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

July 3, 2025

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-10369

GUADALUPE FRIAS; SHANNON MCKINNON,

Plaintiffs–Appellees,

versus

GENARO HERNANDEZ,

Defendant–Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:23-CV-550

Before JONES, OLDHAM, *Circuit Judges* and HENDRIX, *District Judge.*[*]

EDITH H. JONES, *Circuit Judge* :

Genaro Hernandez is a Dallas Police Department ("DPD") detective by day and private employee of the Stainback Organization by night. In August 2019, a shooting occurred outside the Stainback Organization's

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[*] District Judge of the Northern District of Texas, sitting by designation.

neighbor, a Dallas bar called The Green Elephant. Detective Hernandez allegedly inserted himself into the subsequent criminal investigation at the behest of his private employer to pursue a slew of bogus charges against plaintiff-appellees, the owner of and a hired security guard for The Green Elephant, neither of whom had anything to do with the shooting. Even if his questionable conduct stemmed from ulterior motive to benefit the Stainback Organization, Hernandez's acts fell within the heartland of his role as a detective. Because Texas law affords state actors broad immunity for acts objectively within the scope of their employment, regardless of their subjective intent, Hernandez is immune from suit. The district court's judgment denying dismissal of the plaintiffs' state-law claims must be REVERSED WITH INSTRUCTIONS TO DISMISS, and the case is REMANDED for further proceedings as to the plaintiffs' remaining federal claim.

I.

Plaintiff Shannon McKinnon owns The Green Elephant, a bar in Dallas. Plaintiff Guadalupe Frias is a Kaufman County constable who provides private security for The Green Elephant. In August 2019, a shooting occurred outside The Green Elephant. Plaintiffs called the police in the minutes after the shooting. Waiting for officers to arrive, plaintiffs searched the parking lot of The Green Elephant for evidence and picked up shell casings they had found. Police did not come to The Green Elephant until approximately one week later, when an officer took custody of the shell casings.

The plaintiffs' complaint alleges that, in the days following the shooting, Detective Genaro Hernandez of the DPD was "somehow" assigned to "follow up" on an investigation of criminal mischief related to damage to the Stainback Organization's property. Hernandez's method of assignment to the case was "abnormal," because he was neither dispatched to respond to the shooting nor assigned to the case by a supervisor. Nevertheless, Hernandez and another detective retrieved surveillance footage from a Stainback representative showing that the plaintiffs collected shell casings the night of the shooting. Hernandez took the footage to the DPD Special Investigation Unit ("SIU"), which handles incidents related to firearms. After reviewing the footage and related information, SIU investigators "found no criminal offense pertaining to [p]laintiffs" and "did not file any charges related to the shell casings[.]"

Despite the SIU's findings, the complaint alleges that Hernandez circumvented the DPD's charging process and brought the case directly to the Dallas County District Attorney's Office for prosecution. Hernandez did so even though he "knew that the SIU would not pursue charges" and that no evidence linked plaintiffs to the shooting. To that end, the complaint alleges that Hernandez submitted "reports and other writings" containing false or misleading statements and omissions to the DPD and Dallas County District Attorney. The reports failed to mention (1) the SIU investigation that found plaintiffs had committed no crime and recommended no charges, (2) plaintiffs' innocence of the shooting itself, and (3) Hernandez's conflict of interest arising from his employment relationship with the Stainback

Organization. As a result of the reports, McKinnon and Frias were indicted for the felony offense of tampering with evidence in June 2021.

In March 2022, Frias's case proceeded to trial. At trial, Hernandez's "ulterior motives" for investigating and pursuing charges against the plaintiffs came to light. While Hernandez worked during the week as a detective in the property crimes unit of the DPD, he spent his weekends working for the Stainback Organization. He was first told of the shooting by an individual associated with the Stainback Organization and "secretly inserted himself into the investigation." Hernandez sought to keep this connection secret and never informed the DPD of his employment relationship with the Stainback Organization. Hernandez "simply had another objective in mind" when investigating plaintiffs, ostensibly to benefit the Stainback Organization, which wanted "to be rid of" its neighbor, The Green Elephant. When Hernandez's relationship with the Stainback Organization was disclosed during Frias's trial, the District Attorney's Office dropped the case "in the interest of justice." Charges were also dropped against McKinnon.

Plaintiffs then sued Hernandez. Their complaint alleges federal claims under 42 U.S.C. § 1983 for false arrest and malicious prosecution and state law claims for malicious prosecution, false imprisonment, and civil conspiracy. Hernandez moved to dismiss all the claims against him. The district court granted Hernandez's motion to dismiss the federal malicious-prosecution claim based on qualified immunity. But the court denied his motion to dismiss the federal false-arrest claim, which

remains pending. The court denied his motion to dismiss the three state-law claims. Hernandez now appeals, arguing only that the district court erred in failing to dismiss the plaintiffs' state-law claims because he is entitled to governmental immunity under the Texas Tort Claims Act.

II.

The denial of state-law immunity in cases permissibly brought in federal court "is a collateral order, which this court has jurisdiction to review." *Smith v. Heap*, 31 F.4th 905, 910 (5th Cir. 2022). "[A]n order denying [] immunity under state law is immediately appealable as a 'final decision,' provided that 'the state's doctrine of [] immunity. . . provides a true immunity from suit and not a simple defense to liability.'" *Cantu v. Rocha*, 77 F.3d 795,803 (5th Cir. 1996) (quoting *Sorey v. Kellett*, 849 F.2d 960, 962 (5th Cir. 1988)). When applicable, § 101.106(f) of the Texas Tort Claims Act renders officers "immune from suit." *McFadden v. Olesky*, 517 S.W.3d 287, 294–95 (Tex. App. —Austin 2017, pet. denied). The denial of state-law immunity in this case is therefore immediately appealable under the collateral-order doctrine. *See Wilkerson v. Univ. of N. Tex. ex rel. Bd. of Regents*, 878 F.3d 147, 154 (5th Cir. 2017).

The district court's partial denial of the motion to dismiss is reviewed "*de novo*, accepting all well-pled facts as true and viewed in the light most favorable to the plaintiffs." *Espinal v. City of Houston*, 96 F.4th 741, 745 (5th Cir. 2024) (citation omitted).

III.

Section 101.106(f) of the Texas Tort Claims Act "affords state employees governmental immunity." *Wilkerson*, 878 F.3d at 159. "When it applies, §101.106(f) 'mandates[] plaintiffs to pursue lawsuits against governmental units rather than their employees,' and entitles the employee 'to dismissal' of the relevant tort claim." *Id.* (internal citations omitted). The section states:

> 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). "More succinctly, a defendant is entitled to dismissal upon proof that the plaintiff's suit is (1) based on conduct within the scope of the defendant's employment with a governmental unit and (2) could have been brought against the governmental unit under the [Texas] Tort Claims Act." *Laverie v. Wetherbe*, 517 S.W.3d 748, 752 (Tex. 2017) (citations omitted). This court may dismiss claims on the

pleadings when the facts alleged establish that the conduct at issue fell within the scope of employment. *See Heap*, 31 F.4th at 913–14.

We hold, as further explained, that Hernandez's conduct was "within the general scope of [his] employment." *Wilkerson*, 878 F.3d at 161. And it is undisputed that plaintiffs' tort claims for malicious prosecution, false imprisonment, and conspiracy "could have been brought" against the City of Dallas. *Franka v. Velasquez*, 332 S.W.3d 367, 381 (Tex. 2011).

The Act 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 or about the performance of a task lawfully assigned to an employee by competent authority." TEX. CIV. PRAC. & REM. CODE § 101.001(5).

The Texas Supreme Court's decision in *Laverie* erected the signposts applicable here. Whether an individual acted within the scope of employment "calls for an objective assessment of whether the employee was doing her job when she committed an alleged tort, not her state of mind when she was doing it." *Laverie*, 517 S.W.3d at 753 (citing TEX. CIV. PRAC. & REM. CODE § 101.001(5)). The inquiry asks only whether "there [is] a connection between the employee's job duties and the alleged tortious conduct[.]" *Id.* "So long as it falls within the duties assigned, an employee's conduct is within the scope of employment, even if done in part to serve the purposes of the employee or a third person." *Id.* (quoting *Anderson v. Bessman*, 365 S.W.3d 119, 125–26 (Tex. App.

—Houston [1st Dist.] 2011, no pet.)). Even if a private employer "direct[s] the actions" of an employee and the employee "acts consistent with his private employer's directions . . . 'co-existing motivations do not remove an employee's actions from the scope of his [governmental] employment so long as the conduct serves a purpose of the [governmental] employer.'" *Seward v. Santander*, ___ S.W.3d ___, No. 23-0704, 2025 WL 1350133, at *9 (Tex. May 9, 2025) (citations omitted) (alterations in original). Finally, "references to intent and purpose simply reflect that an employee whose conduct is unrelated to his job, and therefore objectively outside the scope of his employment, is engaging in conduct for his own reasons." *Laverie*, 517 S.W.3d at 754. "This is not tantamount to a threshold requirement that government-employee defendants conclusively prove their subjective intent to establish they acted in the scope of their employment." *Id.*; *see also Garza v. Harrison*, 574 S.W.3d 389, 400 (Tex. 2019) ("Conduct falls outside the scope of employment when it occurs 'within an independent course of conduct not intended by the employee to serve *any* purpose of the employer.'" (emphasis in original) (citations omitted)). But "the employee's state of mind, motives and competency are irrelevant[.]" *Garza*, 574 S.W.3d at 401.[1]

[1] This court has similarly employed a broad standard under the statute. "The employee's acts must be of the same *general nature* as the conduct authorized or incidental to the conduct authorized to be within the scope of employment." *Wilkerson*, 878 F.3d at 159 (emphasis in original) (citations omitted). And the "issue is not whether the government employee had authority to commit the allegedly tortious act," or violated internal policies or procedures, but

"[Hernandez's] personal motivations. . . ultimately do not change h[is] job responsibilities[.]" *Laverie*, 517 S.W.3d at 755. Hernandez acted within the scope of his employment because there is a connection between the duties of his job and his allegedly tortious conduct. Hernandez's assignment to the case and investigation of the plaintiffs fell within the scope of his employment, even if he violated a swath of internal DPD policies by inserting himself into the investigation, concealing his conflict of interest, and acting to benefit his private employer. Numerous Texas authorities confirm that Hernandez's "general conduct was within the scope of employment," even if the "specific act[s]" alleged in the complaint were "somehow wrongful." *Fink v. Anderson*, 477 S.W.3d 460, 470 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *see also Alexander v. Walker*, 435 S.W.3d 789, 792 (Tex. 2014) (in evaluating whether officers sued for assault were acting within scope of employment, generally considering act of securing an arrest instead of tort-based act of assaulting arrestee).

More specifically, "an officer's scope of employment includes . . . investigating [and] arresting[.]" *Rivera v. Garcia*, 589 S.W.3d 242, 249 (Tex. App.—San Antonio 2019, no pet.); *see also Ogg v. Dillard's Inc.*, 239 S.W.3d 409, 419 (Tex. App—Dallas 2007, pet. denied); *Harris County v. Gibbons*, 150 S.W.3d 877, 883 n.7 (Tex. App.—Houston [14th Dist.] 2004, no pet.). Hernandez was assigned to and did investigate criminal activity, and he took a case to the District Attorney's Office to pursue charges for tampering with evidence. TEX. PENAL CODE

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whether he was "discharging the duties generally assigned to [him]." *Id.* at 161 (citation omitted).

§ 37.09. Indeed, the District Attorney's Office brought charges against the plaintiffs and took the case to trial. When an officer enforces "general laws," he is performing a public duty and acting within the scope of his employment. *Garza*, 574 S.W.3d at 403. Why Hernandez took certain actions during the investigation implicated his subjective intent, an inquiry that Texas law explicitly bars. *See Laverie*, 517 S.W.3d at 755. Even if the Stainback Organization "directed [Hernandez's] actions," his conduct still fell within the scope of his employment because it "serve[d] a purpose" of the DPD. *Seward*, ___ S.W.3d at ___, 2025 WL at *9.

