No. 24-_____

In the Supreme Court of the United States

BENJAMIN BENFER,

Petitioner,

versus

CITY OF BAYTOWN; BARRY CALVERT, *Individually*,

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 the Fourth Amendment can countenance an extended bite by a police attack dog where no adequate warning was given, and the suspect was unarmed and subdued, and the Fifth Circuit bucks the great weight of authority from other Circuit Courts of Appeals.

2. Whether this Court should correct the Fifth Circuit's departure from this Court and other Circuit Courts of Appeals with respect to allowing a detention and arrest where the officer did not need to make a stop at all in order to investigate the claimed justification of the stop, and the detainee was merely trying to return home.

3. Whether this Court should correct the Fifth Circuit's departure from the other Circuit Courts of Appeals with respect to a City's lack of adequate training and policies in a known problem area.

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

PARTIES TO THE PROCEEDINGS

Petitioner Benjamin Benfer was the plaintiff in the district court proceedings, and the appellant in the appellate court proceedings. Respondents City of Baytown and Barry Calvert were the defendants in the district court proceedings and appellees in the appellate court proceedings.

RELATED CASES

Benfer v. City of Baytown, No. 4:22-cv-2196, United States District Court for the Southern District of Texas. Judgment entered October 4th, 2023.

Benfer v. City of Baytown, No. 23-20543, United States Court of Appeals for the Fifth Circuit. Judgment entered November 1st, 2024.

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OPINIONS BELOW

The Fifth Circuit's opinion is reported at *Benfer v. City of Baytown*, 120 F.4th 1272 (5th Cir. 2024), and reproduced at 1a–23a. The opinion of the District Court for the Southern District of Texas is reproduced at 26a–78a.

JURISDICTION

The Court of Appeals entered judgment on November 1st, 2024. 24a. This petition is timely filed on or before January 30th, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

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.

U.S. Const. amend. XIV sec. 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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 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 § 38.03(a)–(b)

(a) A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction from effecting an arrest, search, or transportation of the actor or another by using force against the peace officer or another.

(b) It is no defense to prosecution under this section that the arrest or search was unlawful.

STATEMENT OF THE CASE

Respondent Barry Calvert was a K9 officer *en route* to help his fellow officers with a situation that required his skills. Instead of helping his officers like he was tasked with doing, he initiated a minor traffic stop over a non-existent red light violation at a clear intersection, along with a claimed possible identification of a silver Toyota SUV for which there was a BOLO. In the roughly 60 seconds it took him to follow the vehicle a short distance into an apartment complex, he could see the vehicle's license plate, and that it was a Mitsubishi. Based on that alone, he could have written the plate number down, had a ticket sent to the registered owner's address, and gone to help his fellow officers, but he chose not to do that. Instead, he ultimately sicced his attack dog on the driver, Mr. Benfer, over this alleged red light violation despite facing no threat or aggression from Mr. Benfer. Calvert chose to escalate the situation, severely injure Mr. Benfer with near-lethal force, and require the assistance of yet more officers that could have been attending to the original scene that he had chosen to abandon, all so that he could issue a ticket.

Calvert's decision to abandon his duty to his fellow officers in favor of initiating a traffic stop for a minor violation was outside of his purview as a K9 officer. Although he claims that he later *thought* that Petitioner's silver Mitsubishi crossover *might* be a stolen Toyota SUV, the video evidence in the case shows that the Mitsubishi logo on Petitioner's

car was clearly visible to Calvert as he followed Petitioner, and that he did not radio dispatch to determine whether the vehicle in front of him matched the BOLO. Calvert also claimed that he wanted to stop Mr. Benfer's vehicle due to a potential red light violation, but Petitioner pled that no such violation occurred, and the video begins with Mr. Benfer's completion of legal travel through the clear intersection. In short, Calvert abandoned his duty to assist his fellow officers for, at the absolute worst, issuing a minor traffic citation that was not his job to issue. As a result, Calvert's subsequent decisions to violate Petitioner's rights in numerous ways may not be all that surprising given that the stop was ill-fated and ill-advised from its inception.

The video evidence in this case speaks for itself, but in short, it shows that: Mr. Benfer never did anything more than try to walk calmly toward his home; Calvert was never at risk in any way; Calvert gave no indication that Mr. Benfer or his wife were being arrested, or why he was interacting with them at all; although Calvert stated "I have a dog," he did not give Mr. Benfer a warning to comply with a specific directive or give Mr. Benfer an opportunity to comply before the dog was released despite the opportunity to do so; he had shoved Mr. Benfer into bushes, and then had him in hand when the bite command was issued, while Mrs. Benfer was on the ground; he did not release the bite until after the handcuffing was complete despite the dog interfering with the handcuffing

process and despite Mr. Benfer's compliance at that point.

Petitioner brought suit for violations of his civil rights. He alleged that the stop and arrest violated his Fourth and Fourteenth Amendment rights because they were not supported by reasonable suspicion or probable cause, and because excessive force was used. The district court dismissed Petitioner's claims, Petitioner timely appealed, and the Panel of the Fifth Circuit affirmed the dismissal.

REASONS FOR GRANTING THE PETITION

As the Constitution guarantees, law enforcement officers are not allowed to simply grab people off the street without reason, and conversely, citizens are free to ignore officers' requests that fall short of lawful commands. Here, Mr. Benfer did not do anything that would have justified his detention in the first instance, and Calvert did not issue a lawful command indicating that Benfer was under arrest or otherwise being detained, and thus had the right to keep walking toward his home. That understanding was evident by the fact that he asked Calvert to stop touching him, and that even when Calvert sicced the dog on him and was handcuffing his partner, they both repeatedly needed to ask him "what are you doing?," because he never issued a lawful command.

Despite these clear facts, the Fifth Circuit decided to affirm the dismissal of Petitioner's case at

the pleading stage, which created a clear split with the other Circuit Courts of Appeals. To that end, Petitioner respectfully shows as follows:

I. The Fifth Circuit's published opinion directly contravenes the accepted application of detention and excessive force jurisprudence, and 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.

Petitioner brought 3 claims under the Fourth and Fourteenth Amendments: excessive force, unlawful detention, and false arrest.

A. Excessive Force

Beginning with excessive force, the Fifth Circuit's opinion both sets a dangerous precedent and conflicts with the other Circuits in several ways. First, it over-emphasizes Mr. Benfer's attempt to ignore Calvert and continue walking toward his home. *See, e.g.*, 12a. Indeed, "when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business." *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (citing *Florida v. Royer*, 460 U.S. 491, 498 (1983)). Instead of recognizing this right, the Fifth Circuit chose to consider it on par with those who actively resist arrest by violence. *See, e.g.,* 15a. Moreover, it did so despite the fact that the video shows a clear lack of communication to Mr. Benfer that he

was under arrest. Taken together, the Fifth Circuit's opinion on these facts effectively gives law enforcement officers the right to physically grab citizens without justification, then use force and affect an arrest if the innocent citizen exercises their right to ignore the officer.

Second, it held that the initial bite was justified despite clear out-of-circuit authority that Calvert should not have sicced his dog on Mr. Benfer without an adequate warning. *See* 11a–12a. Notably, it avoids this issue by stating that "Benfer ignored Calvert's warning that he had a dog who would bite Benfer if he continued to resist." 12a. Not only was Mr. Benfer was not "resisting" an arrest attempt, Calvert simply did not issue such a warning. The video evidence shows that while he said "I got a dog, he will bite you," he gave no indication whatsoever as to what would precipitate the bite, then released the attack command approximately 12 seconds later, while he had Mr. Benfer in hand.

Calvert's threat was not the type of clear warning with an opportunity to comply that the law requires. There is a consensus of authority among the Circuits that it is unlawful for an officer to issue a bite command without warning or opportunity to comply when feasible to provide one, including when there is no threat, when a plaintiff is unarmed, or when a plaintiff is surrounded by officers. *See, e.g., Campbell v. City of Springboro*, 700 F.3d 779, 789 (6th Cir. 2012) (no qualified immunity where officer "failed to give

warnings" during two incidents before allowing a bite to unarmed suspects when they "were not believed to be a threat to anyone at the time the canine unit was called in," had "no ability to evade police custody" due to proximity to officers); *Chatman v. City of Johnstown*, 131 F. App'x 18, 20 (3d Cir. 2005) (when police used a dog to apprehend plaintiff, who was wanted on an outstanding warrant and spotted walking on a city street, the issue of "[w]hether plaintiff received a warning before the dog was released or not until afterwards is a material question of fact" precluding summary judgment); *Kuha v. City of Minnetonka*, 365 F.3d 590, 598 (8th Cir. 2003) (acknowledging that "there may be exceptional cases where a warning is not feasible," but holding in the context of a suspect who fled from a routine traffic stop and hid, "the allegation that the police officers failed to give a verbal warning prior to using a police dog trained to bite and hold is sufficient to state a Fourth Amendment claim"); *Bey v. Cimarossa*, 202 F.3d 272 (7th Cir. 2000) (denying summary judgment to an officer based on plaintiff's testimony that he was not fleeing and the officer "failed to issue a warning" and "never gave him an opportunity to peacefully surrender before ordering the dog to attack"); *Vathekan v. Prince George's County*, 154 F.3d 173, 175 (4th Cir. 1998) ("it was clearly established in 1995 that it is objectively unreasonable for a police officer to fail to give a verbal warning before releasing a police dog to seize someone"); *Burrows v. City of Tulsa*, 25 F.3d 1055 (10th Cir. 1994) (holding that a jury could have found the "failure to warn" plaintiff before putting a dog over

the fence to find and bite the plaintiff to be objectively unreasonable).

Third, it also bucks the consensus of authority among the Circuits that a bite of this duration—nearly 2 minutes—was justified under these circumstances, comparing Mr. Benfer's actions to a case where a suspect was bitten for approximately 1 minute after having fled through back yards and hidden, and had a knife within reach. 14a–15a (citing *Escobar v. Montee*, 895 F.3d 892, 394 (5th Cir. 2018)). The video shows that Mr. Benfer was unarmed, and was subdued quickly by the dog, yet Calvert let the bite continue until Mr. Benfer was handcuffed. The consensus among the Circuits is that bites of an extended duration constitute excessive force when a suspect is unarmed and subdued. *Compare, e.g., Kuha*, 365 F.3d at 601 (ten to fifteen seconds is reasonable while officers caught up to dog and confirmed no weapons in suspect's reach); *Maney v. Garrison*, 681 F. App'x 210, 218 (4th Cir. 2017) (eight seconds was objectively reasonable); and *Miller v. Clark Cty.*, 340 F.3d 959, 962, 967 (9th Cir. 2003) (up to sixty seconds was "an unusually long bite duration," but reasonably necessary in the circumstances) *with Priester v. City of Riviera Beach*, 208 F.3d 919, 927 (11th Cir. 2000) (attack lasting as long as two minutes was excessive force); *Becker v. Elfreich*, 821 F.3d 920, 929 & n.2 (7th Cir. 2016) (up to three minutes); and *Watkins v. City of Oakland*, 145 F.3d 1087, 1090, 1093 (9th Cir. 1998) (bite lasted around 30 seconds in the officers' view, but began before).

And as a final note, the Fifth Circuit also put heavy weight on *Mrs.* Benfer's actions to justify the employment of Calvert's attack dog against *Mr.* Benfer, but never articulated a reason as to how *Mr.* Benfer posed a threat to Calvert or anyone else during the entire incident. *See, e.g.*, 14a (finding, inexplicably, that "[Mr.] Benfer posed an objective threat to Calvert").

B. Unlawful Detention and False Arrest

With respect to Petitioner's other claims, the Fifth Circuit hangs its hat entirely on the BOLO that Calvert later claimed he was investigating. 7a n. 7. It claims that "decreased visibility" and the fact that Petitioner's car was "similar-looking" to the BOLO gave Calvert reasonable suspicion. 7a. However, the video evidence shows that the make and model of Petitioner's car was visible throughout the encounter, and there is no evidence that the two vehicles were "similar-looking." The Fifth Circuit went on to hold that the stop "lasted no longer than was necessary to effectuate its purpose," (i.e. identify whether Petitioner's car matched the BOLO), 7a (citing *United States v. Brigham*, 382 F.3d 500, 507 (5th Cir. 2004) (en banc) (cleaned up)), despite the fact that Petitioner directly pled (and the video supports) that Calvert could have consulted with dispatch to identify the vehicle as he followed the Benfers into their apartment complex, and the fact that Calvert could see and identify the vehicle the entire time he followed it, including after it parked. Detaining and siccing an attack dog on Mr. Benfer was not necessary to

"effectuate" Calvert's "purpose." Absent the BOLO, the stop was not "justified at its inception," and was thus clearly unconstitutional.

And as noted *supra*, "when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. And any 'refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.'" *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)) (also citing *Florida v. Royer*, 460 U.S. 491, 498 (1983)). Here, the video does not show Mr. Benfer using force against Calvert, only that he is facing away and is trying to continue walking toward his home. But this entire analysis with respect to "resisting arrest" presupposes Mr. Benfer knowing that he was being arrested, which should not be assumed given that Calvert never told him that he was under arrest, nor what he was being arrested for; Calvert only asked Mr. Benfer to "stop," which does not necessarily imply an arrest.

II. The Fifth Circuit's opinion also contravenes other Circuit authority with respect to *Monell* liability.

Authority among the Circuits makes clear that the absence of or failure to adopt an appropriate policy can be considered a policy in the same way that an affirmative policy is, especially when a city is aware of the need for a policy. *See, e.g., J.K.J. v.*

Polk County, 960 F.3d 367, 370, 375–76, 384 (7th Cir. 2020) (en banc) (internal citations omitted); *Glisson v. Indiana Department of Corrections*, 849 F.3d 372, 378–80, 382 (7th Cir. 2017) (internal citations omitted). Notably, the Seventh Circuit in *Glisson* looked at Indiana Department of Corrections' guidelines as evidence that a jail medical provider had the knowledge of the need for a policy but chose not to act. *Glisson*, 849 F.3d at 380. More strikingly, the *en banc* Seventh Circuit in *J.K.J.* looked at the risk of sexual assault in a county jail, despite policies against such conduct, and determined that because it took no action with respect to detection, prevention, *or training*, that a jury was reasonable in holding the county liable under *Monell*. *J.K.J.*, 960 F.3d at 370, 384.

