable request or order to move issued by a person the actor knows to be or is informed is a peace officer, a fireman, or a person with authority to control the use of the premises:

(A) to prevent obstruction of a highway or any of those areas mentioned in Subdivision (1); or

(B) to maintain public safety by dispersing those gathered in dangerous proximity to a fire, riot, or other hazard.

(b) For purposes of this section, "obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous.

## STATEMENT OF THE CASE

On May 25th, 2020, Houston native George Floyd was killed by police in Minneapolis. All of the Petitioners in this lawsuit were either participants in, or otherwise near the protests that took place in Houston in the days after George Floyd's death. Petitioners each attempted to leave their respective protest, but each was trapped by the police department's "kettle" maneuver, put on a bus, and taken to jail without any reason for the detention or arrest, before ultimately being charged for obstructing a roadway, only to have the charge later dropped. A "kettle" maneuver is when a group of police officers surrounds, then closes in on a group of people in order to arrest or otherwise subdue them. At each of these events, no Petitioners or any other protestors were blocking the passage of any sidewalk or roadway, and non-protestors could easily get by the protestors in any direction. One Petitioner, who was not even participating in the protest, was directly told that he was being arrested for being at the "wrong place[ at the] wrong time," and observed one officer ask another: "What am I supposed to charge him with?" Respondent Acevedo was also directly observed at one of these protests, appearing to direct the mass arrest.

Then-Police Chief Art Acevedo was the top executive of the police department at the time, and was a policymaker for the City of Houston with regard to police policy and other matters. Acevedo was responsible for creating and/or executing a

plan to arrest and jail protestors with or without probable cause in order to reduce the likelihood of injury or property damage.

Petitioners brought suit for violations of their civil rights. They alleged that this "catch-and release" system violated of his First and Fourth Amendment rights. They alleged that Mr. Acevedo, as chief of police, developed and implemented this policy for protest response. They further alleged that because Mr. Acevedo was its policymaker, that the City of Houston could also be liable because this policy caused their respective constitutional injuries.

The district court dismissed the claims against the City of Houston, but its ruling was ambiguous with respect to Mr. Acevedo, who had not yet appeared. On Petitioners' motion, the district court re-opened the case, but ultimately granted Mr. Acevedo's motion for judgment on the pleadings, and issued final judgment. Its reasoning for doing so was based on the unpublished Fifth Circuit decision in *Utley v. City of Houston* (a similar George Floyd protest case, affirming dismissal at the pleading stage), despite the fact that *Herrera v. City of Houston* (also an unpublished George Floyd protest case, reversing dismissal at the pleading stage) was issued later and was distinctly more similar.

Petitioners timely appealed, and the original Panel of the Fifth Circuit affirmed the dismissal. It claimed that the facts pled proved all the

Petitioners violated the Obstruction of a Roadway statute provided *supra*, without explaining its reasoning as to how the alleged facts supported that conclusion. The same Panel then denied Petitioners' timely motion for rehearing *en banc*, and simultaneously denied a motion to supplement the record with supporting video evidence.[1]

## REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision is problematic and requires this Court's intervention in three ways. First, it has so far departed from the accepted and usual course of judicial proceedings by selectively weeding out "implausible" facts to reach its desired result, that it requires this Court's correction. Second, its decision stands in stark contrast with the other Circuit Courts of Appeals with respect to the pleading requirements in civil rights cases specifically, and this Court should correct the Fifth Circuit's deviation. And third, its decision directly conflicts with the Texas Court of Criminal Appeals' decision with respect to First Amendment application in this type of case. Finally, this case presents an opportunity to reign in the doctrine of qualified immunity, which has gone far beyond the bounds of the statute it immunizes against.

Each of these insidious problems significantly hamper the effective vindication of plaintiffs' civil

[1] Petitioners will provide the video upon request, if they are not available in the 5th Circuit's records.

rights in the Fifth Circuit, and cannot be allowed to stand uncorrected.

