IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 20-10830

TERRENCE HARMON, SHERLEY WOODS, AS ADMINISTRATRIX FOR THE ESTATE OF OSHEA TERRY,
Plaintiffs–Appellants,

v.

CITY OF ARLINGTON, TEXAS, BAU TRAN,
Defendants–Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION
NO. 4:19-CV-00696-O

APPELLANTS' OPENING BRIEF

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate any potential disqualification or recusal.

Name of Interested Party	**Connection And Interest**
Devi M. Rao/ Roderick & Solange MacArthur Justice Center	Counsel for Plaintiffs-Appellants
John J. Coyle/ McEldrew Young	Counsel for Plaintiffs-Appellants
Sherley Woods	Plaintiff-Appellant
Terrence Harmon	Plaintiff-Appellant
Robert Harris Fugate/ City Attorney's Office	Counsel for Defendants-Appellees
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James Thomas Jeffrey, Jr./ Law Offices of Jim Jeffrey	Counsel for Defendants-Appellees
Bau Tran	Defendant-Appellee
City of Arlington	Defendant-Appellee

/s/ Devi M. Rao
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument should be granted because this case presents important issues of constitutional law and municipal liability, and because of the harm to which Plaintiffs-Appellants have been subjected.

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STATEMENT OF JURISDICTION

Sherley Woods, as administratrix for the estate of O'Shae Terry, and Terrence Harmon brought this action under 42 U.S.C. § 1983 and for state law claims. ROA.187. The district court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1367 for the § 1983 claim and state law claims, respectively. On August 12, 2020, the district court entered a final judgment dismissing all claims. ROA.365. Plaintiffs timely filed a notice of appeal on August 13, 2020. ROA.366. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Whether it violates clearly established law to shoot an unarmed person who is not suspected of any violent offense, within one second, when he begins driving away from the officer.

2. Whether the vehicle's passenger was seized by the officer shooting the vehicle's driver, which subsequently stopped the vehicle, such that the passenger can bring a Fourth Amendment excessive force claim.

3. Whether the Complaint adequately stated a claim for municipal liability against the city, based on the police department's customs of not disciplining the officer for his bad behavior and of using excessive force, in particular against Black men.

INTRODUCTION

This case arises from a deadly police shooting at a traffic stop that was captured on video.

On September 1, 2018, a City of Arlington, Texas police officer pulled over O'Shae Terry for an expired registration tag. After approaching Terry's side of the vehicle, the officer smelled marijuana, and went back to her patrol car, leaving Terry and his passenger, Terrence Harmon, with officer Bau Tran, who was standing next to the passenger side of the vehicle. After a few minutes, including some chit-chat about the weather, Terry decided to end the traffic stop, and started to roll up his windows. In response, Tran grabbed onto the passenger side window with his left hand, and climbed onto the vehicle's running board as he reached into the vehicle with his right hand. Immediately after, Tran withdrew his right hand and reached for his service weapon. Two seconds after Terry started the engine, and one second after Terry took his foot off the brake to pull away, Tran shot Terry. To stop the vehicle, Harmon had to remove his dying friend's leg from the gas pedal and apply the brake with his hands. Terry later died at the hospital.

Terry's mother and Harmon brought suit against Defendant Tran and the City of Arlington. The district court dismissed their complaint. It held that Tran was entitled to qualified immunity because he had not violated Terry's Fourth Amendment rights, despite the fact that Tran deployed deadly force where Tran himself was not in immediate danger at the moment he fired, nor were any members of the public. It held that the law was not clearly established, despite the fact that this Court (in 2009) observed, in the context of a case involving a failed vehicular traffic stop and a deadly shooting, that "[i]t has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle v. Bexar Cty.*, 560 F.3d 404, 417 (5th Cir. 2009). The district court held that Harmon could not bring a Fourth Amendment claim against Tran, despite the fact that he was in the vehicle to which Tran intentionally applied force, and Harmon stopped the vehicle in response to that force. And it held that Plaintiffs' municipal liability claims failed, despite their allegations of the Arlington Police Department's customs of not disciplining Tran for his repeated bad, often violent, behavior and of

using excessive force, in particular against Black men. On each of these issues, the district court should be reversed. Viewing the facts—and the video—in the light most favorable to Plaintiffs, these claims should make it to discovery.