Here, Petitioner clearly pled a plausible *Monell* claim on the basis that the City of Baytown chose not to implement necessary training and policies. Petitioner alleged 5 incidences in the last 3 years of improper use of attack dogs by the City of Baytown, including other incidents perpetrated by Calvert. Since the use of attack dogs is naturally low due to low supply and low need, 5 incidences in 3 years in a town of under 83,000 people is a large number that only the courts can correct since the City is clearly unwilling to address the problem. Those incidences are a custom of misuse of attack dogs, of which Baytown policymakers are aware, that directly caused Mr. Benfer's injuries. Moreover, Mr. Benfer specifically alleged numerous areas where training was clearly deficient based on his limited knowledge prior to discovery

that can obviously lead to exactly this type of harm if left unaddressed. Specifically, Petitioner alleged that failing to train its dog-handling officer on *how*, *when*, or *why* he should use his attack dog as a weapon will inevitably result in the dog being deployed unconstitutionally, as it was here. Not surprisingly, a specially trained "find and bite" dog is not particularly adept at "finding" without "biting," nor is its handler equipped to properly control the dog in such a situation if they are not trained on it. Moreover, it has been held that

> [w]here the city equips its police officers with potentially dangerous animals, and evidence is adduced that those animals inflict injury in a significant percentage of the cases in which they are used, a failure to adopt a departmental policy governing their use, or to implement rules or regulations regarding the constitutional limits of that use, evidences a 'deliberate indifference' to constitutional rights. Under such circumstances, a jury could, and should, find that Chew's injury was caused by the city's failure to engage in any oversight whatsoever of an important departmental practice involving the use of force.

Chew v. Gates, 27 F.3d 1432, 1445 (9th Cir. 1994) (citations omitted). Here, Petitioner's allegation that the City lacked a sufficiently specific policy with respect to its use of attack dogs, in light of previous instances, should have easily passed

muster at the pleading stage to make a *Monell* claim.

III. Qualified immunity is a fundamentally flawed doctrine that should 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).

CONCLUSION

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

Respectfully submitted,

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January 30th, 2025

APPENDIX

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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United States Court of Appeals
for the Fifth Circuit

No. 23-20543

FILED
November 1, 2024

BENJAMIN BENFER,

Plaintiff—Appellant,

versus

CITY OF BAYTOWN, TEXAS; BARRY CALVERT, *Individually*,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CV-2196

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

JERRY E. SMITH, *Circuit Judge*:

Officer Barry Calvert pulled over Benjamin Benfer and his wife for allegedly running a red light and because their vehicle appeared to match the description of a car that had been reported as stolen. As Calvert exited his patrol car, Benfer and his wife also exited their vehicle. A confrontation ensued, ending with Calvert's siccing his K-9 on Benfer. Benfer and his wife were arrested and prosecuted for resisting arrest and interference

with public duties, though all charges were dismissed.

Benfer sued Calvert and the City of Baytown under 42 U.S.C. § 1983 and state law, asserting myriad claims relating to the encounter. The district court granted Calvert and the City's motion to dismiss, finding that Calvert had not violated Benfer's constitutional rights, that Benfer's state tort claims were not cognizable under Texas law, and that Benfer had pleaded insufficient facts to support his *Monell* claims. We affirm.

I.

On the night of February 14, 2021, Calvert was on patrol when he received an alert to look for a stolen silver 2020 Toyota RAV4.[1] At 10:42 pm, he spotted a vehicle that appeared to match the description of the stolen vehicle, so he followed it into an apartment complex's parking lot and engaged his emergency lights. The car was Benfer's silver 2020 Mitsubishi Crossover, not the stolen RAV4, but the angle of Calvert's headlights and the lack of natural light made it difficult for Calvert to see the exact make and model of the car he was stopping.

After pulling Benfer over, Calvert immediately exited his patrol car. Benfer also got out of his car and walked toward Calvert, ignoring commands to stop. As Benfer neared Calvert, Calvert tried to restrain him, but Benfer repeatedly broke free of

[1] The alert did not provide the license plate number.

Calvert's grasp and ignored even more commands. During their tussle, Calvert warned Benfer that he had a dog that would bite Benfer if he continued to resist.

During their struggle, Mrs. Benfer began approaching Calvert. At that time, and in a move to subdue Benfer, Calvert pushed him to the ground. Mrs. Benfer reacted by rushing toward and pushing Calvert. Calvert pushed her off, shouted at her to "back up," and called for an assist from his K-9.

The K-9 bit and subdued Benfer while Calvert handcuffed Mrs. Benfer. Then, after handcuffing Mrs. Benfer, Calvert returned to his car for a second pair of handcuffs before walking over to Benfer. Held by Calvert's K-9, Benfer had fallen to the ground. But, when Calvert attempted to handcuff Benfer, Benfer struggled, putting his hands behind his back. Calvert's bodycam footage does not make clear whether Benfer resisted, or whether the K-9's biting Benfer's arm impeded his movement.[2] While attempting to handcuff Benfer, Calvert commanded his K-9 to release its bite, but the K-9 maintained its hold. Instead, after finally

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[2] "In reviewing a motion to dismiss, we consider 'only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the judge may take judicial notice.'" *Allen v. Hays*, 65 F.4th 736, 742 n.3 (5th Cir. 2023) (quoting 2 James Wm. Moore et al., Moore's Federal Practice § 12.34[2], at 12-94 (3d ed. 2022)). Because the expert report, which is incorporated into Benfer's complaint, refers to Calvert's dash cam and bodycam footage, we may consider the footage at this stage.

handcuffing Benfer, Calvert had to pull the K-9 off of him.

Benfer was charged with resisting arrest, but the charge was later dropped.[3] Benfer sued Calvert in federal court under state law and § 1983, averring that Calvert (1) stopped him without reasonable suspicion; (2) arrested him without probable cause; (3) instituted prosecution against him without probable cause; (4) used excessive force; and (5) assaulted him. Benfer also sued the City of Baytown under § 1983, averring that its policies governing the use of K-9s were unconstitutional and that it had failed to train its officers properly.

Calvert and the City moved to dismiss for failure to state a claim. The district court granted that motion, finding that Calvert had not violated Benfer's constitutional rights, that Benfer's state tort claim was not cognizable under Texas law, and that Benfer had pleaded insufficient facts to support municipal liability for the City. Benfer timely appealed, challenging each dismissal.

II.

"We review a Rule 12(b)(6) dismissal *de novo*." *Hodge v. Engleman*, 90 F.4th 840, 843 (5th Cir. 2024). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face."[4]

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[3] In Baytown, police officers, not the district attorney, initiate misdemeanor criminal proceedings.

[4] *Terwilliger v. Reyna*, 4 F.4th 270, 279 (5th Cir. 2021) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Facial plausibility is satisfied "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Terwilliger*, 4 F.4th at 279. "These standards are the same when a motion to dismiss is based on qualified immunity." *Id.* at 279–80 (citation omitted). So, a complaint survives dismissal if it "pleads facts that, if true, would permit the inference that defendants are liable under § 1983 and would overcome their qualified immunity defense." *Id.* at 280 (cleaned up). Thus, "[i]t is the plaintiff's burden to demonstrate that qualified immunity is inappropriate." *Id.*

To determine whether a government official is entitled to qualified immunity, we ask "(1) whether the undisputed facts and disputed facts, accepting the plaintiffs' version of the disputed facts as true, constitute a violation of a constitutional right, and (2) whether the defendant's conduct was objectively reasonable in light of clearly established law."[5] So, Benfer "must show (1) 'a violation of an actual constitutional right,' and (2) that 'the right was clearly established at the time of violation.'"[6] Because Benfer does not plausibly allege any violations of his constitutional rights, we do not address whether they were clearly established.

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[5] *Harmon v. Dall. Cnty.*, 927 F.3d 884, 892 (5th Cir. 2019) (per curiam) (quoting *Carroll v. Ellington*, 800 F.3d 154, 169 (5th Cir. 2015)).

[6] *Escobar v. Montee*, 895 F.3d 387, 393 (5th Cir. 2018) (quoting *Cooper v. Brown*, 844 F.3d 517, 522 (5th Cir. 2016)).

III.

A.

Benfer posits that Calvert violated his clearly established rights under the Fourth and Fourteenth Amendments by pulling him over without reasonable suspicion. The district court found that the pleaded facts provided Calvert with reasonable suspicion to stop Benfer, and, accordingly, that Benfer had failed to allege plausibly that Calvert stopped him unconstitutionally. We agree.

"The stopping of a vehicle and detention of its occupants constitutes a 'seizure' under the Fourth Amendment." *United States v. Brigham*, 382 F.3d 500, 506 (5th Cir. 2004) (en banc). Such stops comport with the Constitution if they are supported by reasonable suspicion. *See United States v. Walker*, 49 F.4th 903, 906–07 (5th Cir. 2022). "An alert or be on the lookout report may provide the reasonable suspicion necessary to justify an investigatory stop." *Davila v. United States*, 713 F.3d 248, 258 (5th Cir. 2013) (cleaned up). Any stop must be "justified at its inception" and, if so justified, "the officer's subsequent actions [must be] reasonably related in scope to the circumstances that justified the stop." *Brigham*, 382 F.3d at 506 (citing *Terry v. Ohio*, 392 U.S. 1, 88 (1968)).

Calvert's stop was justified at its inception. Calvert had received an alert to look for a stolen silver 2020 Toyota RAV4, and Benfer was driving

a similar-looking Mitsubishi Crossover.[7] Calvert saw Benfer's car through the rain, at night, and the decreased visibility made it difficult for Calvert to know that he had stopped the wrong kind of car.

Because Benfer's vehicle bore sufficient similarity to the silver RAV4 Calvert was instructed to look for and the conditions in which the stop occurred prevented Calvert from realizing his mistake, the stop was reasonably warranted and justified at its inception.

The stop was also reasonable in duration because Calvert's "subsequent actions were reasonably related in scope to the circumstances that justified the stop." *Brigham*, 382 F.3d at 506. Calvert had barely exited his patrol car when Benfer left his vehicle, walked towards Calvert, and resisted arrest. Mrs. Benfer also left their vehicle and approached Calvert. The remainder of the stop was focused on subduing Benfer and his wife—Calvert never had a chance to verify that Benfer's vehicle was not the stolen RAV4. Therefore, the stop "last[ed] no longer than [was] necessary to effectuate [its] purpose . . . ." *Id.* at 507.

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[7] Calvert avers that he also had reasonable suspicion to stop Benfer because Benfer ran a red light. The relevant dash cam footage, however, does not show any traffic violation. Thus, at the motion-to-dismiss stage, it is plausible that the stop may not have been justified if Benfer committed no traffic violation. But Calvert's reasonable belief that Benfer was driving the stolen RAV4 provided reasonable suspicion to justify the stop.

Benfer failed to allege plausibly that Calvert's stop violated his constitutional rights, so the district court properly dismissed that claim.

B.

Benfer contends that Calvert violated his clearly established rights under the Fourth and Fourteenth Amendments by arresting him without probable cause. The district court found that Calvert had probable cause to arrest Benfer for resisting arrest. We agree.

"An arrest is unlawful unless it is supported by probable cause." *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004) (citation omitted). "Probable cause exists when the totality of facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *United States v. Levine*, 80 F.3d 129, 132 (5th Cir. 1996) (citation omitted).

Benfer was arrested for resisting arrest. "A person" resists arrest "if he intentionally prevents or obstructs a person he knows is a peace officer . . . from effecting an arrest . . . by using force against the peace officer . . . ." TEX. PEN. CODE § 38.03(a). "It is no defense . . . that the arrest or search was unlawful." *Id.* at § 38.03(b). That means, "[i]n Texas, the act of resisting can supply probable cause for the arrest itself . . . ." *Ramirez v. Martinez*, 716 F.3d 369, 376 (5th Cir. 2013). And "[t]he great weight of Texas authority indicates

that pulling out of an officer's grasp is sufficient to constitute resisting arrest." *Id.* (collecting cases).

The video unambiguously shows Benfer repeatedly pulling out of Calvert's grasp. Those acts of resisting supplied probable cause for the arrest.

Benfer has not plausibly pleaded that Calvert violated his constitutional rights when arresting him for resisting arrest, so the district court properly dismissed that claim.

C.

Benfer avers that Calvert violated his clearly established rights under the Fourth and Fourteenth Amendments by prosecuting him for resisting arrest. The district court dismissed the § 1983 claim for malicious prosecution, finding that there was probable cause to charge Benfer with resisting arrest. We agree.

"[T]he gravamen of the Fourth Amendment claim for malicious prosecution . . . is the wrongful initiation of charges without probable cause."[8] Meaning, if Calvert had probable cause to charge Benfer, then Benfer's claim must fail.

As discussed above, Calvert's bodycam shows Benfer repeatedly breaking free of Calvert's grasp and refusing to comply with Calvert's commands. That video indisputably showed Benfer "preventing a peace officer from effecting an arrest

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[8] *Hughes v. Garcia*, 100 F.4th 611, 619 (5th Cir. 2024) (quoting *Thompson v. Clark*, 596 U.S. 36, 43 (2022)).

by using force." TEX. PEN. CODE § 38.03(a) (cleaned up). Thus, there was probable cause to institute criminal proceedings against Benfer for resisting arrest.

Therefore, Benfer has not pleaded that Calvert violated his constitutional rights by instituting criminal process against him for resisting arrest. The district court correctly dismissed that claim.

D.

Benfer avers that Calvert's use of his K-9 constituted excessive force in violation of the Fourth and Fourteenth Amendments. Specifically, Benfer claims that Calvert violated his clearly established rights by (1) releasing the dog and (2) allowing the dog to bite him until he was handcuffed. The district court found that Calvert's release and use of his K-9 did not violate Benfer's clearly established rights. We agree.

"To establish a Fourth Amendment violation in this context," Benfer "must establish (1) an injury (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Ratliff v. Aransas Cnty.*, 948 F.3d 281, 287 (5th Cir. 2020) (cleaned up). Calvert's K-9 undisputedly bit Benfer, so only the second and third prongs are at issue here: Benfer must plausibly allege that Calvert's release and use of his dog was a "clearly excessive" use of force that was "clearly unreasonable."