Plaintiffs' arguments to the contrary misapply the law and precedents. They contend that Hernandez was never "lawfully assigned to do anything with respect to this matter" because he violated the DPD's case assignment policy and therefore could not have acted within the scope of his employment. This argument erroneously narrows the statutory "scope of employment," which includes "being *in or about* the performance of a task lawfully assigned to an employee." TEX. CIV. PRAC. & REM. CODE § 101.001(5) (emphasis added). The issue is not whether Hernandez was properly assigned to investigate this matter, but whether his acts were "of the same general nature as the conduct authorized or incidental to the conduct authorized" by his employment. *Laverie*, 517 S.W.3d at 753 (citation omitted). Even if Hernandez's involvement in the plaintiffs' criminal investigation, from his assignment to his charging recommendation, violated DPD internal policy, "the fact remains that [plaintiffs were] being investigated for a crime[.]" *Ogg*, 239 S.W.3d at 419; *see also Gibbons*, 150

S.W.3d at 883, 883 n.7 (off-duty officer acted within the scope of his employment when he initiated a license check because it constituted an "investigation" and a "private individual would not have had the ability to run a license check"). Conduct incidental to such an investigation is related to Hernandez's employment as a detective. *See Rivera*, 589 S.W.3d at 249. In fact, plaintiffs' injuries stem from Hernandez's misuse of his power *as a detective in the property crimes division* to bring the weight of the District Attorney's Office to bear against them. Hernandez could not facilitate such a prosecution "while acting ultra vires and in a personal capacity." *Wilkerson*, 878 F.3d at 160.

Second, Hernandez acted within the scope of his employment when he allegedly provided misleading information in affidavits and reports relevant to the charging decisions of the DPD and District Attorney's Office. Hernandez did not detail the SIU's investigation, misrepresented the plaintiffs' involvement in the shooting, and failed to disclose his conflict of interest. But preparing reports and affidavits for charging decisions is directly related to Hernandez's duty to investigate and prosecute crime. *See McFadden*, 517 S.W.3d at 297 (officers acted within the scope of their employment when preparing an arrest affidavit with false information because they "were acting in their capacities as . . . officers and discharging the duties assigned to them"); *Donohue v. Butts*, 516 S.W.3d 578, 582 (Tex. App.—San Antonio 2017, no pet.) ("falsif[ying] documents in furtherance of [a] prosecution . . . [is] conduct within the general scope of [an officer's] employment").

The plaintiffs also contend, and the district court held, that when "there is no immediate crime and the off-duty officer is protecting a private employer's property or otherwise enforcing a private employer's rules or regulations, the trier of fact determines whether the officer was acting as a public officer or as a servant of the employer." *Gibbons*, 150 S.W.3d at 882 (citations omitted). According to the court, "it remains unclear what capacity Officer Hernandez was acting in at the time he committed the alleged acts." We disagree. The complaint never alleges that Hernandez acted while "off-duty." *Gibbons*, 150 S.W.3d at 882. Nor does it allege that Hernandez was being paid by the Stainback Organization when he investigated the plaintiffs' conduct, collected evidence, brought the evidence to the SIU, or recommended charges to the District Attorney's Office. Rather, the complaint alleges that Hernandez was motivated to act by a Stainback representative and used his authority as a detective to act for the benefit of the Stainback Organization. Regardless of motive, these were acts that only a detective, not a private citizen, could undertake. *See Gibbons*, 150 S.W.3d at 883, 883 n.7; *Seward*, ___ S.W.3d at ___, 2025 WL at *9. As numerous authorities cited above demonstrate, Hernandez acted within the scope of his employment for purposes of the Texas Tort Claims Act.

IV.

We do not condone the actions of Detective Hernandez as pled, but regardless of his motives, the alleged conduct falls squarely within the scope of his employment with the Dallas Police Department. The judgment

of the district court as to the plaintiffs' state-law claims is accordingly REVERSED WITH INSTRUCTIONS TO DISMISS THOSE CLAIMS, and the case is REMANDED for further proceedings on plaintiffs' remaining federal claim.

ANDREW S. OLDHAM, *Circuit Judge*, concurring:

I fully concur in the majority's excellent opinion. But I am troubled by our court's longstanding extension of the collateral-order doctrine to state-law immunities.

I

In 1891, Congress created the courts of appeals and granted them jurisdiction over "final decision[s]." Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891); *see also* Act of June 25, 1948, ch. 83, § 1291, 62 Stat. 929, 929 (codified at 28 U.S.C. § 1291) (changing the language to "final decisions"). About 60 years later, the Supreme Court offered an interpretation of the finality requirement that has since become known as the collateral-order doctrine. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The collateral-order doctrine teaches that decisions are final and thus appealable if they are "conclusive," "resolve important questions separate from the merits," and are "effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quotation omitted).

The Supreme Court has emphasized that the collateral-order doctrine is not expansive. *See Cohen*, 337 U.S. at 546 (explaining that only a "small class" of decisions that are not final judgments are immediately appealable). And the Court has reiterated this point in recent years: "In case after case in year after year, the Supreme Court has issued increasingly emphatic instructions that the class of cases capable of satisfying this 'stringent' test should be understood as 'small,' 'modest,'

and 'narrow.'" *United States v. Wampler*, 624 F.3d 1330, 1334 (10th Cir. 2010) (Gorsuch, J.) (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994); *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995); *Will v. Hallock*, 546 U.S. 345, 350 (2006); *Mohawk*, 558 U.S. at 113). The strength of these instructions is hard to overstate. *See, e.g.*, *Will*, 546 U.S. at 350 ("[W]e have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope," and "we have meant what we have said. . . ."); *Mohawk*, 558 U.S. at 113 ("[W]e reiterate that the class of collaterally appealable orders must remain narrow and selective in its membership." (quotation omitted)).

The Supreme Court has pointed to rulemaking, rather than judicial decisions, as the ordinary method to permit immediate appeals of classes of orders not already recognized by the Court. In 1990, Congress authorized the Supreme Court to use rulemaking to "define when a ruling of a district court is final" under § 1291. 28 U.S.C. § 2072(c). Then in 1992, Congress further empowered the Court to create rules "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under" under § 1292. *Id.* § 1292(e). Since the enactment of these statutes, the Court has suggested that "further avenue[s] for immediate appeal of" rulings that fall outside of current Supreme Court precedent should usually "be furnished. . . through rulemaking" by the Court. *Mohawk*, 558 U.S. at 114. *Accord Swint*, 514 U.S. at 48; *Cunningham v. Hamilton County*, 527 U.S. 198, 210 (1999); *Microsoft Corp. v. Baker*, 582 U.S. 23, 39–40 (2017).

II

This background informs my concern about treating the denial of state-law immunities as immediately appealable. True, our court has long exercised interlocutory appellate jurisdiction over orders denying certain state-law immunities. *See Sorey v. Kellett*, 849 F.2d 960, 961 (5th Cir. 1988). But that precedent is ripe for reconsideration.

A

There are three straightforward reasons why the collateral-order doctrine should not extend to the denial of state-law immunities.

First, we have repeatedly held that States cannot "enlarge or contract federal jurisdiction." *Anthology, Inc. v. Tarrant Cnty. Coll. Dist.*, 136 F.4th 549, 553 (5th Cir. 2025) (quoting *Tercero v. Tex. Southmost Coll. Dist.*, 989 F.3d 291, 298 (5th Cir. 2021)). That is a job the Constitution leaves exclusively to the American people's representatives. *See ibid.* (citing *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850)). Extending the collateral-order doctrine to state-law immunities is in tension with this basic principle. Why? It essentially allows States to control our jurisdiction. If a State recognizes an immunity from suit, we have appellate jurisdiction; if a State treats the immunity as one from liability, we lack appellate jurisdiction. That is worrisome, to say the least.

Second, the Supreme Court has never held that state-law immunities trigger the collateral-order doctrine. *See* Adam Reed Moore, *A Textualist Defense of a*

New Collateral Order Doctrine, 99 N.D. L. REV. REFLECTION 1, 9 (2023) (listing the immunities from suit the Court has recognized as immediately appealable, none of which derive from state law). Nor has the Court enacted a rule permitting immediate appeal of state-law immunities. The Court has indicated a general unwillingness to expand the class of collateral orders. *See, e.g., Mohawk*, 558 U.S. at 113–14. And it is hard to imagine that state-law immunities, which effectively allow States to define our appellate jurisdiction, overcome this skepticism.

Third, the Supreme Court has indicated that only rights resting on an "explicit" *federal* "statutory or constitutional guarantee" are sufficient. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989); *see also Digital Equip.*, 511 U.S. at 874, 880 n.8.[1] Obviously, state-law immunities do not derive from a federal statute or the federal constitution. So they do not justify "piecemeal, prejudgment appeals." *Mohawk*, 558 U.S. at 106.

[1] A classic example is the set of immunities afforded to the President, who has a "unique position in the constitutional scheme." *Trump v. United States*, 603 U.S. 593, 635–37 (2024) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)). As "the only person who alone composes a branch of government," *id.* at 610 (quotation omitted); *see also id.* at 639 ("[U]nlike anyone else, the President is a branch of government."), the President is granted special "[s]olicitude" in seeking "immediate appellate review," *Dellinger v. Bessent*, No. 25-5028, 2025 WL 559669, at *12 (D.C. Cir. February 15, 2025) (Katsas, J., dissenting).

We have no basis for saying that the denial of a state-law immunity justifies immediate appeal under the Supreme Court's current doctrine.[2]

B

So how has our precedent addressed these concerns? Like the proverbial ostrich with its head in the sand, our cases have responded to precisely zero of them. Instead, they have offered the following argument.

> P1: Denials of immunities from suit are collateral orders.
>
> P2: State law defines whether a state-recognized immunity is from suit or liability.
>
> ∴ When state law defines an immunity as one from suit, the denial of such immunity is immediately appealable under the collateral-order doctrine.

See, *e.g.*, *Sorey*, 849 F.2d at 961–63; *see ante*, at 4–5.

Both premises are doubtful.

Start with the first premise. Not all so-called "immunities from suit" qualify for immediate appeal. Under Supreme Court precedent, "only some" immunities from suit warrant collateral-order status: "[I]t is not mere

[2] My concerns are especially pronounced in this case. The only issue in this appeal is the denial of a state-law immunity. But the only reason this claim can be in federal court at all is because of the federal claims *not* in this appeal. *See* 28 U.S.C. § 1367.

avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts." *Will*, 546 U.S. at 351, 353; *see also Digital Equip.*, 511 U.S. at 877, 884 (holding that alleged immunity from suit was not a collateral order because it did "not rise to the level of importance needed for recognition under § 1291"). Thus, "the *only* time a claimed right not to stand trial will justify immediate appellate review under *Cohen* is when a statutory or constitutional provision guarantees that claimed right." *McClendon v. City of Albuquerque*, 630 F.3d 1288, 1295–96 (10th Cir. 2011) (Gorsuch, J.) (quotation omitted); *accord Wampler*, 624 F.3d at 1335–36.[3]

Now consider the second premise. Regardless of how States characterize their immunities—whether from suit or liability—federal appellate courts have a duty to decide for themselves how a right is characterized for purposes of the collateral-order doctrine. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 201 (1988). The Supreme Court has "acknowledged that virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial'" or an immunity from suit. *Digital Equip.*, 511 U.S. at 873. So because "there is no single, 'obviously correct way to characterize' an asserted right," the Court has "held that § 1291 requires *courts of*

[3] To make matters worse, in some States, a denial of certain state-law immunities is not immediately appealable. *See*, *e.g.*, *Sorey*, 849 F.2d at 962. If a particular state-law immunity is not important enough for the State's own courts to hear an immediate appeal, it cannot be of such overwhelming importance that it demands immediate appeal in federal court. *But see id.* at 962–63.

appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Ibid.* (emphasis added) (quoting *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 500 (1989)). In other words, it is *our* duty to determine if some right is a right not to be tried. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 524–25 (1988); *cf. Anthology*, 136 F.4th at 553 (explaining that federal courts are not always bound by how state courts "treat their own state-law immunities"). Our precedents in this area have shirked that duty. At an appropriate time, we should reconsider them.

Appendix B

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

September 4, 2025

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-10369

GUADALUPE FRIAS; SHANNON MCKINNON,

Plaintiffs–Appellees,

versus

GENARO HERNANDEZ,

Defendant–Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:23-CV-550

ON PETITION FOR REHEARING EN BANC

Before Jones, Oldham, *Circuit Judges* and Hendrix, *District Judge.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc

(FED. R. APP. P. 40 and 5TH CIR. R. 40), the petition for rehearing en banc is DENIED.