**I. The Fifth Circuit's published opinion directly contravenes this Court's expression of the pleading standard such that it would render some claims impossible if allowed to stand as precedent. In doing so, it has both departed from the accepted and usual course of judicial proceedings, and come in conflict with the other Courts of Appeals.**

This Court's longstanding articulation of the pleading standard is set forth as a two-step test in in *Twombly* and *Iqbal*. As a first step, the Court recommends identifying which allegations are conclusory (i.e. legal conclusions couched as facts), so that they may be understood as the "framework of [the] complaint," but not given factual credence. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Second, courts are to assume that the leftover factual allegations are true (even if doubtful), *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007), and use those facts to determine whether or not the facts "plausibly give rise to an *entitlement to relief*." *Iqbal*, 556 U.S. at 679 (emphasis added). In *Twombly*, the Supreme Court made clear that while courts need not accept legal conclusions as true in a plaintiff's complaint, that "Rule 12(b)(6) does not countenance dismissals based on a judge's disbelief of a complaint's factual allegations." *Twombly*, 550 U.S. at 555–56 (2007) (cleaned up) (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)). Taken together, a court may dismiss a

complaint where the *right to relief* is speculative, but may not single out and ignore facts that *it believes* are speculative. *Id.*

Here, the Fifth Circuit held as follows:

> Specifically, we hold that there was probable cause to arrest Plaintiffs for obstructing a passageway under section 42.03, notwithstanding Plaintiffs' conclusory allegations to the contrary. It is implausible that a large group of protestors situated on a roadway or sidewalk in downtown Houston for an extended period of time would not have obstructed the roadway or sidewalk on which the protest took place. . . . The size and location of the protests at issue in this case, [in contrast with *Davidson*], supplied the arresting officers with at least probable cause to conclude that the protestors were rendering passage on the roadways or sidewalks they occupied unreasonably inconvenient for purposes of section 42.03.

2a–3a.

To start, the Fifth Circuit labeled all "allegations to the contrary" of its determination that probable cause existed as "conclusory," without mentioning specific allegations. 2a–3a. However, one of the key factual allegations in this case is not, in fact, conclusory, and precludes the determination that factual probable cause existed. Specifically, Petitioners specifically pled that at

each of the mass arrests, non-protestors could easily get by the protestors in any direction. Petitioners even provided the Fifth Circuit with a video that shows as much: while the sidewalk was busy, it was still readily passable in that Petitioner's wheelchair (which was being pushed by another Petitioner), and shows no more obstruction than what a bustling metropolis like Houston experiences regularly in the form of standard foot traffic. Participation in such a protest is no more an offense than walking down a busy street among other pedestrians, as Petitioner was. Moreover, this is a *false arrest* case—any false arrest plaintiff must necessarily plead that they were innocent in order to make their claim. Finding that an allegation of innocence-in-fact is conclusory or otherwise choosing to disbelieve it creates an impossible standard for such plaintiffs, whereby courts can ignore a key fact as "conclusory" in order to find probable cause, which forces plaintiffs to provide evidence of the absence of probable cause without the benefit discovery. If the primary question at the pleading stage is the factual presence or absence of probable cause—as is the case here—then clearly the claim should be able to survive a motion to dismiss and move into discovery, where that factual dispute may be illuminated and potentially decided.

The Fifth Circuit continued: "[i]t is implausible that a large group of protestors . . . would not have obstructed the roadway or sidewalk." 3a. Put differently, it believed that the alleged passability of the various protests was doubtful, and thus chose

to discredit that allegation. But as noted above, singling out and disbelieving doubtful, speculative, or "implausible" facts directly contravenes the pleading standard as described by this Court. *See* pp. 7–8, *supra*. It moreover assumes that all of the protests at issue were "large," despite the fact that the size of each protest was not necessarily described, and fails to account for the fact that even protests that may have had "many" people may not have been sufficiently dense enough to necessarily result in obstruction, as the Fifth Circuit infers.

These two holdings alone so far depart from the accepted and usual course of judicial proceedings that require this Court' correction, given the fact that they directly contravene this Court's basic and longstanding precedent. Moreover, the Fifth Circuit's opinion creates a policy whereby courts can ignore key factual pleadings such that false arrest claims would be nearly impossible to make. Worse still, its selective ignorance of key facts was contradicted by video evidence. But beyond those problems, the Fifth Circuit also sidestepped two issues presented by this case. First, Petitioners specifically alleged that Respondents instituted a policy to kettle and arrest peaceful protestors without probable cause, and used "obstruction of a roadway" as a pretext for the arrests. They even alleged the pattern of arrests, charges, and release of charges that evidenced such a policy. And second, Petitioners also pointed out that at least one of the protestors was arrested without particularized probable cause as required (the officer said he was in the "wrong place[ at the] wrong time"), *see*

*Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (citing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)), and that the charging documents provided by Respondents point to the use of form affidavits that further belie the existence of a policy.[2]

Beyond deviating from the accepted course of judicial proceedings, the Fifth Circuit's decision also stands in opposition to the other Courts of Appeals' universal understanding of the pleading requirements for civil rights cases specifically. When considering § 1983 and *Monell* claims, this Court has made clear that such cases are not subject to any kind of heightened pleading standard, as long as the facts alleged make a plausible constitutional claim. *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam) (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 164 (1993) (a federal court may not apply a standard "more stringent than the usual pleading requirements of Rule 8(a)" in "civil rights cases alleging municipal liability")).