Claims of excessive force in "seizing" a suspect are governed by an objective standard of

reasonableness focusing on the facts of a particular case. *See Graham v. Connor*, 490 U.S. 386, 396 (1989). When reviewing 'the totality of the circumstances,' "we pay particular attention to the *Graham* factors, i.e. 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'"[9] And we must always judge the force used "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Escobar*, 895 F.3d at 394.

1. Calvert's decision to release his K-9 was a constitutional use of force.

An officer did not use excessive force when he released a K-9 on a suspect who "ignored [the officer's] instructions, and retreated further under [a] home, preventing [the officer] from determining whether he was armed." *Shumpert v. City of Tupelo*, 905 F.3d 310, 323 (5th Cir. 2018). In contrast, releasing a dog violates the Fourth Amendment where there are no "attempts to subdue [the suspect] without the use of a dog bite, [or to] provid[e] [the suspect] any warning," and where the suspect "was not suspected of any crime; did not pose an immediate safety threat to officers or others; and was in need of emergency medical intervention due to self-harm and was not attempting to flee the officers." *Sligh v. City of*

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[9] *Escobar*, 895 F.3d at 394 (quoting *Darden v. City of Fort Worth*, 880 F.3d 722, 728–29 (5th Cir. 2018)).

Conroe, 87 F.4th 290, 299 (5th Cir. 2023) (per curiam) (cleaned up).[10]

Benfer repeatedly resisted arrest and walked away from Calvert. Benfer ignored Calvert's warning that he had a dog who would bite Benfer if he continued to resist. Importantly, Calvert deployed the dog only after Mrs. Benfer made physical contact with him while he was trying to restrain Benfer.

Calvert was outnumbered. He faced one individual who had resisted his many attempts to use lesser force and another who made aggressive contact with him—near his gun belt—while he attempted to restrain the first. From the perspective of a reasonable officer on the scene, Calvert's use of a K-9 to subdue Benfer while he dealt with Mrs. Benfer was a measured and ascending use of reasonable force. *See Shumpert*, 905 F.3d 323.

Therefore, Calvert's decision to release his K-9 was not clearly excessive under the circumstances, and Benfer has not plausibly alleged that that decision violated his right to be free from excessive force.

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[10] *Sligh* post-dated the events here and is relevant *only* to the existence of a constitutional violation, not whether that violation was clearly established.

2. Calvert's use of the K-9 to subdue Benfer until he was handcuffed was a constitutional use of force.

Our court first addressed the reasonableness of using a police dog to subdue a suspect in *Cooper v. Brown*, 844 F.3d 517 (5th Cir. 2016). There, an officer pulled Cooper over on suspicion of driving under the influence. *Id.* at 521. After failing a breath test, Cooper fled on foot into a residential neighborhood. *Id.* The initial officer then alerted other officers in the area to Cooper's flight, including Brown and his K-9, Sunny. *Id.* Despite having no reason to believe that Cooper had a weapon, Brown deployed Sunny to search for him. *Id.* Shortly thereafter, Sunny found Cooper and bit him on the leg "for one to two minutes." *Id.* Brown did not order Sunny to release until after handcuffing Cooper. *Id.* Applying the *Graham* factors, we held that "[u]nder the facts in th[e] record, permitting a dog to continue biting a compliant and non-threatening arrestee is objectively unreasonable." *Id.* at 524.

Years later, in *Escobar*, our court again addressed the reasonableness of using a police dog to subdue a suspect. But this time, in contrast with *Cooper*, we held that it was "objectively reasonable to permit [a K-9] to continue biting Escobar until he was fully handcuffed and subdued," despite that he laid flat on the ground, his hands were visible, and he was compliant with the officer's commands. *Escobar*, 895 F.3d at 394. Why? Because the officer "had reason to believe he still posed a threat." *Id.* at 395. "The chase was at

night; Escobar had hidden from the police for twenty minutes[;]" Escobar's mother had warned the police that he "would not go without a fight; and [a] knife remained within Escobar's reach . . . ." *Id.* at 394. Thus, the officer had "reason to doubt [Escobar's] compliance" and that his "surrender was not genuine." *Id.* at 395. Applying the *Graham* factors, we held that "it was objectively reasonable to permit [the K-9] to continue biting Escobar until he was fully handcuffed and subdued." *Id.* at 396.

Because, under the totality of the circumstances, Benfer posed an objective threat to Calvert, the *Graham* factors favor a finding that Calvert's use of his K-9 was objectively reasonable:

The first factor—the severity of the offense—favors Calvert. "[I]nterfering with the duties of a public servant[,]" such as resisting arrest, is a serious offense. *Brothers v. Zoss*, 837 F.3d 513, 519 (5th Cir. 2016). Here, Calvert's bodycam shows Benfer repeatedly breaking free of Calvert's grasp and refusing to comply with Calvert's commands—simply put, Benfer was resisting arrest.

The second factor—whether Benfer posed a threat—is a closer call, but it ultimately favors Calvert. Benfer had disobeyed several of Calvert's commands and resisted arrest. Calvert was outnumbered. Mrs. Benfer, only moments earlier, had made aggressive contact with Calvert—near his gun belt—while he was struggling with Benfer, and although handcuffed, she remained in the general vicinity. The arrest took place on a rainy night. *Cf. Escobar*, 895 F.3d at 394. And there was no indication that Benfer would comply with

Calvert's instructions if Calvert released the K-9. Though Benfer did not appear to be armed, in the face of such facts, a reasonable police officer would have had reason to doubt Benfer's compliance and conclude that he posed a threat.

Benfer disagrees that he posed a threat and that our analysis of his case should begin and end with *Cooper*. In his telling, he was "compliant and non- threatening" by the time Calvert went to handcuff him. And because his behavior matched Cooper's, "permitting a police dog to continue biting [him] is objectively unreasonable." *See Cooper*, 844 F.3d at 524. But we see several distinctions between Benfer's and Cooper's behaviors: Calvert had repeatedly "attempt[ed] to negotiate" with Benfer before calling his K-9 to assist. *Contra id.* at 523. Calvert was outnumbered, and Mrs. Benfer had made aggressive contact with Calvert while he struggled to arrest Benfer. And Benfer and his wife escalated the situation by repeatedly disobeying Calvert's commands and resisting arrest. Under those circumstances, a reasonable officer could conclude that Benfer's surrender was not genuine and that Benfer posed a threat.

And, finally, we have already determined that Benfer resisted arrest, so the third *Graham* factor—whether Benfer was resisting or attempting to flee—favors Calvert.

Even if Benfer had demonstrated that he posed no objective or subjective threat to Calvert or that he would not resist arrest or flee if the K-9 was released, Calvert attempted to release the K-9's

grip on Benfer *before* finishing handcuffing him. Thus, unlike in *Cooper*, where "Brown *permitted* the attack to continue for one to two minutes," *Id.* at 524 n.6 (emphasis added), Calvert did not permit the K-9 to continue biting Benfer. Calvert attempted to cease the use of force, albeit unsuccessfully.

Based on all the circumstances, Calvert's use of his K-9 to subdue Benfer until he was handcuffed was an objectively reasonable use of force that was not clearly excessive under the circumstances, and Benfer has not plausibly alleged that Calvert's decision violated his right to be free from excessive force. So, the district court was correct to dismiss his claim.

E.

In addition to his claims under § 1983, Benfer sued Calvert for assault under Texas tort law. The district court dismissed that claim, finding that Calvert was statutorily immune under Texas law. The district court was correct.

The Texas Tort Claims Act (TTCA) "provides a limited waiver of immunity for certain tort claims against the government." *Tex. Adjutant Gen.'s Off. v. Ngakoue*, 408 S.W.3d 350, 354 (Tex. 2013). Under the TTCA, "recovery against an individual employee is barred" but it "may be sought against the governmental unit only in three instances: . . . (3) when suit is filed against an employee whose conduct was within the scope of his or her employment and the suit could have been brought against the governmental unit." *Mission Consol.*

Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 657 (Tex. 2008). The TTCA allows municipalities to be held liable "for damages arising from . . . police and fire protection and control." TEX. CIV. PRAC. & REM. CODE § 101.0215(a)(1).

That all means a plaintiff seeking to sue a police officer for conduct undertaken within the scope of that officer's employment must sue the municipality, not the officer individually. *Alexander v. Walker*, 435 S.W.3d 789, 792 (Tex. 2014) (per curiam).

"The TTCA defines the term 'scope of employment' as 'the performance for a governmental unit of the duties of an employee's office or employment. . . .'" *Id.* (quoting TEX. CIV. PRAC. & REM. CODE § 101.001(5)). And a police officer's "conduct in the course of arresting" a suspect is "within the general scope of the officers' employment." *Id.*

Benfer's assault claim stems from actions Calvert took when arresting Benfer. Thus, Benfer has sued Calvert for conduct well within the scope of his employment. And that claim could have been brought against the City of Baytown because the TTCA explicitly allows cities to be held liable for damages "arising from . . . police" activities. TEX. CIV. PRAC. & REM. CODE § 101.0215(a)(1). Therefore, Benfer had to bring his tort claim against the City of Baytown, not Calvert individually.

Benfer resists that conclusion by noting, correctly, that the TTCA does not apply to a claim

"arising out of assault . . . or any other intentional tort . . . ." TEX. CIV. PRAC. & REM. CODE § 101.057(2). Benfer has a point: The text of § 101.057(2) appears to prevent a governmental entity from being held liable for the intentional torts of its employees. If the governmental entity cannot be held liable, then the TTCA allows an employee to be sued individually, even if they were acting within the scope of their employment. *See Garcia*, 253 S.W.3d at 657.

The Texas Supreme Court, however, rejected that argument in *Walker*. There, as here, "Walker brought suit . . . alleging assault . . . stemm[ing] from the officers' conduct incident to Walker's arrest . . . ." 435 S.W.3d at 790. Still, the court held that "[t]he allegations in Walker's petition . . . [were] based on conduct within the general scope of the officer's employment" and "could have been brought under the TTCA against the government." *Id.* at 792 (citations omitted).

We are bound to apply Texas law as construed by the Texas Supreme Court, so we affirm the dismissal of Benfer's assault claim against Calvert as indistinguishable from *Walker*. Because Benfer did not amend his complaint and bring his claim against the City, the district court was correct to dismiss the claim.[11]

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[11] When the TTCA requires the plaintiff to sue the governmental entity, "the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed." TEX. CIV. PRAC. & REM. CODE § 101.106(f).

F.

Benfer also sued the City under § 1983, averring that it (1) had inadequate written policies concerning the use of police dogs; (2) had a pattern and/or custom of using police dogs to inflict injuries on non-threatening suspects; (3) failed to train its officer's adequately in the use of police dogs; and (4) ratified Calvert's conduct. The district court dismissed those claims, finding that Benfer had failed to identify a particular policy, failed to show sufficiently numerous instances of K-9 encounters to establish a custom, and failed to support its other claims with anything more than "conclusory allegations." We agree.

1. Benfer failed to plead sufficient facts to support his claim that the City of Baytown had an unconstitutional policy or custom concerning police dogs.

A municipality may be liable under § 1983 if the execution of one of its customs or policies causes the deprivation of a constitutional right.[12] "To establish municipal liability, a plaintiff must show '(1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy (or custom).'" *Newbury v. City of Windcrest*, 991 F.3d 672, 680 (5th Cir. 2021) (quoting *Pineda v. City of Hous.*, 291 F.3d 325, 328 (5th Cir. 2002)).

[12] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

At the motion-to-dismiss stage, a plaintiff need not "allege the specific identity of the policymaker," but must "allege facts that show an official policy, promulgated or ratified by the policymaker, under which the municipality is said to be liable." *Groden v. City of Dall.*, 826 F.3d 280, 283–84 (5th Cir. 2016) (emphasis omitted). Benfer has failed to do so. His amended complaint does not identify anything that could be considered an official policy of the City of Baytown. Benfer's *Monell* claim premised on an unconstitutional policy must fail when he cannot even articulate what official policy Baytown has adopted governing police dogs.

A municipality, however, may still be liable under § 1983 in the absence of an official policy if there is an employee practice that is so widespread and common that it constitutes a custom representing the policies of the municipality. *See Piotrowski v. City of Hous.*, 237 F.3d 567, 581 (5th Cir. 2001).

A plaintiff proves the existence of a custom by showing "a pattern of abuses that transcends the error made in a single case." *Id.* at 582. "A successful showing of such a pattern requires similarity and specificity; prior indications cannot simply be for any and all bad or unwise acts, but rather must point to the specific violation in question." *Hicks-Fields v. Harris Cnty.*, 860 F.3d 803, 810 (5th Cir. 2017) (cleaned up). "In addition to similarity and specificity, a pattern must be comprised of 'sufficiently numerous prior incidents' rather than merely 'isolated

instances.'"[13] "Showing a pervasive pattern is a heavy burden." *Sanchez v. Young Cnty.*, 956 F.3d 785, 793 (5th Cir. 2020) (citation omitted).

Benfer's amended complaint identifies five instances of Baytown police allegedly using dogs to apprehend suspects impermissibly. But Benfer fails to provide the needed factual context for four of those incidents—his threadbare complaint notes only the existence of K-9 encounters that resulted in bites. He does not detail the facts surrounding those encounters or make any attempt to show the needed "similarity and specificity" between events. *See Hicks-Fields*, 860 F.3d at 810.

Those five instances also occurred over the span of four years (2019– 2022). Five incidents of excessive force over four years in a city as large as Baytown[14] is not enough to meet the heavy burden of showing that Baytown had a custom of allowing officers to use police dogs unconstitutionally. *Cf. Davidson v. City of Stafford*, 848 F.3d 384, 396–97 (5th Cir. 2017) (noting that three incidents over three-and-a-half years were insufficient to establish a pattern of constitutional violations).

Therefore, the district court did not err in finding that Benfer had failed plausibly to allege that the City of Baytown had inadequate written policies concerning the use of police dogs or had a

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[13] *Fuentes v. Nueces Cnty.*, 689 F. App'x 775, 778 (5th Cir. 2017) (per curiam) (quoting *McConney v. City of Hous.*, 863 F.2d 1180, 1184 (5th Cir. 1989)).

[14] Baytown had a population of 83,701 according to the 2020 census.

pattern/custom of using police dogs to inflict injuries on non-threatening suspects.