STATEMENT OF THE CASE

I. Factual Background[1]

a. The Traffic Stop

On September 1, 2018, at about 1:40 p.m., Arlington, Texas Police Officer Julie Herlihy stopped O'Shae Terry and his passenger, Terrence Harmon, for a temporary registration tag that was approximately three days expired. ROA.189 (Compl. ¶ 18). Terry and Harmon are both Black men. *See generally* Video. After the men provided proper identifying information, Officer Herlihy continued to detain them because she said she smelled marijuana emanating from the vehicle. ROA.189 (Compl. ¶¶ 19-20). A second Arlington Police officer, Defendant Bau Tran, arrived

[1] Because this appeal challenges the district court's order on a motion to dismiss, most of the relevant facts are taken from Plaintiffs' Amended Complaint, which begins at ROA.186. Additionally, video evidence of the incident was released by the Arlington Police Department and incorporated into the Complaint. ROA.187 (Compl. ¶ 3). Where relevant, this brief also references additional facts from the video ("Video"), which is available here: https://www.youtube.com/watch?v=bh08la7J0_s.

on the scene and approached the vehicle from the passenger's side. ROA.189 (Compl. ¶ 21). Officer Herlihy said she was going to have to search the vehicle, and asked Terry and Harmon to wait with Tran. Video 9:29-:41. Tran ordered the men to lower their windows and shut off the vehicle's engine, which they did. ROA.189 (Compl. ¶ 22).

At this time, nothing indicated that Terry or Harmon posed a threat:

- There was no evidence known to the officers which suggested either had committed a felony. ROA.189 (Compl. ¶ 24).
- Neither man fit the description of any individual wanted for criminal charges. ROA. 190 (Compl. ¶ 27).
- At no point during the vehicle stop did either officer observe any drugs or weapons in the car. ROA.190 (Compl. ¶ 25).
- The vehicle was not listed as stolen, nor was it listed as wanted in connection with any crime. ROA.190 (Compl. ¶ 26).
- In fact, the only evidence that either men had committed a crime was the alleged smell of marijuana emanating from the vehicle. ROA.189 (Compl. ¶ 23).

The vehicle itself did not pose a threat to Tran. Tran was never positioned in the path of the vehicle nor exposed to any risk of serious harm or injury by Terry or Harmon. ROA.190 (Compl. ¶ 29).

b. The Deadly Shooting

The encounter quickly turned deadly when Terry started to roll up the windows of the vehicle. ROA.190 (Compl. ¶ 30). Tran is heard on the video yelling "hey, hey, hey, hey" and "hey stop," as he grabbed onto the passenger window with his left hand. Video 29:49-52. Terry turned on the engine and shifted the car into gear. Video 29:52 (ignition); 29:54 (shift to drive). About two seconds later, just as the vehicle began to move forward, Tran—who had climbed onto the side of the vehicle and was holding onto the vehicle's window with his left hand—stuck his gun through the open window with his right hand, within inches of Harmon's face, and fired at least four shots at Terry. ROA.190 (Compl. ¶¶ 31-32); Video 29:56. The video taken from behind the vehicle shows Terry removing his foot from the brake one second before Tran fires the first shot. Video 12:46-12:47. As Tran started shooting, the video captures Harmon's screams, and then Harmon moaning "hey" repeatedly. Video 29:56-30:02.

After being struck by several bullets, Terry lost control of the vehicle, which drove forward down the road before veering onto a sidewalk. ROA.190 (Compl. ¶ 35). Harmon was forced to grab the

steering wheel and maneuver the vehicle back onto the open road. ROA.191 (Compl. ¶ 36). Harmon then reached down with his hand, removed Terry's leg from the gas pedal, and applied the brake with his hand in order to stop the vehicle. ROA.191 (Compl. ¶ 37). Harmon then exited the vehicle, pulled Terry from the driver's seat, and attempted to render aid to Terry, who was bleeding profusely due to his multiple gunshot wounds. ROA.191 (Compl. ¶ 38). While Harmon was attempting to provide medical aid to Terry, officers forced Harmon to the ground and placed him under arrest. ROA.191 (Compl. ¶ 39).

EMS eventually transferred Terry to Medical City Arlington Hospital, where he later died from his injuries. ROA.191 (Compl. ¶ 40).

Following an investigation, the Tarrant County District Attorney secured an indictment of Tran on the felony charge of criminally negligent homicide. ROA.191 (Compl. ¶ 42); Texas Penal Code § 19.05.[2] That charge is pending. ROA.191 (Compl. ¶ 42).