Appendix C

Order of the United States District Court
for the Northern District of Texas

November 6, 2023

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GUADALUPE FRIAS, et al., Plaintiffs,	§	
VS.	§	Civil Action No. 3:23-CV-0550-D
GENARO HERNANDEZ et al., Defendants.	§	

MEMORANDUM OPINION
AND ORDER

This is an action by plaintiffs Guadalupe Frias ("Frias") and Shannon McKinnon ("McKinnon") against defendant Genaro Hernandez ("Officer Hernandez"), the City of Dallas, and John Does alleging a federal-law claim for false arrest under 42 U.S.C. § 1983 and state-law claims. Officer Hernandez moves to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief can be granted. For the reasons that follow, the court grants Officer Hernandez's motion to dismiss as to plaintiffs' federal-law false arrest claim, declines to reach the motion as to plaintiffs' state-law claims, and grants plaintiffs leave to replead.

Appendix C

I

Plaintiff McKinnon owns and operates a live music venue, the Green Elephant.[1] Plaintiff Frias is a Texas peace officer employed by the Green Elephant to provide security for the venue. Defendant Officer Hernandez is a police officer employed in the Dallas Police Department ("DPD") Property Crimes Division. Outside of his work for the City as a police officer, Officer Hernandez coordinates security for the Stainback Organization, a neighboring business of the Green Elephant.

On August 4, 2019 a disturbance occurred in the parking lot of the Green Elephant that led to shots being fired. Plaintiffs and other staff members investigated and were told that the police had been called. When no DPD units arrived, plaintiffs began searching the parking lot for shell casings and any other items that could be preserved for the authorities. McKinnon picked up shell casings and placed them in a cup before returning with the items to the Green Elephant to await the police. No police came that night, but approximately one week later a DPD officer arrived at the Green Elephant and took custody of the shell casings.

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[1] "In deciding a Rule 12(b)(6) motion to dismiss, the court evaluates the sufficiency of [the plaintiffs'] complaint by 'accept[ing] all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *Bramlett v. Med. Protective Co. of Fort Wayne, Ind.*, 855 F.Supp.2d 615, 618 (N.D. Tex. 2012) (Fitzwater, C.J.) (second alteration in original) (internal quotation marks omitted) (quoting *In re Katrina Canal Breaches Litig.*, 495 F. 3d 191, 205 (5th Cir. 2007)).

Following the incident, the Stainback Organization asserted that gunshots from that night had damaged its property. On August 6, 2019 Officer Hernandez was assigned to follow up on an investigation of criminal mischief related to the property damage claimed by the Stainback Organization. After reviewing surveillance video that showed plaintiffs responding to the incident and later retrieving the shell casings, Officer Hernandez provided the video to the DPD Special Investigation Unit ("SIU").[2] The SIU determined that plaintiffs had not been involved in the shooting and did not file any charges related to the shell casings that McKinnon had retrieved. Two years later, however, plaintiffs were indicted for the felony offense of tampering with evidence, related to their actions on the night of August 4, 2019.[3]

On March 22, 2022 Frias' case proceeded to trial. Officer Hernandez acknowledged during his trial testimony that neither plaintiff had been involved in the shooting or the criminal mischief associated with a broken window. It was revealed that Officer Hernandez was regularly employed by the Stainback Organization. This relationship had not been disclosed to the DPD, in violation of DPD General Orders, which require disclosure of any conflicts of interest with a private employer.[4]

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[2] The SIU is responsible for investigating incidents involving firearms.

[3] McKinnon and Frias were indicted in June 2021, and in September 2021 they turned themselves in.

[4] Plaintiffs maintain that Officer Hernandez's pursuit of criminal charges violated the following provisions of § 421.00 of DPD's General Orders: § 421.01 (stating that an officer working off duty is held to the same standard that applies on duty hours); § 421.03F

It was also discovered that Officer Hernandez's involvement with the case began when he received a cell phone call from property manager Suzi Faaitiiti ("Faaitiiti"), an affiliate of the Stainback Organization, about the incident. On the call, Officer Hernandez told Faaitiiti not to communicate with third parties about the matter. Officer Hernandez received a second call from Faaitiiti a few days later in which she reported receiving another shell casing, but the person who collected that shell casing was not charged. After this information came to light, the Assistant District Attorney moved to dismiss the criminal prosecution against Frias, and, on April 21, 2022, the criminal case against McKinnon was also dismissed. This lawsuit followed. Officer Hernandez moves to dismiss for failure to state a claim on which relief can be granted.

II

Under Rule 12(b)(6), the court evaluates the pleadings by "accept[ing] 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). To survive defendant's motion to dismiss, Frias and McKinnon must allege enough facts "to state a claim to

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(stating that "[n]o member of the department will engage in any off-duty employment where his/her official position might be used to advance private interests or to damage the department's credibility."); and § 421.03J (stating that an employee working off duty shall not use his employment with the City of Dallas to provide information to an off duty employer not available to the general public).

relief that is plausible on its face." *Bell Atl. Corp. 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, 678 (2009).

"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.*; *see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level[.]"). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (alteration omitted) (quoting Rule 8(a)(2)).

Furthermore, under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' " it demands more than " labels and conclusions." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). And "a formulaic recitation of the elements of a cause of action will not do." *Id.* (quoting *Twombly*, 550 U.S. at 555). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citation omitted).

III

The court begins with plaintiffs' claim under 42 U.S.C. § 1983 for false arrest.

A

Officer Hernandez moves to dismiss plaintiffs' 42 U.S.C. § 1983 false arrest claim on the ground that plaintiffs have failed to adequately plead facts from which the court can reasonably infer a violation of plaintiffs' Fourth Amendment right to be free from arrest without probable cause. According to Officer Hernandez, plaintiffs' "shotgun-pleading" is "entirely boilerplate" and does not provide sufficient details to state a claim, such as when plaintiffs were arrested or the criminal offenses with which they were charged; plaintiffs have failed to allege specific unconstitutional acts taken by Officer Hernandez in connection with their arrest (the complaint fails to show that the charging decision was impacted by any false information because it does not allege what facts were fabricated, how they were relied on to bring a criminal charge, and how those facts were false); and even if the complaint had alleged specific facts, the facts that are pleaded show that there was probable cause to arrest plaintiffs, so they cannot assert a plausible Fourth Amendment claim for unreasonable seizure.

Plaintiffs respond that their complaint pleads sufficient facts to establish there was no probable cause to charge them; that the evidence details that McKinnon lacked the criminal intent necessary for a charge of tampering with evidence and Frias committed no culpable

act; and that Officer Hernandez's actions were not objectively reasonably and he took *ultra vires* steps to circumvent the decision of reasonable officers that there was no probable cause to arrest plaintiffs.

Officer Hernandez replies that the facts alleged in the complaint show that there was probable cause for the crime of tampering with evidence, and plaintiffs' reliance on suspicious circumstances is not sufficient for a constitutional claim; that an officer's specific motivation at the time of the arrest is not the inquiry nor does it matter that plaintiffs had an explanation for removing the shell casings; and that his alleged violation of DPD rules is misplaced because the Fourth Amendment does not encompass workplace rules.[5]

B

To prevail on a § 1983 claim for false arrest, a plaintiff must show that he was arrested without probable cause, in violation of the Fourth Amendment. *Parm v. Shumate*, 513 F.3d 135, 142 (5th Cir. 2007). The independent intermediary doctrine is relevant when the plaintiff's

[5] Officer Hernandez contends that plaintiffs' response violates two local rules: First, it fails to comply with N.D. Tex. Civ. R. 15.1 because plaintiffs asked for leave to amend the pleadings but failed to attach a proposed motion as an exhibit; and, second, part of the response violated Rule 7.2(a) because the font is too small. Although this court sometimes cautions that the "[f]ailure to comply with a local civil rule of this court is to be carefully avoided and should not be repeated," *Obregon v. Melton,* 2022 WL 1792086, at *1 n.3 (N.D. Tex. Aug. 2, 2002) (Fitzwater, J.), plaintiffs' failure to follow the local rules has not interfered with the court's decisional process. Accordingly, the court will not deny relief to plaintiffs based on their failure to adhere to these local rules.

claim depends on a lack of probable cause to arrest him. *Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 553 (5th Cir. 2016). Under this doctrine, "even an officer who acted with malice in procuring the warrant or the indictment will not liable if the facts supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or a grand jury, for that intermediary's 'independent' decision 'breaks the causal chain' and insulates the initiating party." *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988) (quoting *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982)). The causal chain remains intact if "it can be shown that the deliberations of that intermediary were in some way tainted by the actions of the defendant." *Id.* at 1428. This doctrine applies even if the arrestee was never convicted of any crime. *Buehler*, 824 F.3d at 554; *see also Smith*, 670 F.2d at 526 (stating that "[t]he constitution does not guarantee that only the guilty will be arrested").

C

At the motion to dismiss stage, plaintiffs "must bring specific, nonspeculative allegations that the defendant deliberately or recklessly provided false information to the independent intermediary" to overcome the independent-intermediary doctrine. *Poullard v. Jones*, 596 F.Supp.3d 729, 738 (N.D. Tex. 2022) (Boyle, J.); *see also McLin v. Ard*, 866 F.3d 682, 690 (5th Cir. 2017) (stating that mere allegations of taint may be adequate to survive where the complaint alleges other specific facts that support the inference).

In the present case, because the grand jury indicted plaintiffs, they must show (and at the Rule 12(b)(6) stage must plausibly plead) that Officer Hernandez tainted the grand jury deliberations in some way to overcome the independent-intermediary doctrine. The complaint alleges that Officer Hernandez and/or other defendants:

> deliberately fabricated facts and/or omitted material facts that caused Plaintiffs to be charged wrongfully with a criminal offense. Defendant's or Defendants' actions were made fraudulently, maliciously, intentionally, knowingly, recklessly, and with plain incompetence. He or they likewise made several intentional, knowing or reckless statements of fact in reports and other writings upon which public officials relied and would have relied to seek the prosecution of Plaintiffs. Defendant knew that others would rely on these reports, affidavits, or supplemental reports in rendering charging decisions.

Compl. (ECF No. 1) at 8, ¶ 21. These allegations are insufficient legal conclusions. The complaint is devoid of any specific allegations or facts that enable the court to draw the reasonable inference that Officer Hernandez provided false information to the grand jury. Accordingly, even when viewing the allegations of the complaint in the light most favorable to plaintiffs and all reasonable inferences are drawn in their favor, plaintiffs have failed to allege sufficient facts to state a plausible

false arrest claim under 42 U.S.C. § 1983 against Officer Hernandez.

Accordingly, the court grants Officer Hernandez's motion to dismiss plaintiffs' false arrest claim under 42 U.S.C. § 1983.

IV

Although the court is granting Officer Hernandez's motion to dismiss, it will allow plaintiffs to replead.

> [I]n view of the consequences of dismissal on the complaint alone, and the pull to decide cases on the merits rather than on the sufficiency of pleadings, district courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal.

In re Am. Airlines, Inc., Privacy Litig., 370 F.Supp.2d 552, 567–68 (N.D. Tex. 2005) (Fitzwater, J.) (quoting *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002)). Because plaintiffs have not stated that they cannot, or are unwilling to, cure the defects that the court has identified, it grants them 28 days from the date this memorandum opinion and order is filed to file a first amended complaint.

V

Plaintiffs also bring state-law claims against Officer Hernandez for malicious prosecution, false imprisonment, and civil conspiracy, which he moves to dismiss. The court declines to reach this part of Officer Hernandez's motion.

Although this court can exercise supplemental jurisdiction over the state-law claims under 28 U.S.C. § 1367(a), in this circuit "[t]he general rule is that a court should decline to exercise jurisdiction over remaining state-law claims when all federal-law claims are eliminated before trial." *Brookshire Bros. Holding, Inc. v. Dayco Prods., Inc.*, 554 F.3d 595, 602 (5th Cir. 2009). Because the court is dismissing plaintiffs' federal-law claim, in its discretion it would also decline to exercise supplemental jurisdiction over the state-law claims. There is therefore no need for the court to address the part of Officer Hernandez's motion that seeks dismissal of the state-law claims on the merits.

* * *

Accordingly, for the reasons explained, the court grants Officer Hernandez's August 17, 2023 motion to dismiss as to plaintiffs' federal-law claim, declines to reach the motion as to plaintiffs' state-law claims, and grants plaintiffs leave to replead.

SO ORDERED.

November 6, 2023.

SIDNEY A. FITZWATER
SENIOR JUDGE

Appendix D

Order of the United States District Court
for the Northern District of Texas

March 22, 2024

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GUADALUPE FRIAS, et al., Plaintiffs,	§	
VS.	§	Civil Action No. 3:23-CV-0550-D
GENARO HERNANDEZ et al., Defendants.	§	

MEMORANDUM OPINION
AND ORDER

This is an action by plaintiffs Guadalupe Frias ("Frias") and Shannon McKinnon ("McKinnon") against defendants Genaro Hernandez ("Officer Hernandez"), the City of Dallas, and John Does alleging federal-law claims under 42 U.S.C. § 1983 for false arrest and malicious prosecution, in violation of the Fourth Amendment, and supplemental state-law claims. Officer Hernandez moves to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief can be granted. For the reasons that follow, the court grants Officer Hernandez's motion to the extent it seeks dismissal of plaintiffs' malicious prosecution claim under § 1983, and denies the motion to the extent it seeks dismissal of plaintiffs' false-arrest claim under § 1983 and state-law claims.