2. Benfer failed to plead sufficient facts to support his claim that the City of Baytown failed to train its officers on the proper use of police dogs.

"A municipality's failure to train its police officers can without question give rise to § 1983 liability." *Edwards v. City of Balch Springs*, 70 F.4th 302, 312 (5th Cir. 2023) (cleaned up). To succeed, the plaintiff must show "(1) the city 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." *Id.* (internal quotation marks and citation omitted).

Benfer's complaint falters on that first requirement. "In order for liability to attach based on an inadequate training claim, a plaintiff must allege with specificity how a particular training program is defective." *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 170 (5th Cir. 2010) (internal quotation marks and citation omitted). Benfer alleged only that the City of Baytown failed to retrain Calvert after his involvement in a previous K-9 incident. He made no attempt to identify a specific training program, point out particular deficiencies in that program, or explain why any lack of a formalized training program was constitutionally problematic. Benfer has merely "styl[ed] [his] complaint[] about the specific injury

suffered as a failure to train claim." *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005).

Thus, the district court did not err in finding that Benfer had failed to allege plausibly that the City of Baytown was liable under a "failure-to-train" theory.

3. Benfer has failed to plead sufficient facts to support his claim that the City of Baytown ratified Calvert's conduct.

Ratification "provides another way of holding a city liable under § 1983." *Allen v. Hays*, 65 F.4th 736, 749 (5th Cir. 2023). "[R]atification can suffice for *Monell* liability only if the authorized policymakers approve a subordinate's decision *and the basis for it*." *Id.* at 749 n.10 (internal quotation marks and citation omitted).

Benfer's complaint averred that "[t]he City of Baytown condoned and ratified the actions of Calvert by failing to discipline or retrain him." But ratification requires the approval of a policy maker, not their mere acquiescence, and Benfer has failed to allege any facts even suggesting that any authorized policymaker approved of Calvert's actions. Nor does he provide any support for his apparently novel tactic of merging his failure-to-train claim with his ratification claim. The district court did not err in dismissing Benfer's ratification claim against the City of Baytown.

* * * *

For the foregoing reasons, the judgment of the dismissal is AFFIRMED.

United States Court of Appeals
for the Fifth Circuit

No. 23-20543

FILED
November 1, 2024

BENJAMIN BENFER,

Plaintiff—Appellant,

versus

CITY OF BAYTOWN, TEXAS; BARRY CALVERT, *Individually*,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CV-2196

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

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

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

IT IS FURTHER ORDERED that Appellant 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 DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ENTERED
October 04, 2023

BENJAMIN BENFER, *Plaintiff*,	§	
v.	§	CIVIL ACTION NO. 4:22-CV-2196
CITY OF BAYTOWN, TEXAS, *et al.*, *Defendants*.	§	

ORDER

Pending before the Court is Defendants City of Baytown, Texas ("the City") and Officer Barry Calvert's ("Officer Calvert") (collectively "Defendants") Motion to Dismiss (Doc. No. 14). Plaintiff Benjamin Benfer ("Plaintiff") responded in opposition (Doc. No. 25) and Defendants replied (Doc. No. 26). Having considered the briefs and arguments of counsel, the Court hereby **GRANTS** Defendants' Motion to Dismiss.

I. Factual Background

This is a federal civil rights case stemming from a traffic stop during which Plaintiff was bitten by a K-9. (Doc. No. 9 at 3-4).

The sequence of events is heavily disputed by the parties. Fortunately, most of the pertinent events have been captured on video. The Court will begin by summarizing the facts and allegations as pleaded in Plaintiff's Amended Complaint. Plaintiff's complaint attached a report from alleged police dog expert Vanness H. Bogardus ("Bogardus Report") (Doc. No. 9-1).[1] The Court will then summarize how events unfolded based on the Court's independent review of Officer Calvert's dashboard camera and body camera footage.[2]

A. Facts as Pleaded in Plaintiff's Amended Complaint & Bogardus Report

On the evening of Valentine's Day 2021, Officer Calvert, accompanied by his K-9, was allegedly called to address a domestic disturbance unrelated to this case. (Doc. No. 9-1 at 7). Before the

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[1] The Court notes that pursuant to Federal Rule of Civil Procedure l0(c), it is permitted to consider the Bogardus Report (Doc. No. 9-1) as being part of Plaintiff's Amended Complaint. Fed. R. Civ. P. l0(c) ("A copy of a written instrument that is an exhibit to a pleading is part of the pleading for all purposes."). In doing so, the Court is restricted to considering the "nonconclusory, factual portions" of the report. *Blanchard-Daigle* v. *Geers,* 802 Fed.Appx. 113, 115-16 (5th Cir. 2020) (citing *Fin. Acquisition Partners LP* v. *Blackwell,* 440 F.3d 278, 285-86 (5th Cir. 2006) that "[e]ven if the non-opinion portions of an expert's affidavit constitute an instrument pursuant to Rule 10, opinions cannot substitute for facts...").

[2] The parties raise evidentiary objections pertaining to Officer Calvert's report of the incident and his body camera footage that will be further addressed in subsequent parts of this Order.

disturbance call, police dispatchers put out a "Be On The Lookout" ("BOLO") report for a 2020 silver Toyota RAV4. There was no license plate information provided. (*Id.*). While enroute to address the domestic disturbance, Officer Calvert allegedly observed Plaintiff, who was driving a 2020 silver Mitsubishi SUV, run a red light. (*Id.*). Plaintiff was accompanied by his wife. In addition to believing that he saw Plaintiff run a red light, Officer Calvert noted that he believed Plaintiff's vehicle could possibly be the stolen vehicle mentioned in the BOLO report. (*Id.*).

According to Plaintiff's Amended Complaint, Officer Calvert then stopped Plaintiff for running a red light. (Doc. No. 9 at 4). Plaintiff pleads that he did not run a red light. (*Id.*). Plaintiff further pleads that a criminal court judge later granted "a motion to suppress due to there being no proof of any traffic violation on Calvert's dashcam." (*Id.*). Plaintiff pleads that, after he was stopped, Officer Calvert unleashed his K-9, Hero, to bite Plaintiff. Plaintiff pleads that he suffered several bites that required stitches, one of which he claims was in close proximity to his brachial artery. (*Id.*). Following the incident, Plaintiff pleads that Officer Calvert "falsely charged" his wife with interference with public duties and "[a]fter much money and time were expended [sic] all charges were dropped against [Plaintiff and his wife] without any obligation required."[3] (*Id.*).

[3] Plaintiff's wife is not a party in this lawsuit.

B. Facts as Viewed from Officer Calvert's Body Camera & Dashboard Camera Footage[4]

In considering a motion to dismiss, matters attached to or incorporated into a complaint by reference and that are central to a party's claims may also be considered. *Funk v. Stryker Corp.,* 630 F.3d 777, 783 (5th Cir. 2011); *New Orleans City v. Ambac Assur. Corp.,* 815 F.3d 196, 200 (5th Cir. 2016). Here, Plaintiff refers to Officer Calvert's body camera and dashboard camera in his Amended Complaint, and the contents of the footage are central to his claims. Therefore, it is appropriate to consider the footage in reviewing Plaintiff's claims. *B.S. b/n/f Justin S. v. Waxahhachie Ind. Sch. Dist.,* 2023 WL 2609320, at n. 64 (5th Cir. Mar. 23, 2023); *see Phillips next friend of JH v. Prator,* 2021 WL 3376524, at *1 n.l (5th Cir. Aug. 3, 2021) (considering video footage that depicted an encounter between a student and the deputy because plaintiff referenced the video in her complaint and it was central to her claim).

Based on the video footage, Officer Calvert followed Plaintiff, used his emergency lights, and

[4] The Court notes that Officer Calvert's dashboard camera footage of the actual incident in question is very brief. Although the video is 20 minutes long in total, the only pertinent parts are in the first minute, where Officer Calvert follows Plaintiff and his wife into the parking lot and then gets out of the vehicle. From there, the dashcam video remains pointed away from where the actual dispute took place and Officer Calvert's body camera footage better informs the facts. (*See* Doc. No. 14-1).

turned on his siren. Plaintiff pulled into the parking lot of an apartment complex and stopped. (Officer Calvert Body Camera Footage, Doc. No. 14-2 at 0:00-0:22).

Almost immediately after Officer Calvert exited his patrol car, Plaintiff and his wife also exited their vehicle despite being told to stay in their car. (*Id.* at 0:22-0:24). Plaintiff then began walking away from Officer Calvert. (*Id.* at 0:24-0:30). Officer Calvert repeatedly commanded for him to stop. At one point, Officer Calvert attempted to physically stop Plaintiff by grabbing his arm. (*Id.* at 0:28-0:34). In response, Plaintiff continued to be non-compliant and pulled away. Plaintiff said "no" to Officer Calvert repeatedly, demanded that he not touch him, and told Officer Calvert that they were "in a private community" while actively walking away. (*Id.*).

Officer Calvert then warned Plaintiff that he had "a dog" that "would bite [Plaintiff]" if Plaintiff continued to refuse to comply. (*Id.* at 0:36-37). Officer Calvert grabbed Plaintiff's wrist in an attempt to restrain him, but Plaintiff pulled out of his grasp. (*Id.* at 0:37-0:39). A scuffle then ensued, and Officer Calvert appeared to push Plaintiff into nearby bushes. (*Id.* at 0:47). As that scuffle ensued, Officer Calvert contends, and Plaintiff does not deny, that Plaintiff's wife entered the fray and grabbed at his duty belt near his weapon. (*Id.*). Whether her actions were intended to get ahold of Officer Calvert's weapon is not clear, but the video confirms her attempt to interfere with Officer

Calvert's efforts. At that point, Officer Calvert then yelled "assist," which presumably deployed his K-9 while Officer Calvert dealt with Plaintiff's wife. (*Id.* at 0:51). Officer Calvert told Plaintiff's wife to put her hands behind her back and attempted to handcuff her while simultaneously commanding Plaintiff to get on the ground (*Id.* at 1:01-1:16). Officer Calvert's K- 9 then began biting Plaintiff. (*Id.* at 1:10-1:17). After successfully handcuffing Plaintiff's wife, Officer Calvert ordered her to sit on the ground (*Id.* at 1:38-1:41).

Officer Calvert then walked to his patrol vehicle, grabbed a second pair of handcuffs, and returned to where Plaintiff and his K-9 were on the ground. (*Id.* at 1:41-1:51). The K-9 appears to continue to bite Plaintiff as Officer Calvert commanded Plaintiff to put his hands behind his back and handcuffed his left wrist. (*Id.* at 1:57-2:05). Officer Calvert struggled to handcuff him because Plaintiff still failed to fully put his hands behind his back as requested. (*Id.* at 2:05-2:12). It is unclear from the video at this point if Plaintiff's difficulty putting his hands behind his back was purposeful or because the K-9 was biting him. Nevertheless, Officer Calvert repeatedly told Plaintiff to "put his hands behind his back" and to "stop fighting me" as he attempted to handcuff him. (*Id.* at 2:15-2:20). Finally, Officer Calvert successfully handcuffed Plaintiff. (*Id.* at 2:31). Officer Calvert then restrained the K-9 and stepped away from Plaintiff and his wife, who were, at that point, both handcuffed on the ground. (*Id.* at 2:34-2:38).

C. Plaintiff's Causes of Action & This Dispute

Plaintiff brings several causes of action against Defendants. According to his Amended Complaint, Plaintiff's causes of action are as follows:

1. A cause of action under 42 U.S.C. § 1983 for unlawful detention and arrest without probable cause against Officer Calvert because he allegedly violated the Fourth and Fourteenth Amendments of the United States Constitution by stopping Plaintiff without probable cause or reasonable suspicion (*Id.* at 7);

2. A cause of action under 42 U.S.C. § 1983 for excessive force against Officer Calvert because he allegedly violated the Fourth and Fourteenth Amendments of the United States Constitution when Plaintiff was attacked and bitten by the K-9 controlled by Officer Calvert (*Id.* at 7-8);

3. A cause of action under 42 U.S.C. § 1983 against Officer Calvert for malicious prosecution because he allegedly "made material misrepresentations in the police report in order to justify the arrest and prosecution when he knew there was no probable cause to either arrest or prosecute Plaintiff." (*Id.* at 9);

4. A cause of action against Officer Calvert for common law assault under Texas law (*Id.* at 8); and,

5. A cause of action for municipal liability against the City of Baytown under 42 U.S.C. § 1983 for failing to have adequate written policies, failing to train and supervise Officer Calvert on how to handle a K-9, and because the City has allegedly adopted a pattern, practice, and custom of using K-9s to inflict injuries upon non-threatening suspects (*Id.* at 8).

Defendants moved to dismiss Plaintiff's claims in their entirety. In their Motion to Dismiss, Defendants argue Plaintiff has (1) failed to allege facts to state a plausible claim under the Fourteenth and Fourth Amendments;[5] (2) failed to

[5] Defendants maintain that because Plaintiff's Fourteenth Amendment claims are "based on the propriety of his arrests, or force used therein," they are not cognizable under the Fourteenth Amendment and should be dismissed. (Doc. No. 14 at 13). This Court agrees with Defendants. In *Gone v. Smith,* the plaintiff brought both Fourth and Fourteenth Amendment claims against the City of Pasadena. 2017 WL 978703 (S.D. Tex. Mar. 14, 2017). The court held that the plaintiff's Fourteenth Amendment claim should be dismissed since the plaintiff failed to plead any specific unconstitutional conduct in violation of the Fourteenth Amendment. *Id.* at *3. After dismissing the plaintiff's Fourteenth Amendment claims, the court consolidated and considered the plaintiff's claims of excessive force under the Fourth Amendment. *Id.* This Court finds that case instructive. Plaintiff here has not pleaded unconstitutional conduct specific to the Fourteenth Amendment. In Plaintiff's

allege sufficient facts to support his unlawful detention, arrest without probable cause, excessive force, malicious prosecution, and state law assault claims and to overcome Officer Calvert's qualified immunity; and (3) failed to show that the City of Baytown violated Plaintiff's rights. Plaintiff responded in opposition (Doc. No. 25) and Defendants replied (Doc. No. 26).