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[2] The elements of the offense are that: "(1) defendant's conduct caused the death of an individual; (2) the defendant ought to have been aware that there was a substantial and unjustified risk of death from his conduct; and (3) his failure to perceive the risk constituted a gross deviation from the standard of care an ordinary person would have exercised under like circumstances." *Queeman v. State*, 520 S.W.3d 616,

c. The Arlington Police Department and the City of Arlington

This fatal encounter is consistent with Arlington Police Department's (APD) routine practice. APD has a custom of using excessive—and frequently deadly—force to resolve interactions, as evidenced by five deadly incidents involving APD officers within the past few years, multiple resulting in wrongful death settlements. ROA.193-196 (Compl. ¶¶ 61-97). The City is ranked third in the state of Texas for deadly police encounters. ROA.196 (Compl. ¶ 100).

APD also has a documented history of racial bias against Black men. ROA.196 (Compl. ¶¶ 98-103). Officers regularly exhibit public disdain for minorities, in particular Black men. ROA.191 (Compl. ¶ 45). Three of the five deadly force incidents in the past five years involved Black men, and Black men make up more than 70% of the victims of deadly APD shootings. ROA.196 (Compl. ¶¶ 99-100). There have been multiple documented instances of APD officers using racial slurs—

622 (Tex. Crim. App. 2017). That last element is met when "the seriousness of the negligence would be known by any reasonable person sharing the community's sense of right and wrong." *Montgomery v. State*, 369 S.W.3d 188, 193 (Tex. Crim. App. 2012).

including APD Police Chief Will Johnson recently using the n-word. ROA.196 (Compl. ¶¶ 102-103).

More broadly, in the five years preceding the shooting, APD has been in disarray due to officer misconduct and civil rights violations. ROA.191 (Compl. ¶ 43). Officers regularly violate the civil rights of citizens. ROA.191 (Compl. ¶ 45). This general departmental disdain for the rule of law and individual rights is evidenced by two separate scandals implicating APD officers and leadership. ROA.192 (Compl. ¶ 46). First, in 2016, sixteen APD officers were forced to resign after admitting to writing fake parking tickets and reports under an illegal ticket quota system implemented by APD leadership. ROA.192 (Compl. ¶¶ 47-51). Second, in 2017, officers used excessive force in the arrest of a fourteen-year-old boy, and then engaged in extortion and, at the direction of APD leadership, destruction of evidence to cover up the incident. ROA.192-193 (Compl. ¶¶ 52-60).

The City of Arlington, Texas is responsible for the funding, budget, policies, operation, and oversight of the APD. ROA.188 (Compl. ¶ 15).

d. Failure to Discipline Tran

In the last seven years of his employment with APD, Tran engaged in nine acts of misconduct, known to the APD, which indicated that Tran was at best unsuited to serve as a police officer and, at worst, someone who should be criminally prosecuted. ROA.196-197 (Compl. ¶¶ 104-117). These incidents include an off-duty assault in which Tran threatened a man with a knife—while identifying himself as an APD officer—and a road rage assault, where Tran again used his position as an APD officer to intimidate his victim by putting on his police shirt before the assault, despite being off duty. ROA.197 (Compl. ¶¶ 106-114).

Despite Tran's repeated serious criminal conduct, APD refused to refer Tran for prosecution, fire him, or even seriously discipline him before he shot Terry, serving to embolden Tran and causing him to believe he was above the law. ROA.196 (Compl. ¶¶ 116-117).

II. The Proceedings Below.

Sherley Woods, as administratrix for the estate of O'Shae Terry, and Terrence Harmon, filed suit under 42 U.S.C. § 1983 and Texas state law against Tran and the City of Arlington. ROA.8. Plaintiffs filed an

Amended Complaint (the operative pleading—herein "Complaint"), ROA.186, and Defendants both moved to dismiss, ROA.211; ROA.269.

The district court granted in full both Defendants' motions to dismiss. ROA.343-364. The court concluded that (1) Tran was entitled to qualified immunity for Terry's excessive force claim because the Complaint did not allege force that was unreasonable, ROA.348-352,[3] and (2) because the law was not clearly established, ROA.354-355; (3) Harmon failed to allege a Fourth Amendment violation because he was not the subject of Tran's use of force, ROA.352-354; (4) the City of Arlington was not liable under either of Plaintiffs' two theories of municipal liability, ROA.356-358; (4) Plaintiffs' assault and battery claims should be dismissed under the Texas Tort Claims Act, ROA.359-362; and (5) Plaintiffs' claims for punitive and exemplary damages against Tran failed because they lacked valid underlying federal claims against him, ROA.363.

[3] Although the district court ultimately concluded in the body of its analysis that Tran's use of force was reasonable, the headers of its Order suggest the opposite. *See* ROA.348 ("Administratrix Woods has Established a Violation of Terry's Fourth Amendment Rights"); *id.* ("Terry's Injury Resulted from a Use of Force Clearly Excessive to the Need").