Appendix D

I

The relevant background facts of this case are largely set out in a prior memorandum opinion and order, *see Frias v. Hernandez*, 2023 WL 7311193, at *1 (N.D. Tex. Nov. 6, 2023) (Fitzwater, J.), and need not be repeated at length for purposes of deciding Officer Hernandez's motion to dismiss. After the court granted Officer Hernandez's previous motion to dismiss, plaintiffs timely filed a first amended complaint ("amended complaint") that alleges federal-law claims for false arrest and malicious prosecution, and state-law claims for malicious prosecution, false imprisonment, and civil conspiracy.

Plaintiffs' amended complaint includes additional allegations that Officer Hernandez's misrepresentations and omissions misled the assistant district attorney ("Assistant DA") and the grand jury.[1] Officer Hernandez's alleged misrepresentations and omissions include the following: Officer Hernandez knew that the Dallas Police Department's ("DPD's") Special Investigation Unit ("SIU") found "no direct evidence" linking plaintiffs to the shooting and determined that there was no probable cause to charge plaintiffs with a crime; Officer Hernandez knew that plaintiffs did not have "any actual connection" to the person who discharged the firearm that damaged the Stainback Organization's property;

[1] In deciding Officer Hernandez's Rule 12(b)(6) motion, the court construes plaintiffs' amended complaint in the light most favorable to them, accepts as true all well-pleaded factual allegations, and draws all reasonable inferences in plaintiffs' favor. *See, e.g.*, *Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 437 (5th Cir. 2004).

and Officer Hernandez "intentionally, knowingly, and recklessly" failed to disclose his employment relationship with Suzi Faaitiiti ("Faaitiiti"), who asserted that gunshots from that night had damaged the Stainback Organization's property, and "omitted or misrepresented" Faaitiiti's role at the Stainback Organization, a neighboring competitor of plaintiffs' business.

Plaintiffs contend that, but for Officer Hernandez's misrepresentations and omissions, the Assistant DA would not have presented the criminal charges to the grand jury. Officer Hernandez testified at trial regarding his employment relationship with the Stainback Organization and admitted he knew that DPD's General Orders required him to disclose conflicts of interest arising from off-duty employment. After Officer Hernandez was cross-examined regarding his conflict of interest, plaintiffs' defense attorney conferred with the Assistant DA and a supervisor. The supervisor communicated to plaintiffs' defense attorney that if the prosecutor had known about Officer Hernandez's employment relationship with the Stainback Organization, the prosecutor would not have submitted criminal charges to a grand jury or taken plaintiffs into custody. After this conference, the Assistant DA moved to dismiss the criminal charges against plaintiffs "in the interest of justice." Plaintiffs therefore allege false arrest and malicious prosecution claims under § 1983 and state tort claims on the ground that Officer Hernandez did not provide the Assistant DA, DPD officers, or the grand jury with information regarding his off-duty employment and thus the grand jury proceedings and the resulting indictment are tainted.

Officer Hernandez now moves to dismiss plaintiffs' amended complaint under Rule 12(b)(6) for failure to state a claim on which relief can be granted. The court is deciding the motion on the briefs, without oral argument.

II

"In deciding a Rule 12(b)(6) motion to dismiss, the court evaluates the sufficiency of plaintiffs' amended complaint by 'accept[ing] all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *Bramlett v. Med. Protective Co. of Fort Wayne, Ind.*, 855 F.Supp.2d 615, 618 (N.D. Tex. 2012) (Fitzwater, C.J.) (second alteration in original) (internal quotation marks omitted) (quoting *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007)). To survive a Rule 12(b)(6) motion to dismiss, the plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 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, 678 (2009). "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.*; *see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level[.]"). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.'" *Iqbal*,

556 U.S. at 679 (alteration omitted) (quoting Rule 8(a)(2)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678.

III

The court first turns to plaintiffs' false arrest claim under § 1983.[2]

A

Officer Hernandez contends that plaintiffs' amended complaint fails to state a false arrest claim because it does not allege that he fabricated evidence, provided false information, or otherwise lied to the grand jury regarding the facts underlying plaintiffs' criminal charges; the taint exception to the independent intermediary doctrine only applies to an officer's acts or omissions that give the false impression that the suspect committed the crime, not that the officer had ulterior motives; that Officer Hernandez's "arguable lapse in judgment" regarding disclosing his potential conflict of interest to the grand jury does not equate to "fabricating evidence to

[2] When referring in this memorandum opinion and order to claims brought under § 1983, the court recognizes that "[r]ather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates[.]" An "underlying constitutional or statutory violation is a predicate to liability under § 1983." *Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997) (internal quotation marks omitted) (quoting *Johnson v. Harris Cnty. Flood Control Dist.*, 869 F.2d 1565, 1573 (5th Cir. 1989)). In this case, the alleged underlying constitutional violation is of the Fourth Amendment to the United States Constitution.

form probable cause"; and that plaintiffs' amended complaint therefore fails to state a plausible false arrest claim because it does not enable the court to draw the reasonable inference that Officer Hernandez provided false information to the grand jury such that its probable cause finding is tainted.

Plaintiffs respond that Officer Hernandez's "series of deceptions, circumventions[,] and omissions" regarding his employment relationship with the Stainback Organization caused plaintiffs to be indicted and taken into custody,[3] Ps. Resp. (ECF No. 30) at 2; that under the taint exception, they are not required to prove that Officer Hernandez "utter[ed] a spat of lies" but only that he withheld "relevant information," *id.* at 3; that, under Fed. R. Evid. 401, relevance is defined broadly to include information that has "any tendency" to make a matter of consequence more or less probable.[4]; and that Officer Hernandez's conflict of interest is relevant information because it made the grand jury indictment more

[3] Officer Hernandez requests in his reply that the court strike plaintiffs' response as untimely. Plaintiffs' response was due January 12, 2024. *See* N.D. Tex. Civ. R. 7.1(e) ("A response and brief to an opposed motion must be filed within 21 days from the date the motion is filed."). Although plaintiffs' response was filed late on January 17, 2024, and parties should adhere to the local rules, the court will consider the response because the timing has not interfered with the decisional process of the court and the five day delay has not materially prejudiced Officer Hernandez, who still had a full opportunity to reply to the response.

[4] Tex. R. Evid. 401 similarly provides that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

probable considering that the Assistant DA's supervisor told plaintiffs' defense counsel that criminal charges would not have been submitted to the grand jury had Officer Hernandez disclosed his conflict of interest.

Officer Hernandez also contends that plaintiffs' amended complaint fails to state a false arrest claim because the allegations establish probable cause: plaintiffs searched the crime scene for shell casings, placed the shell casings in a cup, and carried the shell casings somewhere else. Officer Hernandez maintains that, based on the totality of facts and circumstances, a reasonable person could conclude that plaintiffs tampered with evidence because moving the shell casings impacted DPD's ability to recover forensic evidence and to determine the shooter's location. He posits that a reasonable person could also infer intent to impair the evidence's verity or availability from plaintiffs' "simply intend[ing] to dispossess [themselves] of the object in order to more plausibly disclaim any connection to it." *Thornton v. Texas*, 425 S.W. 3d 289, 304 (Tex. Crim. App. 2014). Officer Hernandez therefore moves to dismiss plaintiffs' false arrest claim on the ground that the amended complaint does not establish a lack of probable cause.

Plaintiffs respond that probable cause did not exist because the grand jury wrongfully issued warrants without knowledge of Officer Hernandez's conflict of interest and because criminal intent was "wholly absent"; Texas law prohibits tampering with evidence to preserve the "honesty, integrity, and reliability of the justice system"; plaintiffs acted according to the statute's purpose because they "alerted the authorities, waited

for them, preserved the evidence, and then waited another week" for them to collect the evidence; Frias "never touched the casings at hand," and McKinnon "meticulously collected [the casings] with a pen in a cup"; an investigation was not pending but was merely "anticipated" or "desired" when plaintiffs acted; and probable cause therefore did not exist to arrest or indict plaintiffs because they did not intend to impair the verity or availability of the evidence in an investigation or official proceeding.

B

To plead a plausible § 1983 false arrest claim, plaintiffs must allege sufficient facts for the court to draw the reasonable inference that they were arrested without probable cause, in violation of the Fourth Amendment. *See Parm v. Shumate*, 513 F.3d 135, 142 (5th Cir. 2007). The independent intermediary doctrine is relevant when plaintiffs' claims depend on a lack of probable cause to arrest them. *See Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 553 (5th Cir. 2016). "It is well settled that if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party." *Curtis v. Sowell*, 761 Fed. Appx. 302, 304 (5th Cir. 2019) (per curiam) (internal quotation marks omitted) (quoting *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1994), *overruled on other grounds by Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en banc)). But the causal chain remains intact if "it can be shown that the deliberations of that intermediary were in some way

tainted by the actions of the defendant." *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988). Under this exception to the independent intermediary doctrine, an independent intermediary's probable cause finding does not protect a law enforcement officer whose "malicious motive led the [officer] to withhold relevant information or otherwise misdirect the independent intermediary by omission or commission." *McLin v. Ard*, 866 F.3d 682, 689 (5th Cir. 2017) (citation omitted). When analyzing allegations of taint at the motion to dismiss stage, mere allegations of taint "may be adequate to survive a motion to dismiss where the complaint alleges other facts supporting the inference." *Id.* at 690 (internal quotation marks omitted) (quoting *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010)).

C

The court concludes that plaintiffs have pleaded a plausible false arrest claim under § 1983 because plaintiffs' amended complaint alleges sufficient facts for the court to draw the reasonable inference that Officer Hernandez in some way tainted the grand jury's deliberations. The amended complaint primarily pleads taint by alleging that Officer Hernandez failed to disclose to the Assistant DA, DPD officers, and the grand jury that he worked off-duty with Faaitiiti and the Stainback Organization, creating a conflict of interest.[5] The omitted

[5] Assistant DA and DPD officers could have independently fact-checked Officer Hernandez's alleged misstatements and omissions regarding the SIU investigation. The only information plaintiffs allege that the Assistant DA and DPD officers did not know relates to Officer Hernandez's off-duty employment.

information alleged in plaintiffs' amended complaint is sufficient to plausibly plead taint at this stage of the case.

Plaintiffs allege that specific representations and omissions were made to the Assistant DA, DPD officers, and the grand jury. For example, the amended complaint asserts that Officer Hernandez made misstatements or omissions regarding the SIU investigation, plaintiffs' actual connection to the person who discharged the firearm or caused damage to the Stainback Organization's property, his employment relationship with the Stainback Organization and Faaitiiti, who made the complaint, and Faaitiiti's role within the Stainback Organization.

Plaintiffs also allege that Officer Hernandez's specific representations and omissions are relevant, material information. According to plaintiffs, Officer Hernandez's conflict of interest is "relevant" information under Rule 401 and therefore the taint exception to the independent intermediary doctrine applies because the exception does not protect an officer who "actively misled the [Assistant DA] and grand jurors." P. Resp. (ECF No. 30) at 4. *See also Cuadra*, 626 F.3d at 813; *Buehler*, 824 F.3d at 555. Plaintiffs do not cite any case (and court has found none) applying Rule 401's definition of relevance to the independent intermediary doctrine's taint exception. The Fifth Circuit has not defined relevance in this context. But district courts within the circuit interpret the term to mean information relevant to a finding of probable cause. *See Van Dyke v. Shackleford*, 2020 WL 5580162, at *4 (E.D. Tex. Sept. 1, 2020) (interpreting

Cuadara's holding to mean that mere generalized allegations of taint, with no explanation as to how additional information would have been relevant to a finding of probable cause, is of no moment); *Paddio v. City of Hammond*, 1997 WL 289704, at *3 (E.D. La. May 28, 1997) (analyzing whether omitted facts were relevant to a finding of probable cause). Officer Hernandez's failure to disclose his conflict of interest may be relevant to the grand jury's probable cause finding because the Assistant DA's supervisor communicated to plaintiffs' defense attorney that criminal charges would not have been submitted to the grand jury had the prosecutor known of Officer Hernandez's employment relationship with the Stainback Organization. Plaintiffs also maintain that the supervisor's statement regarding Officer Hernandez's conflict of interest shows that it is material information.