With respect to the First Amendment, this Court is "mindful that the preservation of liberty depends in part upon the maintenance of social order. But the First Amendment recognizes, wisely we think, that a certain amount of expressive

[2] It is also worth noting that the charging documents all appear to use the same two or three forms, but with Petitioners' names and the arresting officer changed for each, which, if anything, further implies that they were created pursuant to a policy as opposed to individualized determinations of actual probable cause.

disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *Houston v. Hill*, 482 U.S. 451, 472 (1987) (internal citation omitted). To that end, it made clear that for a First Amendment retaliation claim, a plaintiff should usually plead the lack of probable cause because it "generally provide[s] weighty evidence that the officer's animus caused the arrest." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (citing *Reichle v. Howards*, 566 U.S. 658, 668 (2012)); *see also Lozman v. Riviera Beach*, 138 S. Ct. 1945 (2018) (allowing a retaliation claim against a municipality for its policy of retaliation); *Hartman v. Moore*, 547 U.S. 250, 259–60 (2006) (creating the no-probable-cause requirement for prosecutorial retaliation cases); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U. S. 274, 285 (1977) (requiring a showing that the alleged retaliation would not have happened absent retaliatory motive).

The *Bartlett* Court, however, expressly chose not to create a strict requirement, noting that "[a]lthough probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so. In such cases, an unyielding requirement to show the absence of probable cause could pose a risk that some police officers may exploit the arrest power as a means of suppressing speech." 139 S. Ct. at 1727 (cleaned up) (quoting *Lozman*, 138 S. Ct. at 1953). Justice Gorsuch further explained that the First

Amendment protects a distinctly different right than the Fourth Amendment, and notes that "if the only offense for which probable cause to arrest existed was a minor infraction of the sort that wouldn't normally trigger an arrest in the circumstances—or if the officer couldn't identify a crime for which probable cause existed until well after the arrest—then causation might be a question for the jury." *Id.* at 1732.

With respect to both First and Fourth Amendment claims in protest and other similar settings, the Circuits are clear and united in the fact that unjustified arrests—even mass arrests—are and should be actionable where there is reason to believe the arrest was pretextual or probable cause was otherwise plausibly absent. *See, e.g., Baude v. Leyshock*, 23 F.4th 1065 (8th Cir. 2022); *Keating v. City of Miami*, 598 F.3d 753 (11th Cir. 2010); *McTernan v. City of York*, 564 F.3d 636 (3d Cir. 2009); *Beck v. City of Upland*, 527 F.3d 853 (9th Cir. 2008); *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 14 F.3d 457 (9th Cir. 1994).

In the context of First and Fourth Amendment protest cases, there is no precedent for believing that a mass arrest was supported by probable cause merely because the entire group was arrested for the same pretextual crime. Moreover, there is no basis in the First Amendment specifically to allow for a series of hyper-technical mass arrests on small misdemeanors to justify the suppression of peaceful protests. As a result, the Fifth Circuit stands alone in opposition to this Court

and the other Circuit Courts of Appeals. In doing so, it also clearly and egregiously upended the accepted and usual application of the pleading standard, and must be corrected.

**II. The Fifth Circuit's opinion also directly contravenes the Texas Court of Criminal Appeals' longstanding decision regarding the application of the First Amendment to the obstruction statute, as well as the this Court's understanding of First Amendment retaliation cases.**

In 1981, Texas's highest criminal court, the Texas Court of Criminal Appeals, interpreted Texas's own obstruction statute and held that in peaceful protest cases, arrests for obstruction require "that passage be severely restricted or completely blocked" in order to "give ample breathing room for the exercise of First Amendment rights. At the same time, such a definition adequately protects the right of the public to have access to the . . . premises." *Sherman v. State*, 626 S.W.2d 520, 526 (Tex. Crim. App. 1981). And in 2019, this Court reiterated the principle that government officials cannot retaliate against individuals for engaging in protected speech absent sufficient non-retaliatory grounds. *Bartlett*, 139 S. Ct. at 1722 (citing *Hartman*, 547 U.S. at 256, *Crawford-El v. Britton*, 523 U.S. 574, 593 (1998), *Mt. Healthy*, 429 U.S. at 283–84 ). It noted that the absence of probable cause is *not* a required showing where "officers have probable cause to make arrests, but typically exercise their

discretion not to do so. In such cases, an unyielding requirement to show the absence of probable cause could pose a risk that some police officers may exploit the arrest power as a means of suppressing speech." *Id.* at 1727 (internal citations and quotations omitted).