The district court entered judgment against Plaintiffs, ROA.365, and this appeal followed.[4]

STANDARD OF REVIEW

This Court reviews *de novo* dismissals under Rule 12(b)(6) on the basis of qualified immunity. *Alexander v. City of Round Rock*, 854 F.3d 298, 303 (5th Cir. 2017). The Court must "accept 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 252 (5th Cir. 2005), *abrogated on other grounds by Kingsley v. Hendrickson*, 576 U.S. 389 (2015). Under the "narrow exception" articulated by the Supreme Court in *Scott v. Harris*, 550 U.S. 372 (2007), a video recording can take precedence over facts alleged in a complaint only when the video "unequivocally disprove[s] the [plaintiff's] version of events." *Bros. v. Zoss*, 837 F.3d 513, 517 (5th Cir. 2016).

At the motion to dismiss stage, the "immunity-from-suit interest does not require that the plaintiff's original complaint exceed the short-and-plain-statement standard of Rule 8." *Arnold v. Williams*, 979 F.3d 262, 267 (5th Cir. 2020). Indeed, "a plaintiff must plead qualified-

[4] Plaintiffs do not appeal the dismissal of their state law claims.

immunity facts with the minimal specificity that would satisfy *Twombly* and *Iqbal*." *Id.*

SUMMARY OF THE ARGUMENT

Defendant Tran is not entitled to qualified immunity. He violated Terry's clearly-established Fourth Amendment right to be free from excessive force. In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Supreme Court explained that where a "suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Id.* at 11. And this Court explicitly held over a decade ago, in the "specific context of shooting a suspect fleeing in a motor vehicle" after a failed traffic stop, that "[i]t has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle v. Bexar Cty.*, 560 F.3d 404, 417-18 (5th Cir. 2009). Moreover, this Court's caselaw, consistent with seven of its sister circuits—clearly establishes that an officer who is not in the path of a moving vehicle cannot shoot at the vehicle based on concerns for his own safety.

Defendant Tran was not in immediate danger himself—he was not in danger of being hit by the vehicle, and the vehicle had moved only a few feet before he shot. There were no allegations of any danger to the public. On the facts pled by Terry and supported by the video—a traffic stop involving no suspicions of a violent offense and an unarmed person who starts driving away from the officers with no nearby bystanders—an officer could not reasonably perceive an "immediate and significant threat" to justify killing the person. *Id.* at 413. So no reasonable officer would have shot to kill.

Harmon, as the passenger, may bring a Fourth Amendment claim. By deliberately shooting the driver of the moving car, Tran caused the car to stop, effectively seizing everyone inside, including Harmon. Harmon was not some "bystander" to the force—he was subject to it.

Finally, Plaintiffs sufficiently alleged two separate theories of municipal liability. First, they alleged a custom of failing to discipline Tran for repeated bad and criminal acts, of which the City had knowledge. At the motion to dismiss stage, they were not required to name a specific policymaker with knowledge, and their allegations were not conclusory. Second, they alleged a custom of excessive force and racial

bias against Black men, which was the moving force behind the violation here—the use of excessive force against a Black man.

ARGUMENT AND AUTHORITIES

I. Defendant Tran is Not Entitled to Qualified Immunity.

A. Legal Framework.

Government officials may be held liable where their actions "violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity ensures that, before they are subjected to suit, officers are on notice that their conduct is unlawful. *See id.*

The qualified immunity analysis has two prongs. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). The first prong asks whether the facts that the complaint has alleged makes out a violation of a constitutional right. *See id.* The second prong asks whether the right at issue was "clearly established" at the time of defendant's conduct. *See id.*

This Court's caselaw assigns the plaintiff the burden to disprove that defendants are entitled to qualified immunity. *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002).[5]

B. Tran's Use of Deadly Force Was Excessive.

"[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). The Supreme Court set out the relevant constitutional rule in *Garner*: Deadly force violates the Fourth Amendment unless "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Id.* at 11; *see also Cole v. Carson*, 935 F.3d 444, 453 (5th Cir. 2019) ("*Tennessee v. Garner* announced the principle that the use of deadly force is permitted only to protect the life of the shooting officer or others.").