Plaintiffs allege "other facts" that support the inference that Officer Hernandez withheld relevant, material information or otherwise misdirected the grand jury by commission or omission: Officer Hernandez worked at the Stainback Organization on weekends for five to seven years; the Stainback Organization provided Officer Hernandez with the surveillance video depicting plaintiffs responding to the shooting and canvassing the parking lot for shell casings; Faaitiiti provided Officer Hernandez another shell casing that she had been given by an individual; Officer Hernandez did not pursue charges against the individual who provided Faaitiiti with that shell casing; Officer Hernandez told Faaitiiti not to communicate with third parties regarding the matter; Officer Hernandez knew that he had a duty to disclose his employment relationship with the Stainback

Organization; Officer Hernandez knew that the Assistant DA asked about his relationship with Faaitiiti and he communicated that he knew her but did not disclose his employment relationship; the Assistant DA's supervisor communicated to plaintiffs' defense attorney that charges would not have been submitted to the grand jury had Officer Hernandez disclosed his conflict of interest; and the Assistant DA dropped charges against plaintiffs "in the interest of justice." Although plaintiffs can only "speculate" regarding whether some of these other facts were presented or omitted in the grand jury room based on Officer Hernandez's trial testimony, that speculation is sufficient at this stage.[6]

Plaintiffs need not allege that Officer Hernandez fabricated evidence, provided false information, or otherwise lied to give the grand jury the impression that plaintiffs committed a crime. A plaintiff pleading a false arrest claim under the independent intermediary doctrine's taint exception need only allege that an officer's "malicious motive . . . lead [him] to withhold *relevant* information," *Cuadra*, 626 F.3d at 813 (emphasis added), or otherwise misdirected the independent intermediary "by omission or commission." *Hand*, 383 F.2d at 1428. The case law allows plaintiffs to plead taint by omission, so plaintiffs did not need to allege facts indicating that

[6] The secret reality of grand jury proceedings makes it "understandably difficult for a plaintiff to know what was said—or [was not] said—to the grand jury absent any form of discovery." *Wilson v. Stroman*, 33 F.4th 202, 212 (5th Cir. 2022). And "while that reality [does not] excuse pleading requirements, it does mean that allegations about what was presented or omitted in the grand jury room will in some sense be speculative." *Id.*

Officer Hernandez affirmatively provided false information or fabricated evidence to taint the grand jury's deliberations. *See Porter v. Farris*, 328 Fed. Appx. 286, 288 (5th Cir. 2009) (per curiam) (analyzing officer's omission to grand jury that defendant's wife denied his involvement in crime) (citing *Kohler v. Englade*, 470 F.3d 1104, 1113 (5th Cir. 2006) ("[T]he intentional or reckless omissions of material facts from a warrant application may amount to a Fourth Amendment violation.")).

Officer Hernandez quotes in reply a recent Fifth Circuit case that analyzed plaintiffs' false arrest allegations, held that plaintiffs satisfied their burden to plead taint, and remanded to the district court to determine "whether those representations were *false* and whether the omitted information was material to probable cause *with respect to these plaintiffs*." *Wilson v. Stroman*, 33 F.4th 202, 213 (5th Cir. 2022) (emphasis in original). In that case, the Fifth Circuit analyzed a false arrest claim under *Franks v. Delaware*, 438 U.S. 154 (1978): an officer is liable if he "'deliberately or recklessly provides false, material information for use in an affidavit in support of [a warrant]' or 'makes knowing and intentional omissions that result in a warrant being issued without probable cause.'" *Id.* at 206 (alteration in original) (quoting *Melton v. Phillips*, 875 F.3d 256, 264 (5th Cir. 2017) (en banc)). *Franks* requires a two-pronged analysis, asking first whether the affiant made a false statement in support of a warrant, and second whether the alleged false statement is necessary to a finding of probable case. *See Franks*, 438 U.S. at 155-56; *see also Winfrey v. Rogers* ("*Winfrey II*"), 901 F.3d 483, 494-95 (5th Cir. 2018) (analyzing *Franks* false arrest claim). A *Franks* claim is

distinguishable from the taint exception despite the "conceptual overlap" because a *Franks* claim is a "cause of action" while the taint exception is "an exception to a doctrine that *insulates* an official who would otherwise be liable for false arrest." *Wilson*, 4 F.4th at 209 (emphasis in original). The Fifth Circuit's directive on remand in *Wilson* therefore does not apply to plaintiffs' false arrest claim because plaintiffs do not plead a *Franks* false arrest claim.

Because the court construes plaintiffs' amended complaint in the light most favorable to them and draws all reasonable inferences in their favor, the court concludes that plaintiffs allegations enable it to draw the reasonable inference that Officer Hernandez misled the grand jury. *See id.* at 212-13 (holding that complaint was sufficient to survive motion to dismiss where complaint alleged that officials' testimony during public trial resembled misrepresentations and omissions made to magistrate and grand jury); *McLin*, 866 F.3d at 690 n.3 (citing *Bustamante v. Christian*, 1997 WL 42530, at *5 (N.D. Tex. Jan 29, 1997) (Fitzwater, J.) (holding that plaintiffs' allegations were sufficient to survive a motion to dismiss when they alleged that the indictment was a product of false and misleading testimony)); *Burroughs v. City of Laurel*, 2019 WL 4228438, at *9 (S.D. Miss. Sept. 5, 2019) (holding that plaintiff's allegations were sufficient to survive motion to dismiss when they alleged that officers intentionally withheld exculpatory evidence from grand jury and knowingly presented fabricated and/or misleading evidence). And there is no basis in the record for the court not to conclude, after accepting all well-pleaded factual allegations as true, that

the omitted relevant, material information identified by plaintiffs was presented to the grand jury. *See Winfrey II*, 901 F.3d at 497; *Winfrey v. Johnson*, 766 Fed. Appx. 66, 70-71 (5th Cir. 2019) (applying *Winfrey II*). Accordingly, the court denies Officer Hernandez's motion to dismiss plaintiffs' false arrest claim under § 1983.

D

Officer Hernandez also maintains that plaintiffs' false arrest claim should be dismissed because plaintiffs' arrests were supported by arguable probable cause. Probable cause to support an arrest exists "when the totality of the facts and circumstances within [an 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." *Lincoln v. Turner*, 874 F.3d 833, 842 (5th Cir. 2017) (citation omitted). Because probable cause is a fact-intensive inquiry, the court is unable to conclude, after drawing all reasonable inferences in plaintiffs's favor, that the amended complaint fails to plead a plausible claim.

IV

The court now turns to plaintiffs' malicious prosecution claim under § 1983.

A

Although unclear based on plaintiffs' amended complaint, plaintiffs' and Officer Hernandez's briefs on the instant motion refer to plaintiffs' federal-law malicious prosecution claim. Accordingly, to the extent that

plaintiffs assert a Fourth Amendment claim under § 1983 for malicious prosecution, the court will address it.

Officer Hernandez contends that plaintiffs' Fourth Amendment-based malicious prosecution claim brought under § 1983 must fail because he is entitled to qualified immunity and the right to be free from malicious prosecution was *not* clearly established at the time of the alleged violation. *See Morgan v. Chapman*, 969 F.3d 238, 245 (5th Cir. 2020). Plaintiffs respond that Officer Hernandez is not entitled to qualified immunity because he violated clearly established law and he engaged in reckless or intentional conduct.

B

The court will first determine whether plaintiffs have pleaded a plausible malicious prosecution claim before determining whether Officer Hernandez is entitled to qualified immunity.[7]

The Supreme Court only recently recognized a standalone Fourth Amendment malicious prosecution claim. *See Thompson v. Clark*, 596 U.S. 36, 42 (2022). "The gravamen of the Fourth Amendment claim for malicious prosecution, as [the Supreme Court] has recognized it, is the wrongful initiation of charges without probable cause." *Id.* at 43. The common law elements for

[7] *See infra* at § IV(C)(1) (addressing two-prong analysis for qualified immunity, and explaining that, if no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity).

a malicious prosecution tort include "(i) the suit or proceeding was 'instituted without any probable cause'; (ii) the 'motive in instituting' the suit 'was malicious,' which was often defined in this context as without probable cause and for a purpose other than bringing the defendant to justice; and (iii) the prosecution 'terminated in the acquittal or discharge of the accused.'" *Id.* at 44 (citing T. Cooley, Law of Torts 181 (1880)).

The Fifth Circuit's recognition of a standalone Fourth Amendment malicious prosecution claim has also been in flux. At one time, the Fifth Circuit determined that "the elements of the state-law tort of malicious prosecution and the elements of the constitutional tort of 'Fourth Amendment malicious prosecution' [were] coextensive." *Gordy v. Burns*, 294 F.3d 722, 725 (5th Cir. 2002), *abrogated by Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en banc). A plaintiff therefore "had to prove six elements to prevail on a constitutionalized malicious prosecution claim." *Armstrong v. Ashley*, 60 F.4th 262, 279 (5th Cir. 2023) (citing *Gordy*, 294 F.3d at 727). These six elements included

> (1) the commencement or continuance of an original criminal proceeding; (2) its legal causation by the present defendant against plaintiff who was defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) malice; and (6) damages.

Id. But in *Castellano*, 352 F.3d at 954, the Fifth Circuit abrogated the rule iterated in *Gordy*. It was not reinstated until after *Thompson*, which provided "clear recognition of the constitutional tort of malicious prosecution, overruling [*Castellano*]." *Armstrong*, 60 F.4th at 279. Today, *Gordy* applies, and "parties asserting a Fourth Amendment malicious prosecution claim under § 1983 must prove the above elements, in addition to the threshold element of an unlawful Fourth Amendment seizure." *Id.* (citing *Thompson*, 596 U.S. at 43 n.2). Because plaintiffs were detained and, as stated above, they plead sufficient allegations to enable the court to draw the reasonable inference that they were detained in the absence of probable cause, they have met this threshold inquiry. *See Manuel v. City of Joliet, Ill.*, 580 U.S. 357, 367 (2017). Moreover, because the parties do not dispute any element of malicious prosecution, the court assumes that plaintiffs have sufficiently pleaded a malicious prosecution claim under § 1983.

C

The court next determines whether Officer Hernandez is entitled to qualified immunity.

1

To decide whether Officer Hernandez is entitled to qualified immunity, the court performs a two-pronged analysis. *See Mitchell v. Mills*, 895 F.3d 365, 369 (5th Cir. 2018). The court begins with the question "whether, taken in the light most favorable to plaintiff as the party asserting the injuries, the facts they have alleged show that [the defendant's] conduct violated a constitutional

right." *Ellis v. Crawford*, 2005 WL 525406, at *3 (N.D. Tex. Mar. 3, 2005) (Fitzwater, J.); *see also Pearson v. Callahan*, 555 U.S. 223, 232 (2009) ("First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right." (internal quotation marks and citations omitted)). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id.* "Even if the government official's conduct violates a clearly established right, the official is nonetheless entitled to qualified immunity if his conduct was objectively reasonable." *Wallace v. County of Comal*, 400 F.3d 284, 289 (5th Cir. 2005). "The objective reasonableness of allegedly illegal conduct is assessed in light of the legal rules clearly established at the time it was taken." *Salas v. Carpenter*, 980 F.2d 299, 310 (5th Cir. 1992) (citing *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)). "'The defendant's acts are held to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the' plaintiff's asserted constitutional or federal statutory right." *Cozzo v. Tangipahoa Par. Council*, 279 F.3d 273, 284 (5th Cir. 2002) (quoting *Thompson v. Upshur County*, 245 F.3d 447, 457 (5th Cir. 2001)).

Clearly established rights must not be defined at a high level of generality. *See Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004) (per curiam). "For example, the

right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause. . . violates a clearly established right." *Anderson*, 483 U.S. at 639. But because defining clearly established rights so broadly would "destroy" the balance struck by the qualified immunity doctrine, rights must instead be defined in a "more particularized" sense. *Id.* at 639-40. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Brosseau*, 543 U.S. at 199 (quoting *Saucier*, 533 U.S. at 202). Although this does "not require a case directly on point," it does command that the plaintiff show that "the violative nature of the particular conduct is clearly established." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (emphasis omitted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). "Such specificity is especially important in the Fourth Amendment context, where the [Supreme] Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.'" *Id.* (second alteration in original) (quoting *Saucier*, 533 U.S. at 205). In essence, the plaintiff must "identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated the Fourth Amendment." *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam).