II. Legal Standard

A defendant may file a motion to dismiss a complaint for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). To defeat a motion to dismiss under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp.*

Amended Complaint, he only cites the Fourteenth Amendment without specific allegations. Plaintiff's claims of unlawful detention, arrest without probable cause, excessive force, and malicious prosecution are all covered by the Fourth Amendment. Thus, the Court will consolidate and consider all of Plaintiff's § 1983 claims as alleged violations of the Fourth Amendment. *See also Albright v. Oliver,* 510 U.S. 266, 273 (1994) ("Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process" must be the guide for analyzing these claims'"); *Cuadra v. Houston Indep. Sch. Dist.,* 626 F. 3d 808, 814 (5th Cir. 2010) (dismissing plaintiff's Fourteenth Amendment claims because alleged pretrial deprivations of constitutional rights should be addressed under the Fourth Amendment). The Court hereby dismisses claims made pursuant to the Fourteenth Amendment but will consider them under the rubric of the Fourth Amendment.

v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 663 (2009) (citing *Twombly,* 550 U.S. at 556). "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." *Id.* (quoting *Twombly,* 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly,* 550 U.S. at 557).

In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins. Co.,* 509 F.3d 673, 675 (5th Cir. 2007). The Court is not bound to accept factual assumptions or legal conclusions as true, and only a complaint that states a plausible claim for relief survives a motion to dismiss. *Iqbal,* 556 U.S. at 678-79. When there are well-pleaded factual allegations, the court assumes their veracity and then determines whether they plausibly give rise to an entitlement to relief. *Id.*

To determine whether to grant a Rule 12(b)(6) motion, a court may look only to allegations in a complaint to determine their sufficiency. *Santerre v. Agip Petroleum Co., Inc.,* 45 F.Supp.2d 558, 568

(S.D. Tex. 1999); *Atwater Partners of Texas LLC v. AT & T, Inc.,* 2011 WL 1004880 (E.D. Tex. 2011). A court may, however, consider matters outside the four comers of a complaint if they are incorporated by reference, items subject to judicial notice, matters of public record, orders, items appearing in the record of a case, and exhibits attached to a complaint whose authenticity is unquestioned. *See Chawla v. Shell Oil Co.,* 75 F.Supp.2d 626, 633 (S.D. Tex. 1999); *Brock v. Baskin-Robbins USA Co.,* 113 F.Supp.2d 1078, 1092 (E.D. Tex. 2000) (at motion to dismiss for failure to state a claim, a court may consider an indisputably authentic document that is attached as an exhibit, if plaintiff's claims are based on the document).

Moreover, when defendants attach video evidence to a motion to dismiss for failure to state a claim that is referred to in the complaint and central to it, a court may consider that evidence. *Inclusive Cmty. Project, Inc. v. Lincoln Prop. Co.,* 920 F.3d 890, 900 (5th Cir. 2019); *Hartman v.* Walker [sic], 685 Fed. App'x 366, 368 (5th Cir. 2017) ("[O]n a motion to dismiss, the court is entitled to consider any exhibits attached to the complaint, including video evidence ... [and] the court is not required to favor plaintiff's allegations over the video evidence."). A district court "should not discount the non-moving party's story unless video evidence provides so much clarity that a reasonable jury could not believe his account." *Darden v. City of Fort Worth, Tex.,* 880 F.3d 722, 730 (5th Cir. 2018); *see also Ramirez v. Martinez,*

716 F.3d 369, 374 (5th Cir. 2013) (citing *Scott v. Harris,* 550 U.S. 372 (2007)). That is the case here.

III. Analysis

A. Evidentiary Objections

As a threshold matter, this Court must first address whether it may consider Officer Calvert's dashboard camera footage, body camera footage, and Incident Report. Officer Calvert's video footage and Incident Report are attached to Defendants' Motion to Dismiss. (Doc. Nos. 14- 1, 14-2, 14-3). Plaintiff did not attach anything to his Amended Complaint (Doc. No. 9) except for the Bogardus Report (Doc. No. 9-1). That report, however, also references the videotape. Moreover, Plaintiff referred to the footage in his Amended Complaint, and the contents are central to his claims.

Defendants attached the video footage to their Motion to Dismiss (Docs. Nos. 14-1, 14-2). In response, Plaintiff did not object to this Court's consideration of the videos footage. (Doc. No. 25 at 5).

Since the parties agreed, and as noted above, the law supports that agreement, the Court will consider Officer Calvert's dashboard camera and body camera footage and will accept the scenario presented in the footage as true for purposes of this motion to dismiss. The Court will consider the recordings in analyzing the pleadings and

Defendants' Motion to Dismiss, but will discount the Amended Complaint in favor of the video evidence only when that evidence "blatantly contradict[s] the plaintiffs' well-pleaded factual allegations." *Ramirez,* 716 F.3d at 375; *Griffin v. City of Sugar Land, Tex.,* 2019 WL 175098, at *6 (S.D. Tex. Jan. 11, 2019), *aff'd,* 787 Fed. App'x 244 (5th Cir. 2019) (adopting the video evidence over the complaint allegations when the video showed the plaintiff violating a city ordinance, clearly contradicting his complaint allegation that the arresting officers lacked probable cause to arrest him).

Next, the Court must address whether it may consider Officer Calvert's Incident Report. Defendants attached the 20-page Incident Report to their Motion to Dismiss (Doc. No. 14-3). They argue that Plaintiff's exhibit, the Bogardus Report, references the Incident Report and is based upon underlying information contained in the Incident Report; therefore, the Incident Report should be considered. (Doc. No. 14 at 10). Plaintiff objects and argues that Defendants only vaguely reference the Bogardus Report and do not provide a pincite to where it supposedly relies on the Incident Report. (Doc. No. 25 at 6). Given that Defendants only generally referred to the Bogardus Report as relying upon the Incident Report and failed to identify specific portions of the Bogardus Report that implicate Officer Calvert's 20-page Incident Report, the Court denies Defendants' request to consider it.

B. Qualified Immunity

The Court will now address Plaintiff's various causes of action against Officer Calvert under § 1983 alleging (1) unlawful detention, (2) arrest without probable cause, (3) excessive force, and (4) malicious prosecution. Defendants urge the Court to grant their motion because Plaintiff's claims are insufficient to overcome Officer Calvert's qualified immunity.[6] Alternatively, Defendants contend dismissal is proper because Plaintiff has failed to plead facts that would support these a claim for relief.

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson* v. *Callahan,* 555 U.S. 223, 231 (2009). The purpose of qualified immunity is to protect officials from harassment, distraction, and liability when they perform their duties reasonably, but to hold public

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[6] In their Motion to Dismiss, Defendants assert Officer Calvert's qualified immunity without specifying which of Plaintiff's claims they are responding to. (Doc. No. 14, at 10). Defendants' qualified immunity arguments revolve only around the alleged constitutional violations. Additionally, Defendants only raise the issue of qualified immunity *after* discussing Plaintiffs state law assault claim and why that claim should be dismissed under the Texas Tort Claims Act. *(Id.* at 9). Given the nature of this briefing, the Court will address only qualified immunity as it relates to Plaintiff's alleged constitutional violations. The Court will consider Plaintiff's state law assault claim separately.

officials accountable when they exercise their powers irresponsibly. *Id.* When an official should have known that his conduct would violate the plaintiff's constitutional rights, he or she is not entitled to qualified immunity. *White v. Pauly,* 137 S. Ct. 548, 552 (2017).

When evaluating a defendant's qualified immunity defense at the motion to dismiss stage, a district court must first find "that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity." *See Est. of Bonilla* v. *Orange Cnty.,* 982 F.3d 298, 306 (5th Cir. 2020) (quoting *Hyatt* v. *Thomas,* 843 F.3d 172, 177 (5th Cir. 2016)) ("Once a defendant asserts the qualified immunity defense, '[t]he plaintiff bears the burden of negating qualified immunity.'"). A plaintiff seeking to overcome qualified immunity at the pleading stage must allege: "(l) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd,* 563 U.S. 731, 732 (2011). The Supreme Court does not require district courts to address both prongs for every case. *See Pearson v. Callahan,* 555 U.S. 223, 236 (2009). Rather, courts may find qualified immunity based solely on plaintiff's failure to clear the clearly established hurdle. *See also* "[w]e have discretion to leapfrog the merits and go straight to whether the alleged violation offended clearly established law." This is because addressing the first prong of whether a constitutional violation took place, "sometimes results in a substantial

expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case." *Id.* In accordance with that decision, this Court will examine Plaintiff's pleadings as they pertain to the clearly established requirement as an initial matter.

When addressing the clearly established requirement in a recent case, the Fifth Circuit noted that overcoming qualified immunity generally "requires the plaintiff to identify a case-usually, a body of relevant case law-in which an officer acting under similar circumstances was held to have violated the Constitution." *Joseph v. Bartlett,* 981 F.3d 319, 330 (5th Cir. 2020) (cleaned up). The unlawfulness of the challenged conduct must be "beyond debate." *Id.* (citing *Ashcroft,* 563 U.S. at 741). In fact, the Circuit stated, "we cannot deny qualified immunity without identifying a case in which an officer acting under similar circumstances was held to have violated the Fourth Amendment, and without explaining why the case clearly proscribed the conduct of that individual officer." *(Id.* at 345).

Here, Plaintiff has failed to meet this burden and, consequently, Officer Calvert is entitled to qualified immunity defense based on the clearly established prong. Plaintiff's response is devoid of supporting precedent. Stated differently, it does not contain analogous case law with similar facts demonstrating that the alleged misconduct here

has been found to be unlawful.[7] Since Plaintiff has failed to refute Officer Calvert's qualified immunity using precedent, this Court finds that Plaintiff has not overcome the second prong of qualified immunity-that the right he asserts was "clearly established" at the time of the alleged misconduct.

The Court could end its inquiry here and grant Officer Calvert qualified immunity based solely on Plaintiff's failure to overcome the second prong.

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[7] The Court feels the need to clarify its holding on this point. The "clearly-established" prong of qualified immunity has undergone substantial interpretive changes during the past years, particularly in the Fifth Circuit. Older case law requires that the plaintiff's alleged *right* be clearly established. *Anderson v. Creighton,* 483 U.S. 635 (1987). In the present case, that *right,* among others, would be the right to not be unjustifiably assaulted by a police dog. More recent case law, however, shifts the emphasis to require that the alleged *conduct* be a clearly established violation. For example, in *Joseph,* the Fifth Circuit explained that to overcome the clearly established prong, "plaintiffs must also demonstrate that the law was "clearly established"—that, as of [the date of the incident], any reasonable officer would have known that [the officer's] behavior was unlawful." *Joseph,* 981 F.3d at 336. This Court will not comment on whether this shift is an actual change in requirements or merely a different manner of interpreting the long-existing requirements. It only observes that, under recent case law, the plaintiff's ability to present precedent is the linchpin of the analysis. All of this to say, this Court's ruling is *not* that the right alleged (to be free from assault by a police dog) is not a clearly established right. Regardless of whether it is the *right* or the *violation* that must be clearly established, this Court would still find Officer Calvert entitled to qualified immunity.

For the sake of being thorough, however, the Court will address the first prong—whether Officer Calvert violated Plaintiff's Fourth Amendment rights. The Court finds that Plaintiff has not adequately pled facts supporting this prong either. Plaintiff failed to sufficiently plead facts supporting his § 1983 claims for (1) unlawful detention, (2) arrest without probable cause, (3) excessive force, (4) malicious prosecution.[8] The Court will now address in more detail why Plaintiff's facts, as pled, do not support a constitutional violation for any of these four claims.

1. Unlawful Detention

Defendants first challenge Plaintiff's ability to state a claim for unlawful detention. Defendants maintain that Officer Calvert had reasonable suspicion to stop Plaintiff because he thought Plaintiff ran a red light, believed that Plaintiff might be driving a stolen vehicle, and ultimately observed (and experienced) Plaintiff resisting arrest. (Doc. No. 14 at 13-14).

The Fourth Amendment protects individuals from unreasonable searches and seizures. Traffic stops are considered seizures within the meaning of the Fourth Amendment. *See U.S. v. Banuelos-Romero,* 597 F.3d 763, 766 (5th Cir.2010). The legality of seizures/traffic stops for Fourth

[8] Since Plaintiff failed to plead facts supporting these four constitutional violations, the Court would alternatively dismiss these claims under a traditional 12(b)(6) analysis.

Amendment purposes is analyzed under the standard articulated by the Supreme Court in *Terry v. Ohio,* 392 U.S. 1 (1968). To analyze the legality of a vehicle stop under *Terry,* the Court must follow the two-step process. *United States v. Brigham,* 382 F.3d 500, 506 (5th Cir. 2004). The first step considers whether the officer was justified in stopping the vehicle at its inception. *Id.* The second step examines whether the officer's subsequent actions were reasonably related in scope to the circumstances that justified the stop. *Id.*

This first step, determining whether the vehicle stop was justified at its inception, is satisfied "if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony." *United States v. Hensley,* 469 U.S. 221, 229 (1985). The investigatory stop must be "supported by reasonable suspicion 'that the person apprehended is committing or has committed a federal offense.'" *United States v. Thomas,* 997 F.3d 603, 609 (5th Cir. 2021) (quoting *Arizona v. Johnson,* 555 U.S. 323, 326 (2009)). "[A]n alert or BOLO report may provide the reasonable suspicion necessary to justify an investigatory stop." *Davila v. United States,* 713 F.3d 248, 258 (5th Cir. 2013) (citing *United States v. Rodriguez,* 564 F.3d 735, 742 (5th Cir. 2009)). Thus, Courts must examine "whether the officer's action was justified at its inception"—specifically, whether reasonable suspicion was then present. *See Terry,* 392 U.S. at 20.

Applying these standards here, the Court finds Officer Calvert's conduct was justified at the inception because he believed Plaintiff ran a red light and may have been driving a stolen vehicle.