Here, the Fifth Circuit held that the probable cause existed at *each* protest because the protestors "render[ed] passage on the roadways or sidewalks they occupied unreasonably inconvenient." 3a. It went on to further hold that "[b]ecause they had probable cause to arrest Plaintiffs, the City's police officers did not violate the [protestors'] First" Amendment rights. 3a

Each of these holdings represent a serious conflict with the Texas Court of Criminal Appeals' decision on the application of the First Amendment in protest and mass arrest cases. They moreover flout their established standards. First, the Fifth Circuit's decision takes away the "ample breathing room for the exercise of First Amendment rights" that the Texas Court of Criminal Appeals created, in favor of an extremely low standard of allowing police to arrest protestors for creating "unreasonable inconvenience." Such a standard effectively gives police departments and officers *carte blanche* to affect unjustifiable mass arrests of protestors, so long as a group is sufficiently "large" to make passage "unreasonably inconvenient," even if a plaintiff alleges that "non-protestors could easily get by the protestors in any direction." And second, it contravenes this Court

by requiring plaintiffs to show the absence of probable cause in order to state a First Amendment claim.

Here, Petitioners alleged that the policy to kettle and arrest them under the pretext of obstruction was due to the fact that they were George Floyd protestors specifically. Charitably, police may have conducted these retaliatory arrests to preemptively avoid negative interactions with protestors, but the arrests would still be considered retaliatory. As such, the First Amendment claim should have survived despite the finding of probable cause, and the Fifth Circuit's holding otherwise requires this Court's correction.

## III. Qualified immunity is a fundamentally flawed doctrine that should either be limited to heat-of-the-moment decisions, or cease to exist.

A foundational principle of the legal system is that "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. . . . for it is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Based on that bedrock understanding of the nature of legal rights, it must be the case that the qualified immunity defense has the power to negate the existence of constitutional rights altogether in certain cases by recognizing the existence of constitutional harms,

but foreclosing the availability of a remedy. Whether or not a person's rights are erased is determined by an ultimately arbitrary standard (clear establishment) that also has the effect of shrinking the number of actionable claims as society and technology evolve past the factual scenarios that can currently be said to "clearly establish" any given right. Circuit Judges from the various federal Courts of Appeals are also beginning to question the propriety of the doctrine. *See, e.g., Sosa v. Martin Cty.*, 57 F.4th 1297, 1304 (11th Cir. 2023) (en banc) (Jordan, J., concurring in the judgment).

Indeed, qualified immunity is a "legal fiction" that came from the faulty interpretation of § 1983. *Id.*; *accord Werner v. Wall*, 836 F.3d 751, 768 (7th Cir. 2016) (Hamilton, J., dissenting). "[S]tatutory interpretation, as we always say, begins with the text," *Ross v. Blake*, 578 U.S. 632, 638 (2016), and often "ends" there as well. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014). And § 1983's text is clear: "Every person who, under color of *any* statute . . . subjects . . . *any* citizen of the United States . . . to the deprivation of *any* rights, privileges, or immunities . . . shall be liable to the party injured in an action at law." 42 U.S.C. § 1983 (emphasis added). Nowhere in that text does Congress mention or provide for immunity. *See, e.g.*, *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421 (2021) (Thomas, J., concurring in denial of certiorari) (contemporary two-part qualified immunity "test cannot be located in § 1983's text and may have little basis in history."); William Baude,

*Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 47 (2018) (examining and rejecting various rationales for qualified immunity as a proper textualist interpretation of §1983). Moreover, § 1983's original text held actors liable when acting under color of state law, "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201, 235 (2023) (quoting Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13). That phrase was "meant to encompass" existing common law defenses and immunities—and make them unavailable to defendants. *Id.* As a result, "modern [qualified] immunity jurisprudence is not just *a*textual but *counter*textual." *Rogers v. Jarrett*, 63 F.4th 971, 980 (5th Cir. 2023) (emphasis in original) (Willett, J., dissenting).

In the context of the present case, the need to rethink the broad and ever-expanding application of qualified immunity is even clearer. Mr. Acevedo was a long-serving police chief that is well aware of citizens' constitutional rights. He was not acting in the heat of the moment, or making a split-second decision when making the alleged policy to pre-emptively kettle and arrest peaceful protestors. At the very least, the protection of qualified immunity should not extend to circumstances such as this, where the official in question has ample opportunity to consider the legality of his actions.

## CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted,

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December 3rd, 2024

# APPENDIX

**APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI**

**TABLE OF CONTENTS**

**United States Court of Appeals**
**for the Fifth Circuit**

No. 24-20026

FILED
August 6, 2024

ERIN WADE; JANIE TORRES; BRISENIA FLORES; MAXSTAR MCDONALD; EMILY PAYTON; NICHOLAS NABORS; JOSE DONIS; VICTORIA GARCIA; ERNEST ALUMANAH; LORENZO JOHNSON,

*Plaintiffs—Appellants*,

*versus*

CITY OF HOUSTON, TEXAS; ART ACEVEDO,

*Defendants—Appellees*.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CV-1357

Before JONES, SMITH, and HO, *Circuit Judges*.
PER CURIAM:

Plaintiff–Appellants were participants in (or were in the vicinity of) protests that occurred in downtown Houston following the death of George Floyd in May 2020. They allege that they were falsely arrested after City of Houston police officers performed "kettle maneuvers" to contain the protests, *i.e.*, surrounded the protestors and confined them to a small space. They further allege

that then-Chief of Police Art Acevedo formulated and implemented a policy for the City of "kettling" and arresting protesters.

Plaintiffs sued the City and Acevedo under 42 U.S.C. § 1983, claiming violations of the First, Fourth, Fifth, and Fourteenth Amendments.[1] These claims are premised on the alleged absence of probable cause to arrest Plaintiffs for violating section 42.03 of the Texas Penal Code, which makes it illegal to "obstruct[] a highway, street, sidewalk," or other passageway. The district court found that there was probable cause to arrest Plaintiffs under section 42.03 and dismissed the claims against both the City and Acevedo.

Two panels of this court have addressed the same issue on nearly identical facts but reached conflicting conclusions. In *Utley v. City of Houston*, No. 21-20623, 2022 WL 2188529 (5th Cir. June 17, 2022), the panel held that there was probable cause to arrest the plaintiff-protestor and affirmed dismissal of the plaintiff's § 1983 lawsuit against the City and Acevedo. Then, in *Herrera v. Acevedo*, No. 21-20520, 2022 WL 17547449 (5th Cir. Dec. 9, 2022), the panel held that the plaintiff-protestors had plausibly alleged that they were arrested without probable cause and affirmed denial of the defendants' motion to dismiss.

Since neither opinion was published, neither is binding on this panel, but we reach the same conclusion as the *Utley* panel did. Specifically, we

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[1] Plaintiffs have forfeited any claim based on the Fifth Amendment by failing to brief it on appeal.

hold that there was probable cause to arrest Plaintiffs for obstructing a passageway under section 42.03, notwithstanding Plaintiffs' conclusory allegations to the contrary. It is implausible that a large group of protestors situated on a roadway or sidewalk in downtown Houston for an extended period of time would not have obstructed the roadway or sidewalk on which the protest took place. The primary case that the *Herrera* panel relied on to conclude that the plaintiffs there had plausibly alleged false arrest did not involve a large group of protestors; it involved a single protestor outside an abortion clinic who occasionally approached patients on the sidewalk or in the parking lot and did so without "rendering entry into the Clinic impassible or inconvenient as required under § 42.03." *Davidson v. City of Stafford*, 848 F.3d 384, 389 (5th Cir. 2017) (concluding that officers lacked probable cause). The size and location of the protests at issue in this case, by contrast, supplied the arresting officers with at least probable cause to conclude that the protestors were rendering passage on the roadways or sidewalks they occupied unreasonably inconvenient for purposes of section 42.03. *See Illinois v. Gates*, 462 U.S. 213, 243 n.13, 103 S. Ct. 2317, 2335 n.13 (1983) ("[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.").

Because they had probable cause to arrest Plaintiffs, the City's police officers did not violate the First, Fourth, or Fourteenth Amendments. *See Davidson*, 848 F.3d at 391 (reciting standards for

First and Fourth Amendments); *Thomas v. Kippermann*, 846 F.2d 1009, 1011 (5th Cir. 1988) (Fourth and Fourteenth Amendments). And because there was no underlying constitutional violation, the municipal- and supervisory-liability claims against the City of Houston and former Chief Acevedo were appropriately dismissed. *See Hicks-Fields v. Harris Cnty.*, 860 F.3d 803, 808 (5th Cir. 2017) ("As is well established, every *Monell* claim requires an underlying constitutional violation." (citation and internal quotation marks omitted)); *Tamez v. Manthey*, 589 F.3d 764, 772 (5th Cir. 2009) (same with respect to supervisory liability). These claims also fail because they are not supported by sufficient allegations of an official policy or of deliberate indifference. *See Verastique v. City of Dallas*, -- F.4th ---, No. 23-10395 (5th Cir. July 8, 2024).