"When confronted with a qualified-immunity defense at the pleadings stage, the plaintiffs must plead 'facts which, if proved, would defeat [the] claim of

immunity.'" *Guerra v. Castillo*, 82 F.4th 278, 285 (5th Cir. 2023) (alteration in original) (quoting *Waller v. Hanlon*, 922 F.3d 590, 599 (5th Cir. 2019)). The pleading standard remains the same, and "'[t]he crucial question is whether the complaint pleads facts that, if true, would permit the inference that [Officer Hernandez is] liable under § 1983, and would overcome his qualified immunity defense.'" *Id.* (quoting *Terwilliger v. Reyna*, 4 F.4th 270, 280 (5th Cir. 2021)). At this stage, it is plaintiffs' burden to demonstrate that Officer Hernandez is not entitled to qualified immunity. *See id.*

2

The court concludes that plaintiffs have not adequately pleaded a malicious prosecution claim under § 1983 because, between 2003 and 2021, Fifth Circuit precedent explicitly denied the possibility of a constitutional malicious prosecution claim. *See Guerra*, 82 F.4th at 289; *Anokwuru v. City of Houston*, 990 F.3d 956, 964 (5th Cir. 2021); *Espinal v. City of Houston*, ___ F.4th ___, 2024 WL 981839, at *5 (5th Cir. Mar. 7, 2024).

Officer Hernandez maintains that he is entitled to qualified immunity because he did not violate clearly established law—that none of his alleged misconduct occurred after the Supreme Court's decision in *Thompson*, which recognized a standalone Fourth Amendment malicious prosecution claim and overruled *Castellano*. *See Thompson*, 596 U.S. at 42. Although a Fifth Circuit decision has rejected Officer Hernandez's position in the context of a § 1983 malicious prosecution claim, *see Bledsoe v. Willis*, 2023 WL 8184814, at *6 (5th Cir. Nov.

27, 2023) (per curiam), that opinion is unpublished and therefore not binding in this case. A recent published, binding Fifth Circuit opinion held that an officer was entitled to qualified immunity from a malicious prosecution claim because the Fifth Circuit had rejected the existence of a constitutional malicious prosecution claim before *Thompson*, which was rendered on April 4, 2022. *See Guerra*, 82 F.4th at 289. Although plaintiffs maintain that McKinnon's charges were dismissed on April 21, 2022, 17 days after *Thompson*, the relevant inquiry is whether the law was clearly established "at the time of [Officer Hernandez's] alleged misconduct." *Jennings v. Patton*, 644 F.3d 297, 300 (5th Cir. 2011) (citing *Pearson*, 555 U.S. at 232). Plaintiffs' amended complaint does not allege any facts regarding Officer Hernandez's alleged misconduct after March 22, 2022, when he testified at Frias' trial. The court concludes that plaintiffs have failed to plead a plausible § 1983 malicious prosecution claim because they have not satisfied their burden to demonstrate that Officer Hernandez is not entitled to qualified immunity. Accordingly, the court grants Officer Hernandez's motion to dismiss plaintiffs' malicious prosecution claim under § 1983.[8]

[8] Assuming *arguendo* that *Bledsoe v. Willis*, 2023 WL 8184814 (5th Cir. Nov. 27, 2023) (per curiam), is inconsistent with this court's reasoning, *Bledsoe* is unpublished and therefore not binding in this case.

V

The court now turns to plaintiffs' state-law claims for malicious prosecution, false imprisonment, and civil conspiracy.

A

Officer Hernandez maintains that § 101.106(f) of the Texas Tort Claims Act ("TTCA") bars plaintiffs from pursuing their state-law tort claims against him. He contends that, under the factual allegations of the amended complaint, he is alleged to have been an employee at DPD, a governmental unit; that the amended complaint alleges that his conduct occurred within the scope of his employment as a police officer; and that the state tort claims could have been brought against the City, according to the Supreme Court of Texas' interpretation of the phrase.

Plaintiffs respond that whether Officer Hernandez was acting within the scope of his employment is an "open question" because his conduct was *ultra vires*. And plaintiffs have attached to their response brief a second amended complaint for use "if pursuant to § 101.106, the City of Dallas, though, seeks to stand in Defendant's shoes[.]"[9] P. Resp. (ECF No. 30) at 9.

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[9] The TTCA contains an "elections of remedies" provision that is designed to require "a plaintiff to make an irrevocable election at the time suit is filed between suing the governmental unit under the [TTCA] or proceeding against the employee alone[.]" *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 657 (Tex. 2008)

B

TTCA § 101.106(f) provides:

> 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 Ann. § 101.106(f) (Vernon 2003). Although § 101.106(f) is a state statute, it can be raised in federal court as a defense to alleged violations of Texas tort law. *See*, *e.g.*, *Wilkerson v. Univ. of N. Tex.*, 878 F.3d 147, 158-62 (5th Cir. 2017).

To obtain dismissal under § 101.106(f), a defendant must show that the plaintiff's suit "(1) was based on conduct within the general scope of the defendant's employment with a governmental unit and (2) could have been brought against the government unit under the [Texas] Tort Claims Act." *Anderson v. Bessman*, 365 S.W. 3d 119,

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(citing Tex. Civ. Prac. & Rem. Code Ann. § 101.106). Plaintiffs have elected to proceed against Officer Hernandez.

124 (Tex. App. 2011, no pet.); *see also Zahn v. Solano*, 2012 WL 13027085, at *1 (N.D. Tex. May 29, 2012) (Means, J.); *Kelemen v. Elliott*, 260 S.W.3d 518, 524 (Tex. App. 2008, no pet.). The first prong of the test involves two inquiries: "whether the individual defendant was an employee of a governmental unit and whether the acts alleged fall within the scope of that employment at the relevant time." *Bessman*, 365 S.W.3d at 124 (first citing *Poland v. Willerson*, 2008 WL 660334, at *4 (Tex. App. Mar. 13, 2008, pet. denied) (mem. op.); and then citing *Turner v. Zellers*, 232 S.W.3d 414, 417 (Tex. App. 2007, no pet.)). Under the second prong, "[a]ll common-law tort theories alleged against a governmental unit are assumed to be 'under the Tort Claims Act' for purposes of section 101.106." *Wilkerson*, 878 F.3d at 161 (quoting *Franka v. Velasquez*, 332 S.W.3d 367, 369 (Tex. 2011)). Thus a suit "could have been brought under [the TTCA] against the governmental unit" even if the TTCA does not waive sovereign immunity for the suit in question. *Franka*, 332 S.W.3d at 369.

C

Because Officer Hernandez was an employee of a governmental unit, the court considers whether he was acting within the scope of his employment at the relevant time.

1

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 a competent authority." Tex. Civ. Prac. & Rem. Code Ann. § 101.001(5). Texas peace officers retain "their status as peace officers twenty-four hours a day[.]" *Blackwell v. Harris County*, 909 S.W.2d 135, 139 (Tex. App. 1995, writ denied). As a result, the "scope of employment is not determined simply on the basis of whether an officer is technically off-duty or on-duty." *Harris County v. Gibbons*, 150 S.W.3d 877, 882 (Tex. App. 2004, no pet.). "Instead, the dispositive question is: 'in what capacity was the officer acting at the time he committed the acts for which the complaint is made.'" *Kraidieh v. Nudelman*, 2016 WL 6277409, at *5 (Tex. App. Oct. 27, 2016, no pet.) (mem. op.) (citing *Blackwell*, 909 S.W.2d at 139). "'If an officer is performing a public duty, such as the enforcement of general laws, he is acting in the course and scope of his employment as a police officer even if the [private] employer directed him to perform the duty.'" *Id.* (brackets in original) (citing *Gibbons*, 150 S.W.3d at 882). If, however, "there is no immediate crime and the off-duty officer is protecting a private employer's property or otherwise enforcing a private employer's rules or regulations, the trier of fact determines whether the officer was acting as a public officer or as a servant of the employer." *Gibbons*, 150 S.W.3d at 882 (citing *Mansfield v. C.F. Bent Tree Apartment Ltd. P'ship*, 37 S.W.3d 145, 150 (Tex. App. 2001, no pet.)). In addition, "[a]n employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." Restatement (Third) of Agency § 7.07(2) (2006).

Officer Hernandez must satisfy his burden to show that plaintiffs' suit is based on conduct within his employment at DPD. *See Bessman*, 365 S.W.3d at 124. Officer Hernandez maintains that plaintiffs' allegations are based on his conduct as a police officer in the DPD Property Crimes Division. He cites plaintiffs' amended complaint, which alleges that "[Officer Hernandez] ha[d] been a detective in the DPD Property Crimes Division" for roughly one year before the incident. But the amended complaint also alleges that Officer Hernandez worked off-duty at the Stainback Organization, a private employer.

It is unclear from the amended complaint whether plaintiffs' allegations are based on Officer Hernandez's employment at DPD or the Stainback Organization. For example, Officer Hernandez was not responding to an immediate crime. The amended complaint alleges that Officer Hernandez was "somehow" assigned to "follow up" on the Stainback Organization's reported property damage two days later—but he had neither been dispatched to respond to the offense nor assigned by a supervisor. He retrieved the surveillance video depicting the Stainback Organization's property damage from the Stainback Organization itself and brought it to the SIU. He also allegedly "circumvented" DPD's submission process to the DA's Office to pursue criminal charges against plaintiffs, who operated a neighboring competitor of the Stainback Organization's business. Based on the amended complaint alone, it remains unclear what capacity Officer Hernandez was acting in at the time he

committed the alleged acts. Accordingly, the court concludes at the pleading stage that Officer Hernandez has failed to carry his burden to show that plaintiffs' state-law tort claims are based on conduct within the general scope of his employment with DPD, not the Stainback Organization. The court therefore denies Officer Hernandez's motion to dismiss plaintiffs' state-law claims.

* * *

For the reasons explained, the court grants Officer Hernandez's December 22, 2023 motion to dismiss regarding plaintiffs' malicious prosecution claim under § 1983 and denies it as to plaintiffs' false arrest claim under § 1983 and state-law claims.

SO ORDERED.

March 22, 2024

SIDNEY A. FITZWATER
SENIOR JUDGE

Appendix E

Plaintiffs' First Amended Complaint
United States District Court for the
Northern District of Texas

December 1, 2023

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GUADALUPE FRIAS AND SHANNON MCKINNON,	§	CIVIL ACTION NO.
Plaintiffs,	§	3:23-cv-0550-D
v.	§	
GENARO HERNANDEZ, AND JOHN DOES (1-10)	§	
Defendants.	§	

PLAINTIFFS' FIRST AMENDED COMPLAINT

Plaintiffs GUADALUPE FRIAS and SHANNON McKINNON bring this action pursuant to the Fourth, Fifth and Fourteenth Amendments, 42 U.S.C. § 1983 and state common law against Dallas Police Department Detective GENARO HERNANDEZ, the CITY OF DALLAS, and JOHN DOES (1-10).

Appendix E

I.

PARTIES

1. Plaintiffs are Texas residents who and reside in Dallas County, Texas.

2. Defendant GENARO "JERRY" HERNANDEZ has appeared in this action and is represented by counsel.

II.

JURISDICTION AND VENUE

3. As this suit is brought pursuant to 42 U.S.C. § 1983, this Court has federal question jurisdiction. This Court has general personal jurisdiction over Defendants as they reside and/or works within the Dallas Division of the Northern District of Texas.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because a substantial portion of the events or omissions giving rise to Plaintiff's claims occurred in Dallas County, Texas, which is within the Northern District and Dallas Division.

III.

FACTS

BUSINESS OWNER AND CONSTABLE RESPOND TO GUNFIRE AND PRESERVE SHELL CASINGS AFTER DPD FAILS TO RESPOND

5. Plaintiff GUADALUPE FRIAS is a Texas peace officer employed as a constable for Kaufman County. Plaintiff SHANNON MCKINNON is a local business owner who has owned and "The Green Elephant," a licensed premise and live music venue, that has been open since 1990. The Green Elephant is located at 5627 Dyer Street, Dallas, Texas 75206. Approximately a half mile east of the SMU Campus across Central Expressway, the establishment is popular with many students there. Plaintiff FRIAS provides security detail for The Green Elephant and its surrounding premises.

6. On or about August 4, 2019, there was a "Hip Hop" occurred event at the bar. A disturbance occurred inside the premises of The Green Elephant. In the minutes thereafter, gunshots were heard on the street outside at approximately 1:21 a.m. 9-1-1 calls were placed at 1:21 and 1:22. Plaintiffs and other Green Elephant staff went outside to investigate where they were told the police had been called. Plaintiffs were unable to identify who was doing the shooting or why. Plaintiff McKINNON saw one or more of the shell casings on the ground, but did not touch them.