It is undisputed that Officer Calvert initially "stopped" Plaintiff because he thought that Plaintiff ran a red light.[9] (Doc. Nos. 9 at 4; 14 at 13). Plaintiff concedes that there was a BOLO report for a stolen silver 2020 Toyota RAV4 without license plate information. (Doc. No. 9-1 at 7-8). While Plaintiff was driving a silver 2020 Mitsubishi crossover and not a silver 2020 Toyota RAV4, Plaintiff's vehicle was similar to the stolen vehicle.[10] Moreover, given the fact that the stop

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[9] Plaintiff notes that although Officer Calvert swore in an affidavit and police report that Plaintiff ran the light before arriving at his residence, Officer Calvert's dashboard camera footage refuted this assumption after the fact and a "criminal court judge" granted "a motion to suppress due to there being no proof of any traffic violation on Calvert's dashcam." (Doc. No. 9 at 4). That a criminal court made this finding is irrelevant. First of all, the fact that the dashcam did not show Plaintiff ran the red light does not preclude the possibility that it happened. "Not showing" something does not equate to demonstrating that "it didn't happen." More importantly, for purposes of determining whether Officer Calvert had reasonable suspicion to conduct the stop, it only matters that Officer Calvert believed, at the time the stop was occurring and when he decided to conduct the stop, that Plaintiff ran a red light. This belief constitutes reasonable suspicion.

[10] Although Plaintiff's vehicle was not exactly the same as the one described in the BOLO report, the Court nonetheless finds that the initial stop was nevertheless lawful since this BOLO qualifies as a "reasonable but mistaken judgment[]"

occurred at night, the differences between the vehicles (both Japanese cross-overs) may not have been readily apparent. Given that Officer Calvert had reasonable suspicion based upon the BOLO report that Plaintiff was committing an offense by potentially driving a stolen vehicle, the Court finds that he had reasonable suspicion to justify an investigatory stop. *See United States v. Campbell,* 178 F.3d 345 (5th Cir. 1999) (holding that officers had reasonable suspicion to conduct a *Terry* stop where the individual "matched the physical description of the bank robber from the day before and was approaching a car that matched a detailed description of the getaway vehicle").

For a *Terry* stop to be lawful, not only must an officer be justified in stopping the vehicle at its inception, but also the officer's subsequent actions must have been reasonably related in scope to the reason for the stop. *See Terry,* 392 U.S. at 20. The Court finds that Plaintiff has failed to adequately plead facts that support a violation of this second prong as well. As the camera footage shows, Officer Calvert only escalated his behavior in response to Plaintiff's and his wife's continued noncompliance. Faced with two resisting individuals who immediately exited their car, contrary to instructions, and did not follow orders, Officer Calvert's subsequent actions were reasonably related in scope to the reason for the stop.

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that is not "plainly incompetent." *See Stanton* v. *Sims,* 571 U.S. 3, 6 (2013).

Therefore, Plaintiff has not pleaded facts that demonstrate Officer Calvert violated his statutory or constitutional rights and cannot clear either prong of the qualified immunity analysis. Even without a finding of qualified immunity, the Court finds Plaintiff has not pleaded sufficient facts to establish an unconstitutional detention and would alternatively dismiss under Rule 12(b)(6).

2. Arrest without Probable Cause

Plaintiff also pleads that he was arrested without probable cause in violation of the Fourth Amendment.[11] Defendants maintain that their motion should be granted because Officer Calvert had probable cause to arrest Plaintiff for his alleged red light violation, because he believed Plaintiff was driving a stolen vehicle, and because Plaintiff resisted arrest. (Doc. No. 14 at 14). Defendants also argue that Officer Calvert's body camera footage shows that Plaintiff "used force to resist being placed in handcuffs," which further supplies the basis for probable cause. (Officer

[11] Plaintiff appears to attempt to characterize his claim that he was arrested without probable cause as a "false arrest" claim in his Response in opposition. (Doc. No. 25 at 10). There is no mention, however, of a false arrest cause of action in Plaintiff's Amended Complaint. *(See* Doc. No. 9). Plaintiff only pleads that he was arrested without probable cause in violation of the Fourth Amendment. (Doc. No. 9 at 7). Given that a motion to dismiss is evaluated based on the operative complaint, Plaintiff is not permitted to add claims to his Amended Complaint by way of his Response in opposition. Thus, the Court will not consider Plaintiff's attempted additional false arrest claim.

Calvert Body Camera Footage, Doc. No. 14-1 at 0:24-35).

Probable cause for arrest exists when the totality of the facts and circumstances within the police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense. *U.S. v. McCowan,* 469 F.3d 386, 390 (5th Cir. 2006) (citing *United States v. Ramirez,* 145 F.3d 345, 352 (5th Cir. 1998) and *United States v. Shugart,* 117 F.3d 838, 846 (5th Cir. 1997). "A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence at his direction from effecting an arrest [or] search ... by using force against the peace officer or another." Tex. Pen. Code. § 39.03(a). "It is no defense to prosecution under this section that the arrest or search was unlawful." *Id.* at§ 38.03(b).

Moreover, in Texas, "the act of resisting can supply probable cause for the arrest itself." *Ramirez v. Martinez,* 716 F.3d 369, 376 (5th Cir. 2013). "The great weight of Texas authority indicates that pulling out of an officer's grasp is sufficient to constitute resisting arrest." *Id.* (citing cases); *see also id.* ("[U]nder Texas law Deputy Martinez could have reasonably concluded that Ramirez committed the offense when Ramirez pulled his arm away from Deputy Martinez's grasp"); *Vactor v. State,* 181 S.W.3d 461, 467 (Tex.App.—Texarkana, 2005, pet. denied) ("[O]nce

Vactor forcefully resisted Webb's attempt to place him in handcuffs for the purpose of safely performing a *Terry* search, Vactor committed the new criminal offense of resisting a search.").

Based upon Plaintiff's Amended Complaint, it is somewhat unclear what crime he was ultimately charged with, but he pleads that Officer Calvert improperly stopped him for running a red light, which was later "prove[n] false" by a criminal court judge. (Doc. No. 9 at 4). He also pleads that Officer Calvert "provided patently false statements in an affidavit to charge Benfer with resisting arrest," and that "all charges were dropped" against him. (*Id.*). Plaintiff does not plead any additional facts to support a lack of probable cause.

The Court notes once again that Plaintiff's contention that a criminal court found, after the fact, that the evidence did not prove he ran a red light or resisted arrest, is not determinative of the inquiry of whether Officer Calvert had probable cause to stop or arrest him.[12] The relevant time period for the Court to consider is the officer's knowledge *at the moment of arrest,* not any events that take place later. As noted, Officer Calvert,

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[12] "Foundational to our qualified immunity doctrine is the concept that we must view an officer's actions from that officer's point of view without the benefit of hindsight. From the comfort of a courtroom or chambers, it is often possible for judges to muse on how an officer could have handled a situation better. But that does not mean the officer is not entitled to qualified immunity." *Solis* v. *Serrett,* 31 F.4th 975, 978 (5th Cir. 2022).

believing *at the moment of arrest,* that Plaintiff had run a red light and was potentially driving a stolen vehicle, had reasonable suspicion for the stop. After the stop, Plaintiffs' own conduct provided probable cause. Plaintiff refused to follow Officer Calvert's instructions to stay in the car and immediately existed the vehicle. He started walking away and refused to stop, as ordered. He pulled his arm away multiple times when Officer Calvert tried to restrain him. Case law is clear that pulling out of an officer's grasp, as Plaintiff did here, constitutes resisting. *See Ramirez,* 716 F.3d at 376. Thus, at the moment of confrontation, Plaintiff's active resistance supplied probable cause for Officer Calvert to effectuate the arrest.

This Court therefore finds that Officer Calvert did not violate a statutory or constitutional right of Plaintiff's, and neither prong of the qualified immunity analysis is met on this claim. Accordingly, Plaintiff has not pleaded sufficient facts to make out a viable claim under the Fourth Amendment for arrest without probable cause.

3. Excessive Force

Plaintiff also makes a claim based upon the alleged use of excessive force. Specifically, Plaintiff pleads that after he was improperly stopped, Officer Calvert "unleashed Hero to bite and the rend [sic] the flesh of Benfer" and that he subsequently suffered severe injuries requiring stitches including one close to the brachial artery which can lead to death in minutes if severed."

(Doc. No. 9 at 4). Plaintiff does not plead, perhaps purposefully, any additional facts pertaining to how the arrest and involvement of the K-9 with Officer Calvert took place.

In their Motion to Dismiss, Defendants argue that Plaintiff has failed to plead facts that would support an excessive force claim and that Officer Calvert is immune from these claims. (Doc. No. 14 at 16). Defendants contend that Plaintiff has failed to plead any injury associated with being grabbed by Officer Calvert when he attempted to handcuff Plaintiff and when he was pushed into the bushes.[13] (*Id.*). Moreover, Defendants maintain that Plaintiff fails to plead facts that support a claim for excessive force regarding the bites he sustained from Officer Calvert's K-9. (*Id.*).

To succeed in proving an excessive force claim, the Plaintiffs must "establish (1) an injury (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the

[13] To the extent Plaintiff contends that he has an excessive force claim centering on being handcuffed or pushed into the bushes, the Court notes that he does not allege any facts to support this cause of action in his Amended Complaint. Moreover, there is no mention, discussion, or defense of an excessive force claim centered on these particular alleged injuries in his Response in opposition to Defendants' Motions to Dismiss. (*See* Doc. No. 25). Since the Amended Complaint is wholly devoid of facts concerning an excessive force claim centering on being handcuffed or pushed into the bushes and Plaintiff failed to address or defend this claim in his Response, this Court finds that he has abandoned those claims and they are hereby dismissed.

excessiveness of which was clearly unreasonable." *Ratliff v. Aransas Cnty.,* 948 F.3d 281, 287 (5th Cir. 2020); *Hale v. City of Biloxi, Miss.,* 731 Fed. App'x 259, 262 (5th Cir. 2018). "[W]hether the force used is 'excessive' or 'unreasonable' depends on 'the facts and circumstances of each particular case.'" *Graham v. Connor,* 490 U.S. 386, 396 (1989). "Factors to consider include 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Id.* The "reasonableness" inquiry is an objective one, and focuses on whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them. *Id.* at 395, 397. The Court will analyze whether Plaintiff asserted sufficient allegations in his Amended Complaint to satisfy each element as to the dog bites Plaintiff experienced.

Injury: A plaintiff must show he or she was injured to succeed on an excessive force claim. Physical injuries are not necessarily required. *See Petta v. Rivera,* 143 F.3d 895, 899 (5th Cir. 1998). Rather, psychological pain, injuries, and disabilities as the result of the use of excessive force will suffice for the injury element. *Id.* In his Amended Complaint, Plaintiff pleads that he "suffered severe bite injuries some requiring stitches [sic] including one close to the brachial artery which can lead to death in minutes if severed." (Doc. No. 9 at 4). The Bogardus Report further notes that Plaintiff suffered bite injuries to

his left and right biceps, the right of his back, and to his neck. (Doc. No. 9-1 at 6). Therefore, Plaintiff has adequately pled facts supporting the injury requirement.

Causation: The second element of an excessive force case requires a plaintiff to show his or her injuries were "directly and only" a result of the excessive force. It is here that Plaintiff's allegations fail. As discussed, Plaintiff refused to comply with orders to remain in his vehicle and walked away from Officer Calvert despite receiving warnings about the K-9. (Doc. No. 14-1 at 0:23-31). Plus, during the encounter with Plaintiff, Plaintiff's wife joined the tussle and appears to have reached for Officer Calvert's duty belt presumably near his service pistol. (*Id.* at 0:47). It was only then that Officer Calvert called for his K-9 to "assist," and the dog bit Plaintiff.

Considering these uncontroverted facts, the Court finds that Plaintiff's injuries are not directly and only the result of an instance of alleged excessive force. From the beginning of the encounter, Plaintiff disobeyed Officer Calvert's commands to stay in his vehicle and to stop walking. Plaintiff continued to resist Officer Calvert's commands to stop even after Officer Calvert informed him that he had a dog that would bite him. Therefore, any injury caused by the dog bites was not directly and only the result of Officer Calvert's behavior.

Accordingly, the Court finds that Plaintiff's injuries, and their severity, were in large part due to his refusal to comply with Officer Calvert's directions. Had Plaintiff remained in his vehicle or stopped when Officer Calvert asked him to, the deployment of the K-9 and resulting injuries would never have occurred. Plaintiff had multiple opportunities, from the moment he exited his vehicle and began walking away, and even after Officer Calvert warned him that he had a dog that would bite him, where he could have cooperated. Thus, Plaintiff's allegations fail to satisfy the causation requirement.

Reasonableness: The third prong considers whether the force used was clearly unreasonable. Whether a force is reasonable is "judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." *Graham,* 490 U.S. at 396. "Not every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers," violates the Fourth Amendment. *Id.* Courts assess "reasonableness" using and objective standard and must account for the fact that police are "forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 397.

Even if the injuries were found to be caused by Officer Calvert, Defendants maintain, and this Court finds, that the force used by Officer Calvert was reasonable because Plaintiff resisted arrest

and defied Officer Calvert from the moment he exited his vehicle to when he was finally handcuffed. (Doc. No. 14 at 16). Moreover, Defendants argue that Plaintiff's wife reaching in the area of Officer Calvert's duty belt near his service pistol added to the "immediate threat" that Officer Calvert was experiencing as he struggled to get Plaintiff to stop walking. Defendants contend that Officer Calvert was ultimately "[f]aced with the split-second decision of being disarmed and attacked by Plaintiff [and his wife]—with no other officer to assist." (Doc. No. 14 at 17). According to Defendants, any objectively reasonable officer faced with the same facts and circumstances would have deployed their K-9 to assist and subdue Plaintiff until Officer Calvert could detain both Plaintiff and his wife. (*Id.*). Moreover, the entire incident involving the K-9 lasted approximately one minute and 48 seconds.[14] Officer Calvert only deployed the K-9 to subdue Plaintiff until he was able to retrieve his second pair of handcuffs from his vehicle. He restrained the K-9 once Plaintiff was successfully handcuffed.

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[14] The Court notes that the Bogardus Report states that the interaction between Officer Calvert's K-9 and Plaintiff lasted two minutes and fourteen seconds. (Doc. No. 9-1 at 6). Officer Calvert's body camera footage, however, shows Officer Calvert presumably deploying his K-9 at 0:49 when he yells "assist!" and then retrieving the K-9 after Plaintiff was successfully handcuffed at 2:35. (Doc. No. 14-1). This means the encounter involving the K-9 was approximately a minute and 48 seconds, not two minutes and 14 seconds as the Bogardus Report states. That differential could be due to timing issues as opposed to substantive differences.