The judgment of the district court is AFFIRMED.

**United States Court of Appeals**
**for the Fifth Circuit**

No. 24-20026

FILED
August 6, 2024

ERIN WADE; JANIE TORRES; BRISENIA FLORES; MAXSTAR MCDONALD; EMILY PAYTON; NICHOLAS NABORS; JOSE DONIS; VICTORIA GARCIA; ERNEST ALUMANAH; LORENZO JOHNSON,

*Plaintiffs—Appellants*,

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CITY OF HOUSTON, TEXAS; ART ACEVEDO,

*Defendants—Appellees*.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CV-1357

Before JONES, SMITH, and HO, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that Appellants pay to Appellees the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See Fed. R. App. P. 41(b). The court may shorten or extend the time by order. See 5th Cir. R. 41 I.O.P.

**United States Court of Appeals**
**for the Fifth Circuit**

No. 24-20026

FILED
September 4, 2024

ERIN WADE; JANIE TORRES; BRISENIA FLORES; MAXSTAR MCDONALD; EMILY PAYTON; NICHOLAS NABORS; JOSE DONIS; VICTORIA GARCIA; ERNEST ALUMANAH; LORENZO JOHNSON,

*Plaintiffs—Appellants*,

*versus*

CITY OF HOUSTON, TEXAS; ART ACEVEDO,

*Defendants—Appellees*.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CV-1357

ON PETITION FOR REHEARING EN BANC

Before JONES, SMITH, and HO, *Circuit Judges*.
PER CURIAM:

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

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

**United States Court of Appeals**
**for the Fifth Circuit**

No. 24-20026

FILED
August 6, 2024

ERIN WADE; JANIE TORRES; BRISENIA FLORES; MAXSTAR MCDONALD; EMILY PAYTON; NICHOLAS NABORS; JOSE DONIS; VICTORIA GARCIA; ERNEST ALUMANAH; LORENZO JOHNSON,

*Plaintiffs—Appellants*,

*versus*

CITY OF HOUSTON, TEXAS; ART ACEVEDO,

*Defendants—Appellees*.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CV-1357

ORDER:

IT IS ORDERED that Appellants' opposed motion to supplement the record on appeal with 2 videos is DENIED.

*/s/Edith H. Jones*

EDITH H. JONES
*United States Circuit Judge*

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| ERIN WADE, *et al*., | § | CIVIL ACTION NO. |
| Plaintiffs, | § | 4:22-cv-01357 |
| | § | |
| VS. | § | JUDGE KENNETH |
| | § | HOYT |
| | § | |
| CITY OF HOUSTON, | § | ENTERED |
| TEXAS, *et al*, | § | October 20, 2022 |
| | § | |
| Defendants. | § | |

**MEMORANDUM OPINION AND ORDER**

## I. INTRODUCTION

Pending before the Court is the defendants', City of Houston, Texas ("the City") and Houston Police Chief Art Acevedo, motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (DE 8). The plaintiffs, Erin Wade, Jose Donis, Ernest Alumanah, Maxstar McDonald, Lorenzo Johnson Jr., Victoria Garcia, Nicholas Nabors, Emily Payton, Brisenia Flores, and Janie Torres, have filed a response to the defendants' motion (DE 18). The defendants have filed a reply (DE 19). After reviewing the motion, the pleadings, the response, the reply, the relevant exhibits, and the applicable law, the Court determines that the defendants' motion should be **GRANTED**.

## II. FACTUAL BACKGROUND

On May 29, 2020, the plaintiffs were among hundreds of people in downtown Houston protesting George Floyd's death. The plaintiffs all shared a similar experience: police officers ordered the plaintiffs to disperse before surrounding them in a crowd control technique called "kettling," in which police officers compact a crowd of people into a small area. The officers then arrested the plaintiffs and over 700 other protestors for obstructing a roadway. The plaintiffs were transported to various detainment facilities, and some were handcuffed or had their hands zip-tied. One plaintiff suffered a minor cut when a police officer removed the zip-tie, and four plaintiffs allege their COVID-19 masks were taken. The plaintiffs were all released within two days, and the charges against them were dropped.