Applying the rule in *Garner*, this Court held in *Lytle v. Bexar County*, 560 F.3d 404 (5th Cir. 2009), that "a suspect that is fleeing in a

[5] As set forth herein, Plaintiffs easily satisfy that burden in this case. However, Plaintiffs preserve the right to challenge this Court's burden framework, which conflicts with the law of several other circuits. *See Joseph on behalf of Estate of Joseph v. Bartlett*, No. 19-30014, -- F.3d --, 2020 WL 6817823, *5 n.19 (5th Cir. Nov. 20, 2020).

motor vehicle is not so inherently dangerous that an officer's use of deadly force is *per se* reasonable." *Id.* at 416. Therefore, the Court explained, the reasonableness of using deadly force on a suspect fleeing in a vehicle depends on the facts and circumstances of the case, including (1) the danger posed by the suspect to the officer, (2) the danger posed to other members of the public, and (3) the officer's conduct in response to the situation. *See id.* at 417. Considering each of those three factors in turn, Tran's use of force, as alleged, was not reasonable as a matter of law.

i. Officer Danger.

One aspect of the safety inquiry asks whether the victim posed a danger to the officer at the time the officer employed deadly force.

In *Lytle*, an officer tried to initiate a traffic stop on a suspected felon but the vehicle accelerated, leading the officer on a half-mile chase that was "well over" the thirty-mile-per-hour speed limit. *Id.* at 407. During the chase, the car collided with a vehicle in the oncoming lane, came to a stop, and then began backing up toward the police cruiser "in an effort to free [the car] from the collision." *Id.* at 409. The driver then moved the car forward, and made it three or four houses down the block when the officer fired, killing the vehicle's passenger. *See id.* The Court observed

that although the vehicle may have posed a threat when "it was backing up toward [the officer], that does not necessarily make his firing at the vehicle when it was driving away from him equally reasonable." *Id.* at 413. The inquiry turns on whether the officer was in danger "at the moment" the officer fires. *Id.* at 408, 413-14.

As in *Lytle*, on the facts alleged here, Terry has plausibly alleged facts on which "a jury could find that that there was no threat to [the officer] at the time of the shooting." *Id.* at 414. Here, like in *Lytle*, Terry's vehicle did not "pose[] an immediate and significant threat of harm" to Tran at the time he used the deadly force. *Id.* at 413. In fact, Tran himself was *never* in the path of the vehicle, unlike the officer in *Lytle*. *See* ROA.190 (Compl. ¶ 29) ("At no point in time was Tran positioned in the path of the vehicle.").

This Court's decision in *Goldston v. Anderson*, 775 F. App'x 772 (5th Cir. 2019), cited by the district court, is in accord. ROA.349-50. In *Goldston*, this Court affirmed summary judgment based on qualified immunity for an officer who shot a fleeing fugitive as he backed his car up "quickly" towards another officer. *Id*. at 773. *Goldston* stands for the

unremarkable proposition that when an officer is in the direct path of a vehicle, deadly force may be warranted.

The district court recognized that the facts of *Goldston* are distinguishable because "neither Tran nor his partner were in the immediate forward path of the vehicle." ROA.350. Yet it concluded that Tran's positioning "at and on the side of Terry's vehicle[] subject[ed] him to an increased risk of danger of serious bodily injury or death." ROA.350. This conclusion is doubly wrong.

First, being "at" the side of a moving vehicle does not pose a threat of harm—the existence of the threat generally turns on whether the person is in the vehicle's path. *See Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008) (holding that the officer was "standing to the [car's] passenger side at all times, and consequently could not have been struck as the [car] moved backwards and then forwards."). As the Ninth Circuit explained: "[a] moving vehicle can of course pose a threat of serious physical harm, but only if someone is at risk of being struck by it." *Orn v. City of Tacoma*, 949 F. 3d 1167, 1174 (9th Cir. 2020). Here, where the district court acknowledged that Tran was not in the "path of the vehicle," ROA.350, he was never at risk of being hit by it, *see Orn*, 949 F.3d at 1174-75

(observing that where officer was "never in the vehicle's path of travel" he "was never at risk of being struck" and therefore deadly force was not warranted). What is more, the video shows that Tran was on the side of the vehicle that was against the curb. *See, e.g.*, Video 25:41. To pull onto the road, then, Terry had to move *away* from Tran, not towards him. Video 12:46-12:48.

Second, that the fact that Tran was "on the side" of the vehicle when he fired, ROA.350, does not reflect the *need* to use deadly force, but a *desire* to. The Complaint alleges—and the video supports—that Tran "climb[ed] onto the side of the vehicle" "[i]n an effort to gain a good angle to shoot Mr. Terry." ROA.190 (Compl. ¶ 31); Video 29:48-29:59. In other words, viewing the facts in the light most favorable to Plaintiffs, Tran did not shoot because he was "on the side of Terry's vehicle," ROA.350—he was on the vehicle *in order to shoot*.