7. When no DPD units had arrived, Plaintiffs returned to the street to investigate. Plaintiffs walked through the parking lot. Constable FRIAS had a flashlight. The pair searched for shell casings and any other items that they could preserve for authorities as the Green Elephant routinely cleaned the parking lot to be a "good neighbor" to the other businesses on the block and a street sweeper commonly traveled through there. Plaintiff McKINNON picked up the casings with a pen and placed them in a cup. Plaintiffs went back to the Green Elephant and waited for the police to arrive that morning. That did not occur. Approximately a week later, an officer from the Dallas Police Department came to The Green Elephant and took custody of the shell casings.

MOONLIGHTING DETECTIVE PURSUES BOGUS CHARGES

8. Defendant GENARO "JERRY" HERNANDEZ has been a detective in the DPD Property Crimes Division for only about one year before this incident. During that time, he had never been assigned to homicide or and violent crimes division of the department. In addition, though, he also coordinates the security for a neighboring business of The Green Elephant, the Stainback Organization, located at 5622 Dyer Street, Dallas, Texas, 75206. The Stainback Organization is a commercial real estate business with multiple properties. Before the incident of August 4, 2019, one or more of the principals of the Stainback expressed a desire to purchase the property where the Green Elephant is located for its own expansion and/or to be rid of the venue.

9. Following the August 4th incident, representatives of the Stainback Organization asserted that property damage from one or more of the gunshots that had been fired.

10. On August 6, 2019, Defendant HERNANDEZ somehow gets "assigned" to "follow up" on an investigation of Criminal Mischief related to the reported property damage to the Stainback building. He had neither been dispatched to respond to the offense, nor had he been assigned by a supervisor. Though his method of assignment was abnormal, nonetheless, he and another detective retrieve surveillance video from a Stainback representative, property manager Suzi Faaititi, which depicts Plaintiffs responding to the commotion outside and later canvassing the parking lot while armed.

11. Defendant HERNANDEZ took the footage to the DPD Special Investigation Unit, which investigates incidents involving firearms and would handle "any related charges." After reviewing the footage and related information, the SIU investigators found no criminal offense pertaining to Plaintiffs and did not file or pursue any charges in August 2019 or thereafter. Among other things, SIU investigators specifically found that Plaintiffs had not fired their weapons and that Constable Frias, in particular, had not been involved in any shooting. The SIU detectives also did not file any charges related to the shell casings picked up by Plaintiff McKINNON.

12. Despite the SIU findings, Defendant, alone, or in league with others, circumvented DPD's submission

process to the Dallas County District Attorneys' Office for a much later prosecution—even though Defendant HERNANDEZ knew that the SIU would not pursue charges and that "no direct evidence linked Mr. Frias to the actual person shooting the round that caused the damage" to the Stainback property. *Trial Transcript*, *Genaro Hernandez*, at 74:15–17. Almost two years later and without notice, both Plaintiffs get surprisingly indicted for the felony offense of Tampering with Evidence. Exclusively as a result of the indictment, a warrant is issued for each Plaintiffs' arrest. Each subject then turns himself into custody.

TRIAL REVEALS JERRY'S DISHONESTY TO THE DISTRICT ATTORNEY

13. On March 22, 2022, Plaintiff FRIAS' case proceeded to a trial before the Court. Defendant HERNANDEZ took the stand and reasserted a raft of allegations against Plaintiff on direct examination, but which soon unraveled. He acknowledged that neither Plaintiff had any role in an aggravated assault or the criminal mischief associated with the broken window. He further cast doubt that had officers even responded to the shots fired call what if any action they would have taken regarding the shell casings.

14. During the trial, Defendant HERNANDEZ also acknowledged that the shell casings had been collected were associated with an individual depicted on the surveillance camera and who had no reported affiliation with Plaintiffs. Likewise, he explicitly acknowledged that there was no evidence that linked Plaintiffs to any

of damage associated to the Stainback Property. Furthermore, Defendant HERNANDEZ stated that that there "was no effort" to identify the person who actually shot the firearm associated with the casings. Indeed, Defendant further acknowledged that he never requested any testing to help resolve the gunfire incident.

15. During cross-examination, it soon became more clear that Defendant HERNANDEZ simply had another objective in mind. Defendant had secretly inserted himself into the investigation. His role in the matter did not begin with a dispatch from a 9-1-1 operator or a unit commander, but with a cell phone call from Ms. Faaitiiti of the Stainback Organization. This role would remain a secret, because Defendant specifically told Ms. Faaitiiti not to communicate about this matter with any third parties. Trial Transcript, Hernandez, 76:16-77:24. In fact, Defendant's instructed Ms. Faaititti not to disclose any such matter occurred after he learned that the DPD SIU had determined that there were no charges to pursue against Plaintiffs. *Id,* 78:2-4. Indeed, Ms. Faaitiiti called Defendant HERNANDEZ on or about August 15, 2019 to report that she had been given *another* shell casing that had not been recovered from the parking lot. Neither the person who provided the last shell casing or another person who had assisted Plaintiffs in the parking lot were ever charged by Defendant HERNANDEZ. Furthermore, despite these calls, Det. HERNANDEZ did not apprise his colleagues within the department of his employment relationship with Stainback.

16. Defendant acknowledged on the stand that he had regular weekend employment with the Stainback Organization for the preceding "maybe five, seven years." This pecuniary relationship had been undisclosed to not just other detectives and supervisors within the Dallas Police Department but to assistant district attorneys of the Dallas County District Attorneys' Office. HERNANDEZ further testified All officers of the DPD have an affirmative duty to apprise the Department of any conflicts of interest with a private employer.

17. The Dallas Police Department operates under its General Orders. General Order 421.00 Off-Duty Employment specifically addresses the terms and conditions of officers' work outside of the department.

Section 421.01 Procedure states:

> **Working off-duty employment is a privilege and not a right.** The purpose of this procedure is to establish guidelines to manage off-duty employment for both sworn and non-sworn members of the department. Employees working off-duty employment are held to the same standards of conduct and performance that apply during on duty hours. Employees must adhere to all department rules and procedures including those related to the use of force.

Section 421.03 Prohibitions Applicable to All Off-Duty Employment proscribes several acts that are pertinent

to the present facts. Section 421.03F. states: "No member of the department will engage in any off-duty employment where his/her official position might be used to advance private interests or to damage the department's credibility." Similarly, Section 421.03J. provides:

An employee working off-duty employment shall not:

1. Use his/her employment with the City of Dallas to obtain or provide to any off-duty employer any information to which the general public would not have access or for which the general public would be required to make a formal request through appropriate City of Dallas channels. Should an off-duty employer request a member of the department provide information or services described in this subsection or which could reasonably be construed to create the appearance of a conflict of interest, the employee shall:

    a. Advise the employer of the potential conflict and that he/she cannot provide the information or services requested;

    b. Refer the requestor to the employee's division commander; and

    c. Refer the requestor to the proper office (Records Section, Legal Services Section, etc.) within the department to make a formal request.

***

5. Assist in an investigation by a private security or investigative agency or a private individual.

Defendant HERNANDEZ's pursuit of criminal charges in this instance violated these and other provision of Section 421 of the DPD General Orders which are designed to ensure the integrity and objectivity of charging and investigation decisions by the Dallas Police Department. Violations of the foregoing further violated Chapter 143 of the Texas Local Government Code. Defendant concealed his conflicts from pertinent officials that the Department and the Dallas County District Attorneys' Office resulting in Plaintiffs' unlawful prosecution.

DA SUPERVISOR STATES PLAINTIFFS WOULD NOT HAVE BEEN PROSECUTED HAD DEFENDANT REVEALED HIS CONFLICTS OF INTEREST

18. During his cross-examination, Defendant HERNANDEZ at the outset blamed the assistant district attorneys for never inquiring about his relationship with the Stainback organization. "The State never asked me," he told Plaintiffs' criminal defense. *Id.*, at 83:9. "I told them that I knew them from previous (sic). That's why she [Ms. Faatittii] called me. As far as the employment, no." *Id.*, 83:9-11. Following an almost immediate recess after these revelations, Plaintiff FRIAS's criminal defense attorney conferred with the Assistant District Attorney prosecuting the action as well as that ADA's supervisor. The supervisor indicated that he would have preferred that Plaintiffs' criminal defense had revealed

Defendant HERNANDEZ's undisclosed relationship with the Stainback organization BEFORE the prosecution had been initiated. **Had such a revelation occurred, the supervisor communicated to Plaintiffs' criminal defense counsel, the criminal actions against Plaintiffs would not have been submitted to the grand jury *and* Plaintiffs would have never been taken into custody or prosecuted.** After this discussion, the ADA handling the case moved to dismiss the criminal prosecution against FRIAS "in the interest of justice." Thereafter, on April 21, 2022, the same occurred with the action filed against Plaintiff MCKINNON was likewise dismissed "in the interest of justice."

IV.

CAUSES OF ACTION

A.

FALSE ARREST

19. The factual allegations contained in all of the paragraphs of this Complaint are hereby incorporated and re-alleged for all purposes and incorporated herein with the same force and effect as if set forth verbatim.

20. Under the Fourth Amendment of the United States Constitution, all persons are Defendant HERNANDEZ and other Defendants had no probable cause or reasonable suspicion to arrest or detain Plaintiffs or to have either arrested. The Fifth and Fourteenth Amendments further provide that Plaintiffs rights and liberties may not be infringed without Due Process and

Equal Protection under the laws. Defendant(s) acts and omissions violated said protections.

21. No reasonable officer would have detained Plaintiffs or sought their prosecution based on the facts available to Defendant HERNANDEZ and other Defendants. Furthermore, Defendant HERNANDEZ, while acting under color of his office or employment (1) intentionally subjected Plaintiffs another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful; and/or (2) intentionally denied or impeded Plaintiffs in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful. *See* TEX. PEN. CODE §39.03.

22. Defendant HERNANDEZ and/or other Defendants deliberately fabricated facts and/or omitted material facts that caused Plaintiffs to be charged wrongfully with a criminal offense. Defendant's or Defendants' actions were made fraudulently, maliciously, intentionally, knowingly, recklessly, and with plain incompetence. He or they likewise made several intentional, knowing or reckless statements of fact in reports and other writings upon which public officials relied and would have relied to seek the prosecution of Plaintiffs.

Defendant knew that others would rely on these reports, affidavits, or supplemental reports in rendering charging decisions. Defendant HERNANDEZ specifically intentionally, knowingly and with reckless disregard of the truth made the following statements and/or omitted the following material statements to third

parties including Dallas Police Department officers, Dallas County Assistant District Attorney, including:

a. that the Special Investigation Unit found that neither Plaintiff had committed any crime, including Aggravated Assault or Tampering with Evidence;

b. that the SIU determined that there was no probable cause to charge either Plaintiff with any criminal offense;

c. that neither Plaintiff had any actual connection to any person who had discharged a firearm related to the recovered casings;

d. that neither Plaintiff had any actual connection to any persona who had discharged the firearm that caused damage to neighboring property;

e. that Defendant HERNANDEZ intentionally, knowingly and recklessly failed to apprise the Dallas County District Attorneys' who charge Plaintiffs that he had an employment relationship with the Stainback organization.

f. that Defendant HERNANDEZ intentionally, knowingly, and recklessly misrepresented how he knew the complainant (Stainback organization representation, Ms. Faatittti);

g. that Defendant HERNANDEZ intentionally, knowingly and recklessly omitted and

misrepresented the nature of Ms. Faatitti's role within the Stainback organization.

23. As a result, Defendants intentionally, knowing and recklessly misled one or more of the Assistant District Attorney(s) who presented the bogus criminal charges to the grand jury. These misrepresentations and omissions of material fact caused Plaintiffs to be indicted and arrested on charges they knew were unsupported by the evidence, and failed to establish probable cause. These misrepresentations and omissions to the Dallas County District Attorneys' Office and subsequently to the grand jury misled both entities and caused each to originate charges neither would have. But for these omissions and misrepresentations to these otherwise independent parties, Plaintiffs never would have been charged or indicted. Defendants' detention and arrest violated Plaintiff's clearly established rights under the United States Constitution to be free from a seizure without probable cause. Defendant(s) pursued such charges they were baseless. As a result, they violated their well-established duties to prevent another officer from violating an individual's rights. *See Ware v. Reed*, 709 F.2d 345, 353 (5th Cir. 1983). As a direct and proximate result of Defendants' actions, Plaintiffs suffered injuries.