The incident did not last longer than necessary to detain Plaintiff and his wife.

Considering the totality of the circumstances, the Court finds, despite Plaintiff's conclusory contentions to the contrary, that Officer Calvert's use of force was not excessive and he did not violate Plaintiff's statutory or constitutional rights. From the outset of Officer Calvert's interaction with Plaintiff and his wife, they refused to comply with basic instructions. An objectively reasonable officer, when dealing with two individuals refusing to comply with simple commands, one of whom also attempted to potentially disarm him by grabbing at his duty belt, would have deployed his K-9 to assist. Therefore, Plaintiff has failed to plead facts showing Officer Calvert's use of force was clearly unreasonable.

Fifth Circuit precedent on excessive force further supports this conclusion. In a previous § 1983 case against the City of Baytown, the Fifth Circuit reversed this Court's finding that a question of excessive force existed where far more egregious facts were at play. In *Solis v. City of Baytown, Texas,* 2021 WL 1566445, at *1 (S.D. Tex. Apr. 21, 2021), the plaintiff was riding in her car with her boyfriend when they were pulled over by City of Baytown police officers. After both being asked to exit the vehicle, the plaintiff's boyfriend asked whether the officer was conducting a field sobriety test on him, which the police officer confirmed. *Id.* When the plaintiff's boyfriend

replied that he was not intoxicated, the officer asked him to turn around and place his hands behind his back and arrested him without incident. *Id.* During this exchange, the plaintiff filmed the encounter with her cellphone. She eventually stopped filming but kept her phone in her hand. *Id.*

The arresting officer then walked over to where the plaintiff was standing, and the plaintiff asked for the arresting officer's badge number. *Id.* Rather than providing it, the officer asked to see her phone and reached out in an apparent attempt to take her phone from her hand. *Id.* The plaintiff jerked her phone away from the officer's hand, took a step back, and refused, asking again for his badge number. *Id.* The officer then stated, "Well I don't want you to drop it when I arrest you, so could you please--." *Id.* The plaintiff responded while the officer was still speaking, "Drop it? Excuse me?" and took another step back. *Id.* Before the officer could finish his last sentence and while the plaintiff was saying "Excuse me?" the officer quickly approached plaintiff and grabbed her left arm, twisted it behind her back, and forced her onto the ground, where one of the officers placed his knee on her back while he handcuffed her. *Id.* The plaintiff was charged with public intoxication, but the charge was dismissed a few days later. *Id.*

Based on the body camera footage, this Court found that the plaintiff was not physically threatening the officers in any way and since neither officer gave any indication that turning

over her cell phone was connected to her imminent arrest. *Id.* at 8. This Court also found that the plaintiff jerking her arm away and stepping away from the officer could reasonably be interpreted as an effort to retain her cellphone, not an attempt to resist arrest. *Id.* The incident lasted only seconds. Finally, this Court found that the "quickness with which the officers resorted to tackling [plaintiff] to the ground militates against a finding of reasonableness." *Id.* at 9 (citing *Trammel,* 868 F.3d at 342).

The Fifth Circuit reversed this Court's findings and found immunity as a matter of law. It found that the plaintiff's resistance to arrest cut in favor of the officers, and that it was reasonable for the officers to perceive her as actively resisting arrest. It wrote:

> Case law distinguishes between active and passive resistance. "[W]here an individual's conduct amounts to mere 'passive resistance,' use of force is not justified." *Trammell,* 868 F.3d at 341. Here, Solis was generally hostile to the officers from the beginning of the traffic stop. She emphasized that she and Robinson were near their home, argued with the officers, repeatedly implied that Robinson was pulled over only because of his race, pulled away when Serrett asked for her phone, and stepped back and exclaimed "Drop it? Excuse me!" when Serrett told her she was being arrested. This court has also

> acknowledged that "a suspect who backs away from the arresting officers is actively resisting arrest-albeit mildly." *Buehler,* 27 F.4th at 984 (cleaned up). Solis also seemed to struggle against the officers as they grabbed her arms, which viewed from the officers' perspective could be "another form of resistance." *Id.* Accordingly, it may have been reasonable for the officers to perceive Solis as actively resisting arrest, and this factor weighs in the officers' favor.

Solis v. Serrett, 31 F.4th 975, 982-83 (5th Cir. 2022).

As an initial matter, the Fifth Circuit reversed this Court's findings even though the plaintiff's actions in *Solis* were clearly less akin to resisting arrest than Plaintiff's were in this case, except the Plaintiff's conduct here was much more egregious. There are also several parallels between the Fifth Circuit's findings in *Solis* and the case at hand. The court noted that "a suspect who backs away from the arresting officers is actively resisting arrest—albeit mildly." *Id.* (quoting *Buehler v. Dear,* 27 F.4th 969, 984 (5th Cir. 2022)). Here, Plaintiff was clearly actively resistant to Officer Calvert from the very beginning of the encounter. He refused to comply with basic commands to stop even after Officer Calvert tried to physically stop Plaintiff and warned him that he would be bitten by a K-9. Setting aside Plaintiff's wife's involvement—which escalated the incident—Plaintiff initially refused to get on the ground

when he was commanded to by Officer Calvert and resisted putting his hands behind his back even after the K-9 was deployed. Thus, the Court finds that it was reasonable for Officer Calvert to perceive that Plaintiff was actively resisting arrest.

Furthermore, the Fifth Circuit has directly spoken to whether the use of a K-9 constitutes excessive force in *Schumpert v. City of Tupelo,* 905 F.3d 310 (5th Cir. 2018) and *Escobar v. Montee,* 895 F.3d 387 (5th Cir. 2018). In *Schumpert,* the plaintiff fled from the police after he was pulled over for failing to use a turn signal and driving without a working tag light. *Schumpert,* 905 F.3d at 315. Once the officer located the plaintiff, who was hidden under a house in a crawl space, the officer gave plaintiff a verbal warning to come out or his K-9 would bite him. *Id.* The plaintiff disregarded the warning and burrowed further under the house, which prompted the officer to release his K-9. *Id.* The plaintiff fought the dog and then the officer before being shot. *Id.* The Fifth Circuit held that the officer's use of the K-9 was reasonable, noting that it has "repeatedly held that the 'measured and ascending' use of force is not excessive when a suspect is resisting arrest-provided the officer ceases the use of force once the suspect is subdued." *Id.* at 323.

In *Escobar,* the plaintiff fled from the police with a knife after assaulting his wife. 895 F.3d 387 (5th Cir. 2018). The police eventually found the plaintiff in a yard and released a K-9 to "capture

and hold him." *Id.* The plaintiff was bitten by the dog until fully handcuffed by the police, even though the plaintiff swore that he dropped the knife. *Id.* The Fifth Circuit held that the officer had not used excessive force by permitting the police dog to continue biting the plaintiff until plaintiff was "fully subdued and in handcuffs," which lasted approximately one minute. *Id.* at 391.

The Court finds both cases instructive. Plaintiff, like the plaintiff in *Schumpert,* was warned that if he did not comply, a K-9 would be deployed and that the dog could bite him. When the plaintiff refused to comply by burrowing further into the house, the officer released the K-9. Here, Plaintiff continued to refuse to comply with Officer Calvert's commands to stop even after Officer Calvert escalated his warnings to stop and informed Plaintiff that he had a dog that could bite him. Therefore, this Court follows *Schumpert* and finds that Officer Calvert used "measured and ascending" force when Plaintiff resisted arrest. Moreover, Officer Calvert ceased the use of force once Plaintiff was successfully handcuffed. Thus, Officer Calvert's use of force was reasonable.

Escobar is similarly instructive. Although the Court here assumes Plaintiff was not armed as was the plaintiff in *Escobar,* Plaintiff's wife certainly escalated the conflict by reaching near Officer Calvert's duty belt, which in turn further necessitated the deployment of the K-9. Further, the plaintiff in *Escobar* and Plaintiff were both bitten by the K-9 until each was handcuffed by the

police. The Fifth Circuit found that the K-9 continuing to bite the plaintiff was reasonable, given the duration of the encounter. Plaintiff's encounter with the K-9 also lasted approximately one minute, albeit a bit longer. Accordingly, this Court finds that Officer Calvert allowing the K-9 to continue to bite Plaintiff until he was fully handcuffed was not a use of excessive force.

Given that existing case law counsels against a finding of excessive force in this case, the Court finds Plaintiff's arguments fall short of a finding of excessive force. Therefore, Plaintiff has failed to sufficiently plead that Officer Calvert violated a constitutional right as is required to overcome the first prong of qualified immunity. Having already found the second prong similarly unsatisfied,[15] Officer Calvert is entitled to immunity on Plaintiffs claim of excessive force, and it is hereby dismissed.

4. Malicious Prosecution

Plaintiff alleges that Officer Calvert "made material misrepresentations" in his police report to "justify the arrest and prosecution when he

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[15] Plaintiff seems to have argued that, even without a body of relevant case law, the *Graham* excessive-force factors can deem the right clearly established "in an obvious case." (Doc. No. 25 at 9) (citing *Newman v. Guedry,* 703 F.3d 757, 764 (5th Cir. 2012)). After examining the *Graham* factors and Fifth Circuit precedent, this Court does not find this case to be such an "obvious case" as to be clearly established absent case law.

knew there was no probable cause to either arrest or prosecute Plaintiff." (Doc. No. 9 at 9). In their Motion to Dismiss, Defendants argue that Plaintiff has failed to plead plausible facts that state a claim for malicious prosecution.[16] (Doc. No. 14 at 15). According to Defendants, Officer Calvert's body camera footage shows that Plaintiff resisted arrest and the pleadings in his Amended Complaint "shows probable cause to believe Plaintiff committed an offense for which he could

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[16] Defendants also separately argue that Plaintiff fails to state a *Franks* claim in his Amended Complaint. A *Franks* claim refers to *Franks v. Delaware,* 438 U.S. 154 (1978) in which an officer knowingly, intentionally, or with reckless disregard for the truth makes a false statement in a warrant affidavit. Plaintiff does not explicitly mention the *Franks* case or categorize this allegation as being a *Franks* claim. In fact, Plaintiffs allegation of Officer Calvert's "material misrepresentations" is categorized under his malicious prosecution cause of action. Nevertheless, in their Motion to Dismiss, Defendants maintain that to the extent that Plaintiff is attempting to bring a *Franks* claim, Officer Calvert conducted a warrantless arrest of Plaintiff, which refutes any cognizable *Franks* claim. (Doc. No. 14 at 17). Since Plaintiff's arrest did not involve a false statement in a warrant affidavit and was a warrantless arrest, Defendants contend that Plaintiff fails to state a claim under *Franks.* (*Id.*). To the extent Plaintiff has pleaded a *Franks* claim, he does not allege any facts to support this cause of action in his Amended Complaint. Moreover, there is no mention, discussion, or defense of this claim in his Response in opposition to Defendants' Motions to Dismiss. (*See* Doc. No. 25). Since the Amended Complaint is wholly devoid of facts concerning a *Franks* claim and Plaintiff failed to address or defend this claim in his Response, this Court finds that, to the extent Plaintiff pleaded a *Franks* claim to begin with, he has abandoned it and it is hereby dismissed.

be arrested." (*Id.*). Since Plaintiff has pleaded no factual allegations to indicate that Plaintiff was arrested without probable cause or that Officer Calvert's motives were malicious, Defendants maintain that Plaintiff has failed to state a claim upon which relief may be granted. (*Id.*). This Court agrees.

To prevail on a malicious prosecution claim under§ 1983, the plaintiff must show that (1) a criminal action was commenced against him, (2) the prosecution was caused or aided by the defendant, (3) the action terminated in the plaintiff's favor, (4) the plaintiff was innocent, (5) the defendant acted without probable cause, (6) the defendant acted with malice, and (7) the criminal proceeding damaged the plaintiff. *See Goodson* v. *City of Corpus Christi,* 202 F.3d 730, 740-41 (5th Cir. 2000); Existence of probable cause is an absolute bar to maintaining an action for malicious prosecution under the Fourth Amendment.

In Plaintiff's Amended Complaint, he pleaded that he was charged with resisting arrest by Officer Calvert, which satisfies the first and second elements. (Doc. No. 9 at 4). Plaintiff also pleads that "all charges were dropped" against him "after much money and time w[as] expended," which satisfies the third and fourth elements. (*Id.*). Plaintiff further pleads that Officer Calvert "provided patently false statements in an affidavit to charge Benfer with resisting arrest" and that he "made material misrepresentations in the police

report in order to justify the arrest and prosecution when he knew there was no probable cause to arrest or prosecute Plaintiff." (*Id.* at 4, 9). Viewing Plaintiff's Amended Complaint in the light most favorable to him, the Court finds that, taken as true, these allegations satisfy the sixth element. Finally, in addition to "much money and time" expended, Plaintiff pleaded physical injury as a result of his encounter with Officer Calvert. Thus, the Court finds that Plaintiff has satisfied the seventh element.

The Court does not find, however, that Plaintiff has satisfied the fifth element, that Officer Calvert acted without probable cause. As noted above, the Court concluded that Officer Calvert had probable cause to arrest Plaintiff and that undermines Plaintiff's right to proceed here. Officer Calvert had probable cause based on Plaintiff's conduct resisting arrest and Officer Calvert's then-existing belief that Plaintiff ran a red light and was driving a stolen vehicle.

Accordingly, given that Plaintiff has failed to plead facts sufficient to satisfy each element of a claim for malicious prosecution that would also give rise to a constitutional violation, he cannot overcome either prong of qualified immunity on this this cause of action.

C. State Law Assault Claim Against Officer Calvert

In addition to his various § 1983 claims, Plaintiff brings a state law tort claim for assault against Officer Calvert, though it is unclear whether Plaintiff is suing Officer Calvert in his official or individual capacity. Defendants argue both that Plaintiff has failed to plead facts sufficient to support this claim and that Officer Calvert is statutorily immune against Plaintiff's assault claim under Texas law. (Doc. No. 14 at 17). Specifically, they argue that the Texas Tort Claims Act ("TTCA") requires Plaintiff to have brought the claim against the City of Baytown because Officer Calvert is individually immune under the statute. (*Id.*). The Court agrees and finds this claim barred by the TTCA.