The district court characterized Tran as being "pulled unwillingly on the exterior of a fleeing vehicle," ROA.350, analogizing this case to an unreported district court opinion in which an officer was "dragged before being able to pull himself up to the bumper" of the fleeing suspect's car, at which point "the [suspect] swerved from side to side, attempting to

throw [the officer] from the car." *Woolery v. City of Mineral Wells, Tex.*, No. 4:04-cv-415, 2005 WL 755762, at *2 (N.D. Tex. Apr. 1, 2005). But the district court's characterization of what happened here is supported by neither the video nor Plaintiffs' "well-pled[] factual allegations," which "enjoy a presumption of truth" at this stage. *Peña v. City of Rio Grande City*, 879 F.3d 613, 620 (5th Cir. 2018). The video shows Terry removing his foot from the brake to drive away *one second* before Tran fires. Video 12:46-12:47. There was not time for Tran to have been "dragged" anywhere before he pulled the trigger.

In contrast to this scene, cases from this Court illustrate what an officer being "pulled unwillingly" really looks like. For example, in *Mazoch v. Carrizales*, 733 F. App'x 179, 180 (5th Cir. 2018) (per curiam), a motorist drove his vehicle approximately twenty feet with two officers' arms trapped in a narrow opening of a rolled-up window, severely injuring the officers. And in *Owens v. City of Austin*, 259 F. App'x 621, 623 (5th Cir. 2007), an officer's "arms became trapped in the car" and he "began to be dragged as a result." Here, in contrast, Tran was not "trapped." He was holding onto the passenger window with his left hand. Video 29:48-29:54; ROA.190 (Compl. ¶ 31). The window was open enough

for Tran to move his arms freely—he reached into the car with his right hand, withdrew that same hand to reach for his service weapon, and then reinserted that arm into the car to shoot. Video 29:49-29:56. This is a far cry from an officer-being-dragged case.

In short, because Tran was neither in the path of the vehicle nor being dragged by it he was not in immediate danger at the moment he used the deadly force.

ii. Danger to Others.

The second part of the "threat to safety" inquiry is whether the victim posed a danger to others. This Court addressed this issue in depth in *Lytle*. There, the Court questioned whether the officer "had sufficient indicia to conclude that the [vehicle] posed such a threat of harm" to the public, despite the fact that the vehicle led the officer on a high-speed chase through a residential area and collided with another vehicle while making a wide right turn. 560 F.3d at 416. Ultimately, since "there were no children or bystanders in the path of the vehicle, indicating that no one was in immediate danger," this Court concluded that "the threat was not so great under Lytle's version of facts that [the officer's] conduct [was] beyond question." *Id*. at 417.

This Court, in *Lytle*, also surveyed cases from other circuits on this danger-to-the-public question. *Id.* at 415. In the cases holding that an officer's use of force was reasonable, the suspects had *already* placed officers or members of the public at danger as part of their flight, and were poised to continue to do so. *See Cole v. Bone*, 993 F.2d 1328, 1330-31 (8th Cir. 1993) (driver of eighteen-wheeler led police on fifty-mile chase exceeding speeds of ninety miles per hour, passed traffic on both shoulders, attempted to ram several police cruisers, ran a road block, and forced over one hundred vehicles out of its way); *Williams v. City of Grosse Pointe Park*, 496 F.3d 482, 487 (6th Cir. 2007) (suspect driving stolen car collided with a police cruiser, drove onto the sidewalk, and knocked an officer to the ground); *Abney v. Coe*, 493 F.3d 412, 417-18 (4th Cir. 2007) (suspect led police on an eight-mile chase during which he ran another motorist off the road and committed numerous dangerous traffic violations).

Conversely, this Court observed that "a number of courts have found police officers' shooting of fleeing motorists to be unreasonable—or at least potentially so, for the purposes of qualified immunity appeals—where the driver posed a lesser risk of harm to others." *Lytle*, 560 F.3d at