24. In addition and/or in the alternative, Defendant HERNANDEZ's reckless, knowing and intentional misrepresentation and omissions of fact misdirected the Dallas County District Attorneys' office to repeat these same misrepresentation and omissions to the grand jury. Defendant's withholding of valuable information

concerning his pecuniary relationship with the Stainback organization spanning—by his own testimony some five to seven years—tainted the grand jury proceedings resulting in Plaintiffs' indictment and subsequent arrests. See *Winfrey v. Rogers*, 901 F.3d 483, 497 (5th Cir. 2018) (quoting *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010)) (denying summary judgment because "at best, it is not clear whether 'all the facts [were] presented to the grand jury'… [so] the independent-intermediary doctrine does not apply"). As a direct and proximate result of Defendants' actions, Plaintiffs suffered injuries. See *Poullard v. Gateway Buick GMC LLC*, 2021 WL 4244781 at *6 (N.D. Tex. Sept. 17, 2021) citing *McLin v. Ard*, 866 F.3d 682, 690 (5th Cir. 2017). Further tainting these proceedings were the following misrepresentations and omissions:

a. that the Special Investigation Unit found that neither Plaintiff had committed any crime, including Aggravated Assault or Tampering with Evidence;

b. that the SIU determined that there was no probable cause to charge either Plaintiff with any criminal offense;

c. that neither Plaintiff had any actual connection to any person who had discharged a firearm related to the recovered casings;

d. that neither Plaintiff had any actual connection to any persona who had discharged the firearm that caused damage to neighboring property;

e. that Defendant HERNANDEZ intentionally, knowingly and recklessly failed to apprise the Dallas County District Attorneys' who charge Plaintiffs that he had an employment relationship with the Stainback organization.

f. that Defendant HERNANDEZ intentionally, knowingly and recklessly misrepresented how he knew the complainant (Stainback organization representation, Ms. Faatittti);

g. that Defendant HERNANDEZ intentionally, knowingly and recklessly omitted and misrepresented the nature of Ms. Faatitti's role within the Stainback organization.

These omissions and misrepresentations precluded the District Attorney and the grand jury from having the benefit of "neutrality". To the contrary, these omissions and misrepresentations tainted the District Attorneys' Office intake process and the grand jury deliberations and resulted in the wrongful arrest of both Plaintiffs. These tainted arrests violated Plaintiffs' Fourth Amendment rights.

B.

MALICIOUS PROSECUTION

25. The factual allegations contained in all of the paragraphs of this Complaint are hereby incorporated and re-alleged for all purposes and incorporated herein with the same force and effect as if set forth verbatim. Defendant caused the malicious prosecution of Plaintiffs.

Specifically, (1) the institution of a proceeding; (2) by, or at the insistence of the defendant; (3) the termination of such a proceeding in the plaintiff's favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceeding; and (6) the suffering of the injury or damage as a result of the prosecution.

26. No reasonable officer would have detained Plaintiffs or sought their prosecution based on the facts available to Defendant HERNANDEZ and other Defendants. Furthermore, Defendant HERNANDEZ, while acting under color of his office or employment (1) intentionally subjected Plaintiffs another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful; and/or (2) intentionally denied or impeded Plaintiffs in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful. *See* TEX. PEN. CODE §39.03.

27. Defendant HERNANDEZ and/or other Defendants deliberately fabricated facts and/or omitted material facts that caused Plaintiffs to be charged wrongfully with a criminal offense. Defendant's or Defendants' actions were made fraudulently, maliciously, intentionally, knowingly, recklessly, and with plain incompetence. He or they likewise made several intentional, knowing or reckless statements of fact in reports and other writings upon which public officials relied and would have relied to seek the prosecution of Plaintiffs.

28. Defendant knew that others would rely on these reports, affidavits, or supplemental reports in rendering

charging decisions. Defendant HERNANDEZ specifically intentionally, knowingly and with reckless disregard of the truth made the following statements and/or omitted the following material statements to third parties including Dallas Police Department officers, Dallas County Assistant District Attorney, including:

a. that the Special Investigation Unit found that neither Plaintiff had committed any crime, including Aggravated Assault or Tampering with Evidence;

b. that the SIU determined that there was no probable cause to charge either Plaintiff with any criminal offense;

c. that neither Plaintiff had any actual connection to any persona who had discharged a firearm related to the recovered casings;

d. that neither Plaintiff had any actual connection to any persona who had discharged the firearm that caused damage to neighboring property;

e. that Defendant HERNANDEZ intentionally, knowingly and recklessly failed to apprise the Dallas County District Attorneys' who charge Plaintiffs that he had an employment relationship with the Stainback organization.

f. that Defendant HERNANDEZ intentionally, knowingly and recklessly misrepresented

how he knew the complainant (Stainback organization representation, Ms. Faatittti);

g. that Defendant HERNANDEZ intentionally, knowingly, and recklessly omitted and misrepresented the nature of Ms. Faatitti's role within the Stainback organization.

29. As a result, Defendants intentionally, knowing and recklessly misled one or more of the Assistant District Attorney(s) who presented the bogus criminal charges to the grand jury. These misrepresentations and omissions of material fact caused Plaintiffs to be indicted and arrested on charges they knew were unsupported by the evidence, and failed to establish probable cause. But for these omissions and misrepresentations to these otherwise independent parties, Plaintiffs never would have been charged or indicted. Defendants' detention and arrest violated Plaintiff's clearly established rights under the United States Constitution to be free from a seizure without probable cause. Defendant(s) pursued such charges they were baseless. As a result, they violated their well-established duties to prevent another officer from violating an individual's rights. *See Ware v. Reed*, 709 F.2d 345, 353 (5th Cir. 1983). As a direct and proximate result of Defendants' actions, Plaintiffs suffered injuries.

30. In addition and/or in the alternative, Defendant HERNANDEZ's reckless, knowing and intentional misrepresentation and omissions of fact misdirected the Dallas County District Attorneys' office and the grand jury. Defendant's withholding of valuable information

concerning his pecuniary relationship with the Stainback organization spanning—by his own testimony some five to seven years—tainted the grand jury proceedings resulting in Plaintiffs' indictment and subsequent arrests. See *Winfrey*, *supra*. As a direct and proximate result of Defendants' actions, Plaintiffs suffered injuries.

C.

FALSE IMPRISONMENT

31. The factual allegations contained in all of the paragraphs of this Complaint are hereby incorporated and re-alleged for all purposes and incorporated herein with the same force and effect as if set forth verbatim. Defendant or Defendants caused the false imprisonment of Plaintiffs. Specifically, Defendant or Defendants caused the (1) willful detention; (2) performed without their consent; and (3) without the authority of law and/or by knowingly providing false information resulting in Plaintiffs' detention.

Defendant HERNANDEZ and/or other Defendants deliberately fabricated facts and/or omitted material facts that caused Plaintiffs to be charged wrongfully with a criminal offense. Defendant's or Defendants' actions were made fraudulently, maliciously, intentionally, knowingly, recklessly, and with plain incompetence. He or they likewise made several intentional, knowing or reckless statements of fact in reports and other writings upon which public officials relied and would have relied to seek the prosecution of Plaintiffs.

Defendant knew that others would rely on these reports, affidavits, or supplemental reports in rendering charging decisions. Defendant HERNANDEZ specifically intentionally, knowingly and with reckless disregard of the truth made the following statements and/or omitted the following material statements to third parties including Dallas Police Department officers, Dallas County Assistant District Attorney, including:

a. that the Special Investigation Unit found that neither Plaintiff had committed any crime, including Aggravated Assault or Tampering with Evidence;

b. that the SIU determined that there was no probable cause to charge either Plaintiff with any criminal offense;

c. that neither Plaintiff had any actual connection to any person who had discharged a firearm related to the recovered casings;

d. that neither Plaintiff had any actual connection to any persona who had discharged the firearm that caused damage to neighboring property;

e. that Defendant HERNANDEZ intentionally, knowingly and recklessly failed to apprise the Dallas County District Attorneys' who charge Plaintiffs that he had an employment relationship with the Stainback organization.

f. that Defendant HERNANDEZ intentionally, knowingly and recklessly misrepresented how he knew the complainant (Stainback organization representation, Ms. Faatittti);

g. that Defendant HERNANDEZ intentionally, knowingly, and recklessly omitted and misrepresented the nature of Ms. Faatitti's role within the Stainback organization.

32. As a result, Defendants intentionally, knowing and recklessly misled one or more of the Assistant District Attorney(s) who presented the bogus criminal charges to the grand jury. These misrepresentations and omissions of material fact caused Plaintiffs to be indicted and arrested on charges they knew were unsupported by the evidence, and failed to establish probable cause. But for these omissions and misrepresentations to these otherwise independent parties, Plaintiffs never would have been charged or indicted. Defendants' detention and arrest violated Plaintiff's clearly established rights under the United States Constitution to be free from a seizure without probable cause. Defendant(s) pursued such charges they were baseless. As a result, they violated their well-established duties to prevent another officer from violating an individual's rights. *See Ware v. Reed*, 709 F.2d 345, 353 (5th Cir. 1983). As a direct and proximate result of Defendants' actions, Plaintiffs suffered injuries.

33. In addition and/or in the alternative, Defendant HERNANDEZ's reckless, knowing and intentional misrepresentation and omissions of fact misdirected the

Dallas County District Attorneys' office and the grand jury. Defendant's withholding of valuable information concerning his pecuniary relationship with the Stainback organization spanning—by his own testimony some five to seven years—tainted the grand jury proceedings resulting in Plaintiffs' indictment and subsequent arrests. As a direct and proximate result of Defendants' actions, Plaintiffs suffered injuries.

D.

CIVIL CONSPIRACY

34. The factual allegations contained in all of the paragraphs of this Complaint are hereby incorporated and re-alleged for all purposes and incorporated herein with the same force and effect as if set forth verbatim. Defendant HERNANDEZ conspired with one or more presently unidentified individual and/or corporate Defendants in committing the aforementioned causes of action. As such, any of JOHN DOES (1-10) are likewise responsible to Plaintiffs. Defendant HERNANDEZ and (1) one or more JOHN DOE individual and/or entity (2) had an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) and committed one or more unlawful, overt acts; and (5) damages as the proximate result.

V.

DAMAGES

35. Plaintiff sues for the following damages:

Those injuries and damages include:

a. mental suffering and embarrassment from detention and arrest;

b. fees for the posting of bond;

c. fees for criminal defense attorneys;

d. injuries to Plaintiff FRIAS from his detention, arrest and custody, and damages to his reputation and law enforcement career and licensure; and

e. injuries to Plaintiff MCKINNNON from his detention, arrest and custody, reputation and licensure to operate the Green Elephant.

f. loss of reputation, shame, embarrassment, humiliation in the past;

g. loss of reputation, shame, embarrassment, humiliation in the future; and

h. past expenses for criminal defense;

i. reasonable attorneys' fees pursuant to Sections 42 U.S.C. §§ 1983 and 1988.

VI.

EXEMPLARY DAMAGES

36. Plaintiffs would further show that the acts and omissions of Defendants complained of herein were

committed with fraud, malice, recklessness, and indifference to the protected rights of the Plaintiff. Plaintiffs would further show that no operative limitation under the Texas Civil Practices and Remedies Code would limit any exemplary damages for state common law claims as Defendnant HERNANDEZ violated one or more of the felonies specified by TEX. CIV. PRAC. & REM. CODE § 41.008(c), including but not limited to violations of TEX. PEN. CODE § 32.46 and TEX. PEN. CODE § 32.47. In order to punish said Defendants for engaging in unlawful vicious attacks, and to deter such actions and/or omissions in the future, Plaintiff also seeks recovery from all Defendants for exemplary damages.

VII.

ATTORNEYS' FEES AND JURY DEMAND

37. Plaintiff is further entitled to receive reasonable attorneys' fees, paralegal fees and expert fees and costs pursuant to 42 U.S.C. § 1988. Plaintiff respectfully demands that a jury be empaneled to hear this action.

VIII.

CONCLUSION

Plaintiffs respectfully urge that upon a final hearing of the cause, judgment be entered for the Plaintiffs against Defendants for damages in an amount within the jurisdictional limits of the Court; actual damages, exemplary damages, reasonable attorneys' fees; together with interest as allowed by law; costs of court; and such

other and further relief to which the Plaintiffs may be entitled at law or in equity.

Respectfully submitted,

HENLEY & HENLEY, P.C.

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the CM/EFC system which will send notification to all attorneys of record who are registered for electronic notice.

/s/ Geoff J. Henley
Geoff J. Henley