On May 20, 2022, the plaintiffs sued the City of Houston and Police Chief Art Acevedo under 42 U.S.C. § 1983, alleging violations of their First, Fourth, Fifth, and Fourteenth Amendment rights.

## III. CONTENTIONS OF THE PARTIES

The defendant asserts that all claims should be dismissed because the plaintiffs have not alleged sufficient facts stating a § 1983 claim against the City or a constitutional violation entitling them to relief. The defendant argues that *Utley v. City of Houston*, No. 21-20623, 2022 WL 2188529 (5th Cir. June 17, 2022), which affirmed this Division's

dismissal of identical claims arising from the same protest, is binding and dispositive. As in *Utley*, the plaintiffs' First and Fourth Amendment claims fail because the plaintiffs were obstructing a roadway in violation of Texas Penal Code § 42.03. The police therefore had probable cause to arrest the plaintiffs, who were not engaged in constitutionally protected activity. Additionally, because the plaintiffs have failed to specify an official policy or custom that caused a violation of their constitutional rights, the City cannot be liable for any unconstitutional actions. Finally, the plaintiffs have not stated a Fifth Amendment claim.

The plaintiffs respond that *Utley* is distinguishable because their first amended complaint alleges that non-protestors could easily get by them, thereby curing the alleged obstruction and therefore, they did not obstruct a roadway. They direct the Court to *Herrera v. City of Houston and Chief of Police Art Acevedo, Officers Tien, Seagler, and Wahrenberger*, S.D. Tex. No. 4:20- cv-02083. In that case, this Division denied the defendant's motion to dismiss identical claims arising from the same protest. The plaintiffs also assert that their arrest without probable cause violates both the Fourth Amendment on its face and the First Amendment by suggesting retaliation for protesting. Finally, the plaintiffs argue that the City is liable for these violations because the City's policy of "kettling" and arresting peaceful protestors caused these violations.

## IV. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) authorizes a defendant to move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal is appropriate only if the "[f]actual allegations [are not] enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). On the other hand, "[t]o 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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

## V. ANALYSIS & DISCUSSION

The Court agrees with the defendants that *Utley* is binding and dispositive. In *Utley*, the Fifth Circuit affirmed this Division's dismissal of identical claims arising out of the same protest. *Utley*, 2022 WL 2188529, at *1. *Herrera* is currently on appeal and is not binding on this Court. Additionally, *Utley* is more factually similar to the instant case than *Herrera*.

Here, as in *Utley*, the plaintiffs' First and Fourteenth Amendment claims contain only conclusory allegations. Also like *Utley*, the plaintiffs' Fourth Amendment claim fails because the police had probable cause that supports the plaintiffs' arrest—they were obstructing a roadway in violation of Tex. Penal Code § 42.03, which includes sidewalks. *See Singleton v. Darby*, 609 Fed. Appx. 190, 193 (5th Cir. 2015) (holding that a "State may therefore enforce its traffic obstruction laws without violating the First Amendment, even when the suspect is blocking traffic as an act of political protest."). Thus, the plaintiffs were not engaged in constitutionally protected activity. *Utley*, 2022 WL 2188529, at *1.

Finally, as in *Utley*, the plaintiffs' § 1983 claim against the City fails. The plaintiffs have offered only conclusory allegations that the City ordered their "kettling" and arrests through Chief Acevedo for a crime they allegedly did not commit. *See Floyd v. City of Kenner, La.*, 351 Fed. Appx. 890, 898 (5th Cir. 2009) (holding similar allegations that the chief of police "approved" and "directed" the filing of a false affidavit "amounted to nothing more than mere speculation.").

Moreover, the Fifth Circuit has already determined that the same allegations from the same plaintiffs before the Court in this case were insufficient to state a claim. The plaintiff's proposed second amended complaint in *Utley* named each of the plaintiffs here and included their same allegations. *Utley*, 2022 WL 2188529,

at *2. The Fifth Circuit determined that the proposed second amended complaint "failed to cure the deficiencies in [the plaintiff's] first amended complaint and . . . allowing him further to amend his complaint would be futile." *Id*. The fact that the plaintiffs' complaint in this case alleges that non-protestors could get by the protestors does not change the Fifth Circuit's analysis or its conclusion. Indeed, the plaintiffs' claim, that the *Utley* complaint did not allege that the plaintiff was not obstructing a roadway is wrong—the *Utley* complaint alleged that, too. Therefore, allowing these plaintiffs to further amend their complaint would be similarly futile. The plaintiffs did not address their conclusory Fifth Amendment violation in their response, and it is also dismissed.