416. For example, regarding *Adams v. Speers*, 473 F.3d 989 (9th Cir. 2007), this Court explained, it was "obvious" that a reasonable officer would not have used deadly force to apprehend "a suspect [that] had led police on a chase, 'largely within the speed limit.'" *Lytle*, 560 F.3d. at 415-416 (quoting *Adams*, 473 F.3d at 991). Likewise, in *Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005), this Court noted, a suspect fleeing in a police cruiser did not pose a danger "so grave as to justify the use of deadly force," especially when "the plaintiff's version of facts did not mention any bystanders 'whose physical safety could have been endangered by [the suspect's] actions.'" *Lytle*, 560 F.3d at 416 (quoting *Smith*, 430 F.3d at 773-74). And in *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003), this Court observed, even though the fleeing vehicle had collided with a police cruiser during a high-speed chase, "[g]enuine issues of material fact remain[ed] as to whether [the suspects'] flight presented an immediate threat of serious harm" when they "'accelerated to eighty to eighty-five miles per hour in a seventy-miles-per-hour zone in an attempt to avoid capture.'" *Lytle*, 560 F.3d at 416 (quoting *Vaughan*, 343 F.3d at 1330).

Here, in striking similarity to *Lytle* where the officer fired at the rear of the car as it "began to drive away" with no "bystanders in the path

of the vehicle," 560 F.3d at 409, Tran fired four shots "through the passenger side window" as Terry's car "began to move forward," with no bystanders to be found, ROA.190 (Compl. ¶ 32). The district court mischaracterized Terry's vehicle as having "sped away without regard for [Tran's] safety." ROA.351. The video does show that the car travelled a distance, but all but a few feet of that occurred *after* the deadly shots were fired. Video 12:45-12:59. Critically, Terry removed his foot from the brake just one second before Tran shot. Video 12:46-12:47. Terry had not led officers on a "chase" of any kind before the deadly shots were fired; Tran employed deadly force at almost the very moment Terry began to pull away from the traffic stop.

The district court relied on "Terry's noncompliance and the *general danger* of the fleeing vehicle" as the basis for Tran's alleged apprehension of imminent danger to himself. ROA.351 (emphasis added). Without more, this suggests that an officer can use deadly force against a misdemeanant simply because he does not stop after being asked to do so. Thankfully, that is not the law in this Court: There is no "open season on suspects fleeing in motor vehicles." *Lytle*, 560 F.3d at 414. Terry's decision to drive away from the traffic stop, alone, is insufficient to

sustain the deadly force Tran employed here. As the Supreme Court observed in *Garner*: "It is not better that all felony suspects die than that they escape." 471 U.S. at 11.

iii. Officer Reaction.

Lytle provides that a court should also consider the reasonableness of the officer's response to any perceived danger. 560 F.3d at 412 (holding it would be a mistake "to focus entirely on the threat of harm," without "consider[ing] [the officer's] conduct in response to that threat").[6] Here, Tran's decision to fatally shoot Terry was unreasonable given that (even assuming he was in danger) Tran had alternative options available short of shooting to kill. After grabbing the window and stepping onto the running board Tran could have stepped back from the vehicle *before* the vehicle started moving. *See Orn*, 949 F. 3d at 1167 ("[The officer] could therefore have avoided any risk of being struck by simply taking a step

[6] To start, of course, Tran could have decided not to clamber onto the vehicle—he could have just let Terry, a nonviolent misdemeanor suspect, roll up the windows and drive away. *See Kirby*, 530 F.3d at 482 ("[I]t was [the officer] who placed himself in potential danger by moving towards the rolling [car] instead of fleeing or simply remaining where he was."); *Godawa v. Byrd*, 798 F.3d 457, 465-66 (6th Cir. 2015) (considering that officer "actively 'put himself in a dangerous position in order to effectuate an arrest' by running alongside the car and using his body to try and block the exit").

back, a common-sense conclusion."). And even once the car started moving Tran could have stepped down, rather than shoot—the video shows the vehicle moving only a few feet before Tran fires. Video 12:45-12:47. Before resorting to deadly force, Tran could also have fired warning shots. *See* ROA.350 (noting case in which officer "fir[ed] warning shots" before "finally administering deadly force"). Indeed, this Court has interpreted *Garner* to "require[] a warning before deadly force is used 'where feasible' [as] a critical component of risk assessment and de-escalation." *Cole*, 935 F.3d at 453 (en banc) (quoting *Garner*, 471 U.S. at 11-12); *see also id.* at 449 ("the officers provided 'no warning . . . that granted [suspect] . . . an opportunity to disarm himself before he was shot'").

Tran's actions were unreasonable in response to any perceived threat. Tran shot Terry dead within two seconds of Terry starting up the engine to pull away from the traffic stop, and within one second of Terry taking his foot of the brake. Video 12:45-12:47; 29:54-29:56. It all happened in less time than it took to type this sentence. While the law provides police officers with latitude to make split-second decisions in certain circumstances, here, "the quickness with which the officer[]

resorted to" deadly force "militates against a finding of reasonableness." *Trammell v. Fruge*, 868 F.3d 332, 342 (5th Cir. 2017).