A public employee may be individually liable for his tortious conduct outside the general scope of employment. *Univ. of Texas Health Sci. Ctr. at Houston v. Rios,* 542 S.W.3d 530, 531 (Tex. 2017). The TTCA defines "scope of employment" as "the performance for a governmental unit of the duties of an employee's office or employment and includes being in and about the performance of a task lawfully assigned to an employee by competent authority." Tex. Civ. Prac. & Rem. Code § 101.001(5). An official acts within the scope of her authority if she is discharging the duties generally assigned to her. *Lancaster v. Chambers,* 883 S.W.2d 650, 658 (Tex. 1997) (holding that that on-duty police officers, pursuing a suspect in their

squad car, did not act outside the scope of their authority even though they drove without regard for the safety of others).

If the alleged tortious conduct was within the general scope of employment, Section 101.106 of the TTCA governs. This section "require[es] a plaintiff to make an **irrevocable election** at the time suit is filed between suing the governmental unit under the Tort Claims Act or proceeding against the employee alone." *Mission Consol. Sch. Dist. v. Garcia,* 253 S.W.3d 653, 657 (Tex. 2008) (emphasis added). If the plaintiff chooses to sue the employee alone, the TTCA states, in relevant part:

> "If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed."

Tex. Civ. Prac. & Rem. Code§ 101.106(f).

Here, Officer Calvert was acting within his general scope of employment as police officer for the City of Baytown. The alleged misconduct occurred while Officer Calvert was performing tasks lawfully assigned to him. Like the officers in *Lancaster,* he was on duty and actively pursuing Plaintiff for suspected traffic violations. When Plaintiff chose to bring assault claims against Officer Calvert based on conduct within the scope of his employment, the irrevocable election of Section 101.106 was triggered. As a consequence, the Court will proceed with the understanding that Plaintiff sued Officer Calvert in his official capacity.

Section 101.106(f) therefore dictates that the suit against the employee "shall be dismissed" unless the plaintiff amends his pleadings to name the governmental unit within 30 days after the motion was filed. Officer Calvert and the City of Baytown filed this motion to dismiss on September 28, 2022 *(See* Doc. No. 14). Plaintiff has failed to amend (or at least move to amend) his pleadings as required under the statute on or before the 30th date that this motion was filed. In fact, Plaintiff has already amended his complaint once and did not attempt to cure this problem.

As Plaintiff's claim is against Officer Calvert in his official capacity, it must be dismissed because the City of Baytown has not waived its sovereign immunity for intentional torts for assault and battery. *See, e.g., Huff v. Refugio County Sheriff's*

Dept., 2013 WL 5574901, at *3 (S.D. Tex. Oct. 9, 2013).

Accordingly, Plaintiff's assault claim against Officer Calvert is dismissed.

D. Section 1983 Claims Against the City of Baytown

Plaintiff also sues the City of Baytown under § 1983. Plaintiff alleges that the City of Baytown "did not have adequate written policies, nor did they train or supervise Calvert in the proper handling of a police dog." (Doc. No. 9 at 8). Plaintiff further pleads that the City of Baytown "condoned and ratified the actions of Calvert by failing to discipline or retrain him" and that it has a "pattern, practice and custom of using a biting police dog to inflict injuries upon suspects even if they do not pose a threat" and to "punish them for not complying or for fleeing after they have complied." (*Id.*).

To support his contentions, Plaintiff includes five examples in his Amended Complaint of instances where a City of Baytown K-9 injured people during a stop or arrest. (*See* Doc. No. 14). The five instances are summarized below in bullet points to better facilitate the analysis:

- In 2019, Raphael White was fleeing from the City of Baytown police on foot when Officer Calvert deployed his K-9 to bite White. (*Id.* at 3). According to Plaintiff's

Amended Complaint, White sued, and Officer Calvert's motion for summary judgment was denied because a Southern District of Texas judge found that there was a fact issue pertaining to excessive force (*Id.* at 2-3);

- In October 2021, Alejos Lopez "was not brandishing a weapon" but he was "repeatedly bitten by a Baytown police dog controlled by a Baytown police officer" (*Id.* at 4);

- On January 4, 2020, Trevor Scott was being pursued by the City of Baytown police in a motor vehicle chase when he was "repeatedly bitten by a Baytown police dog controlled by a Baytown police officer" (*Id.* at 5);

- In May 2020, Mark Burns was "repeatedly bitten by a Baytown police dog controlled by a Baytown police officer" (*Id.*); and,

- On March 29, 2022, Joseph Lane "was not brandishing a weapon at the time" and was "repeatedly bitten by a Baytown police dog controlled by a Baytown police officer." (*Id.*).

In their Motion to Dismiss, Defendants argue that Plaintiff has failed to identify a specific unconstitutional policy, custom, or practice for which a policymaker could be held liable, or that a policymaker was aware of an unconstitutional

policy and deliberately chose to maintain it. (Doc. No. 14 at 23, 24). Defendants also argue that Plaintiff has failed to plead any facts to suggest that a policymaker's conduct was a moving force that caused Plaintiff to experience a constitutional deprivation or that it ratified unconstitutional conduct. (*Id.* at 24).

The Court notes that the City of Baytown, as a municipality, may not be held liable under § 1983 on a theory of vicarious liability. *Monell v. Dept. of Soc. Servs.,* 436 U.S. 658, 691 (1978); *see also Kitchen v. Dall. Cty.,* 759 F.3d 468, 476 (5th Cir. 2014). Municipalities may only be liable where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell,* 436 U.S. at 690.

For municipal liability to attach, claims filed under § 1983 require a plaintiff to show three elements: (1) a policymaker; (2) an official policy; and (3) a violation of constitutional rights whose moving force is the policy or custom. *See Cox v. City of Dallas,* 430 F.3d 734, 748 (5th Cir. 2005) (citing *Piotrowski v. City of Houston,* 237 F.3d 567, 578 (5th Cir. 2001)). A plaintiff must still "provide fair notice to the defendant, and this requires more than generically restating the elements of municipal liability." *Id.* Such allegations may include "past incidents of misconduct to others, multiple harms that occurred to the plaintiff, misconduct that occurred in the open, the

involvement of multiple officials in the misconduct, or the specific topic of the challenged policy or training inadequacy." *Id; see Custer v. Houston Police Dept.,* 2017 WL 5484114 (S.D. Tex. Nov. 15, 2017).

At the motion to dismiss stage, plaintiffs need not identify a particular policymaker by name to establish municipal liability but must plead facts that show that the defendant or defendants acted pursuant to a specific official policy, which was promulgated or ratified by the legally authorized policymaker. *Groden v. City of Dallas, Tex.,* 826 F.3d 280, 282 (5th Cir. 2016).

For an official policy, the pleadings for a § 1983 claim are adequate against a city when they set forth "specific factual allegations that allow a court to reasonably infer that a policy or practice exists and that the alleged policy or practice was the moving force" for the constitutional violation asserted. *Balle v. Nueces Cty. Tex.,* 690 F.App'x 847, 852 (5th Cir. 2017) (quoting *Spiller v. City of Tex. City Police Dep't,* 130 F.3d 162, 167 (5th Cir. 1997)). Finally, a Plaintiff must "sufficiently plead any causal connection between the alleged unconstitutional policy or custom and the harm alleged to have occurred." *Joiner v. Murphy,* 2016 WL 8792315 at *4 (S.D. Tex. Aug. 12, 2016) (quoting *Doe 1—Doe 10 v. City of Wichita Falls, Tex.,* No. 7-06CV-106-R, 2007 WL 959028 at *2 (N.D. Tex. Mar. 30, 2007)).

Plaintiff has not identified any specific policymaker in the City of Baytown. Instead all of his claims against the City are alleged without any degree of specificity. Moreover, Plaintiff fails to identify any official City of Baytown policy in his Amended Complaint. (*See* Doc. No. 14). Thus, to the extent that he pleads that municipal liability should attach on the basis of an official policy, the Court grants Defendants' Motion to Dismiss.

In the absence of an official policy, plaintiffs may also survive a Rule 12(b)(6) motion if they plead facts to infer that there existed "[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." *Hick-Fields v. Harris County, Tex.,* 860 F.3d 803, 808-09 (5th Cir. 2017).

The Fifth Circuit has previously found that establishing a pattern requires similarity, specificity, and sufficiently numerous prior incidents. *Davidson v. City of Stafford,* 848 F.3d 384, 396 (5th Cir. 2017). The Court finds that Plaintiff has failed to adequately plead these three requirements and thus has failed to plead facts establishing a pattern for municipal liability to attach to the City of Baytown.

First, Plaintiff has not pleaded sufficiently numerous prior incidents. When examining the numerosity requirement, courts place the alleged

constitutional violations in the context of the size of the police department and the corresponding time period. *see Davidson,* 848 F.3d at 96-97 (5th Cir. 2017) (three arrests over three and a half years did not establish a pattern of constitutional violations for the Stafford P.D.); *Peterson v. City of Fort Worth,* 588 F.3d 838, 851-52 (5th Cir. 2009) (holding 27 complaints of excessive force over a period of three years in a department with more than 1,500 officers did not constitute a pattern); *Pineda v. City of Houston,* 291 F.3d 325, 329 (5th Cir. 2002) (holding eleven incidents cannot support a pattern of illegality in Houston); *Moreno v. City of Dallas,* 2015 WL 3890467, at *9 (N.D. Tex. June 18, 2015) (granting motion to dismiss because "facts suggesting an average of less than two incidents of excessive force per year over the course of five years are not sufficient to indicate a pattern of abuses").

Here, although Plaintiff pleads five instances of where individuals have allegedly been bitten by K-9 spanning four years, this Court does not find that these instances give rise to "[a] persistent, widespread practice ... so common and well settled as to constitute a custom that fairly represents municipal policy." *Hick-Fields,* 860 F.3d at 808-09. As an initial matter, Plaintiff provides no evidence concerning any of the previous incidents, or that the other incidents, aside from White's, resulted in litigation alleging a constitutional violation. Seemingly, the only similarity is that a K-9 was deployed. Moreover, even taking Plaintiff's case into account, he can point to six total incidents

relating to a K-9 and the City of Baytown from 2018 to date. Based on existing case law, this is insufficient to satisfy the numerosity requirement.

Significantly, Plaintiff has failed to plead the other two requirements for pattern liability—specificity and similarity. Demonstrating a pattern requires similarity and specificity—prior indications cannot simply be for "any and all "bad" or unwise acts, but rather must point to the specific violation in question." *Peterson,* 588 F.3d at 851 (quoting *Estate of Davis ex rel. McCully v. City of N Richland Hills,* 406 F.3d 375,383 (5th Cir. 2005)).

Here, Plaintiff has failed to plead facts of the alleged violations with the required similarity. The Fifth Circuit requires prior instances to be sufficiently similar to the event that transpired in the current case. *Hicks-Fields,* 860 F.3d at 810. The facts that Plaintiff includes pertaining to each incident are scant at best. He pleads that five individuals were allegedly bitten by a City of Baytown K-9 (even when some of them were not brandishing a weapon). These are only broad and vague similarities, at best, to Plaintiff's case.

Plaintiff's allegations as they pertain to these other incidents are wholly lacking in the requisite specificity as well. Importantly, there is no description as to the conduct of the alleged victims. The Court is left wondering, for instance, if the other alleged victims in those other cases were also failing to follow an officer's instructions or if their

companions also reached into the area where the officer kept his weapon. In other words, Plaintiff's descriptions of the prior incidents only tell the Court that the individuals were bitten, that no officer was injured, and that some of the individuals were not brandishing a weapon. These descriptions result in more questions than they answer. The Court cannot assume that these prior incidents amounted to misconduct, much less constitutional violations, based upon these bare facts. Thus, Plaintiff's pattern theory of liability fails as he cannot show the prior incidents of alleged misconduct were sufficiently numerous, specific, or similar to his own.

Alternatively, Plaintiff seeks to impose municipal liability against the City based on a ratification theory, arguing that the City's failure to discipline Officer Calvert after this incident ratified his actions. (Doc. No. 25 at 21). The Supreme Court has provided that "if authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *City of St. Louis v. Praprotnik,* 485 U.S. 112, 127 L.Ed.2d 107 (1988). Nevertheless, the Fifth Circuit has repeatedly noted that the ratification theory has been limited to "extreme factual situations." *Peterson v. City of Fort Worth,* 588 F.3d 838, 848 (5th Cir.2009); *World Wide St. Preachers Fellowship v. Town of Columbia,* 591 F.3d 747, 755 (5th Cir. 2009). The subordinate's actions must be "sufficiently extreme—for instance, an obvious violation of

clearly established law" for ratification to establish an official policy or custom for purposes of municipal liability. *Id.* Here, Plaintiff has neither pleaded facts nor cited to legal authority supporting his assertion that Officer Calvert's conduct rises to the level of an "obvious violation of clearly established law."

Finally, this Court finds that Plaintiff has failed to "sufficiently plead any causal connection between the alleged unconstitutional policy or custom and the harm alleged to have occurred." *Joiner,* 2016 WL 8792315 at *4 (quoting *Doe 1—Doe 10,* 2007 WL 959028 at *2 (N.D. Tex. Mar. 30, 2007)). As noted previously, Plaintiff only pleads that the City of Baytown: (1) "did not have adequate written policies, nor did they train or supervise Calvert in the proper handling of a police dog," (2) "condoned and ratified the actions of Calvert by failing to discipline or retrain him," and that (3) has a "pattern, practice and custom of using a biting police dog to inflict injuries upon suspects even if they do not pose a threat" and to "punish them for not complying or for fleeing after they have complied." (*Id.*). These are conclusory statements that fail to allege a specific unconstitutional policy or custom that was the moving force in causing Plaintiff's injuries.

Accordingly, Plaintiff has failed to plead sufficient facts identifying a policymaker or an official policy that would give rise to municipal liability. Plaintiff has also failed to identify an unofficial custom or policy with sufficient

similarity and specificity that could give rise to a pattern of excessive force and has fallen short of identifying deliberate conduct that the City of Baytown engaged in that made them the moving force behind Plaintiff's injuries. Thus, Plaintiff's claims against the City of Baytown are hereby also dismissed.

IV. Conclusion

For the foregoing reasons, the Court hereby **GRANTS** Defendants' Motion to Dismiss

Signed at Houston, Texas, this 4th day of October, 2023

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