## VI. CONCLUSION

Based on the foregoing analysis and discussion, the defendants' motion to dismiss is **GRANTED**.

It is so **ORDERED**.

Signed on October 20, 2022, at Houston, Texas.

*/s/Kenneth M. Hoyt*
Kenneth M. Hoyt
United States District Judge

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| ERIN WADE, *et al*., | § | CIVIL ACTION NO. |
| Plaintiffs, | § | 4:22-cv-01357 |
| | § | |
| VS. | § | JUDGE KENNETH |
| | § | HOYT |
| | § | |
| CITY OF HOUSTON, | § | ENTERED |
| TEXAS, *et al*, | § | January 18, 2024 |
| | § | |
| Defendants. | § | |

**ORDER OF DISMISSAL**

**I.**

Before the Court is the defendant's, Art Acevedo, motion for judgment on the pleadings of the plaintiffs', Erin Wade, Jose Donis, Maxstar McDonald, Lorenzo Johnson, Jr., Victoria Garcia, Nicholas Nabors, Emily Payton, Brisenia Flores, Ernest Alamanah and Janie Torres [DE 44]. The plaintiffs responded and the matter is before the Court on the motion, response and pleadings. Having reviewed those documents, and the attendant case law, the Court determines that the defendant's motion should be granted.

**II.**

The factual basis for the plaintiffs' claim that the defendant is individually liable to them for

violations of this Civil Rights, under 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the federal Constitution, is set out in the Court's earlier filed Memorandum Opinion [DE 23]. Hence, it is unnecessary to repeated those facts here.

In the Court's previous Memorandum, the Court explained its ruling as follows:

> Here, as in Utley, the plaintiffs' First and Fourteenth Amendment claims contain only conclusory allegations. Also like Utley, the plaintiffs' Fourth Amendment claim fails because the police had probable cause that supports the plaintiffs' arrest—they were obstructing a roadway in violation of Tex. Penal Code § 42.03, which includes sidewalks. See Singleton v. Darby, 609 Fed. Appx. 190, 193 (5th Cir. 2015) (holding that a "State may therefore enforce its traffic obstruction laws without violating the First Amendment, even when the suspect is blocking traffic as an act of political protest."). Thus, the plaintiffs were not engaged in constitutionally protected activity. Utley, 2022 WL 2188529, at *1. Finally, as in Utley, the plaintiffs' § 1983 claim against the City fails. The plaintiffs have offered only conclusory allegations that the City ordered their "kettling" and arrests through Chief Acevedo for a crime they allegedly did not commit. See Floyd v. City of Kenner, La., 351 Fed. Appx. 890, 898

> (5th Cir. 2009) (holding similar allegations that the chief of police "approved" and "directed" the filing of a false affidavit "amounted to nothing more than mere speculation.").

(Doc. #23 at 3-5)

For what it is worth, the Court notes that the plaintiffs suggest that the defendant "personally" engaged in illegal conduct at the scene of their arrest -- conduct that violated federal law and, thus, exposed the defendant to personal liability. However, there is no proffered evidence that the "personal" involvement that the plaintiffs assert involved more than the defendant's sworn duty to be present and enforce state law. *See* Tex. Penal Code § 42.03. The basis for the plaintiffs' arrests was that they were accused of obstructing a roadway [or sidewalks] in violation of state law. Whether the defendant was personally present or not, the plaintiffs' arrests were not based on a policy or practice, but state law.

Assuming that the defendant did "personally" cause or direct that the plaintiffs be arrested for obstructing a roadway, that arrest does not violate § 1983 or the First and Fourth Amendments to the Constitution. Moreover, the issues raised in the plaintiffs' lawsuit were addressed by the Fifth Circuit Court of Appeals in *Utley v. City of Houston, et. al,* [No. 21-20623, 2022 WL 21885290 (5th Cir. June 2022, *rehearing denied*]. Finally, the plaintiffs have failed to state a compelling reason,

based in law or equity, why the Fifth Circuit's dismissal of their claims in *Utley* is not a binding precedent here. *See Perillo v. Johnson,* 205 F.3d 775, 780-81 (5th Cir. 2000). The Court holds that it is. Therefore, the defendant's motion for judgment in favor of the defendant on the plaintiffs' current pleadings is Granted.

It is so Ordered.

SIGNED on January 18, 2024, at Houston, Texas.

*/s/Kenneth M. Hoyt*
Kenneth M. Hoyt
United States District Judge