Ultimately, at the time Tran shot Terry, Terry was an unarmed suspect detained for a potential misdemeanor, who attempted to end a traffic stop. Because Terry was not an "immediate threat" to anyone, Tran's use of deadly force violated Terry's Fourth Amendment rights. *Garner*, 471 U.S. at 11.

C. The Law Clearly Established That Defendant Tran's Use of Deadly Force Was Unreasonable.

i. The Clearly-Established Inquiry.

At the second step of the qualified immunity test, "[t]he 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." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). "The central concept is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.'" *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (en banc) (quoting *Hope*, 536 U.S. at 740). There does not need

to be a case "specifically proscrib[ing]" the conduct at issue for officers to "have 'fair warning' that their conduct is unlawful." *Austin v. Johnson*, 328 F.3d 204, 210 (5th Cir. 2003). "Furthermore, 'in an obvious case,'" the Supreme Court's ruling in *Garner* on the use of deadly force "'can clearly establish the answer, even without a body of relevant case law.'" *Cooper v. Brown*, 844 F.3d 517, 524 (5th Cir. 2016) (quoting *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012)).

ii. Officer Tran's Actions Violated Clearly-Established Law.

This Court need look no further than *Garner* and *Lytle* to conclude that a reasonable officer in Tran's position would not have believed the use of deadly force was constitutional. *Garner* holds that where a "suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." 471 U.S. at 11. This Court applied that very test in *Lytle*—a case involving an officer shooting a suspect who failed to yield to a vehicular traffic stop—to hold that genuine issues of material fact precluded summary judgment based on qualified immunity on an excessive force claim where the officer was not in the path of the vehicle in question. 560 F.3d at 407.

Not only did this Court in *Lytle* hold that there was a triable issue on the constitutionality of the officer's use of deadly force (on facts similar to those here), but it held that the right at issue was clearly established. *Id.* at 417. Indeed, the Court thought it was an easy case, expressing that it "need not dwell on this issue." *Id.* "It has long been clearly established," the Court explained (in 2009), "that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Id.* at 417. That was true "as both a general matter," the Court held, citing *Garner*, "and in the more specific context of shooting a suspect fleeing in a motor vehicle," *id.* at 417-18. Since this Court held in 2009, in the context of a suspect declining a vehicular traffic stop, that it was clearly established that "it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others," *id.* at 417, it was clearly established in 2018 that it is unreasonable for an officer to use deadly force against a suspected misdemeanant in the same situation.

What is more, *Lytle* clearly establishes that an officer lacks an objectively reasonable basis for believing his own safety is at risk—and

therefore cannot use concerns about his own safety to justify deadly force—when he is not in the path of the vehicle. In *Lytle*, the vehicle began backing up toward the officer, but then stopped and started to drive *away* from him. *Id.* at 409. "To be sure," this Court concluded, "the [vehicle] might have posed an immediate and significant threat of harm to [the officer] when it was backing up toward him," *id.* at 413, but "a jury could find that there was no threat to [the officer] at the time of the shooting," *id.* at 414. Indeed, another Court of Appeals reads *Lytle* as standing for the proposition that "an officer lacks an objectively reasonable basis for believing that his own safety is at risk when firing into the side or rear of a vehicle moving away from him." *Orn*, 949 F. 3d at 1178. In short, *Lytle* clearly establishes that an officer, like Tran, cannot rely on concerns for his own safety to justify deadly force if he is not in the path of the vehicle at the moment he pulls the trigger.

In *Lytle*'s discussion of the excessive force claim in that case, *Lytle* further solidifies that the deadly force employed here was not reasonable, based on all the relevant circumstances. On the constitutional question—whether the deadly force was excessive—this Court held in *Lytle* that "[a] rational jury could conclude that the [vehicle] did not pose an especially

significant threat of harm such that the use of deadly force was justified." *Id.* at 417. That was so for two reasons. First, as noted above, the vehicle did not pose an immediate threat of harm to the officer, who was not in its path. *Id.* at 413. Second, the vehicle only posed "some threat of harm" to the public, *id.* at 416, over and above the generic danger posed by a suspect fleeing in a vehicle, which this Court disclaimed as insufficient to justify deadly force, *id.* at 414-15 (observing "[n]early any suspect fleeing in a motor vehicle poses some threat of harm to the public" and the Supreme Court's decision in "*Scott* did not declare open season on suspects fleeing in vehicles"). Specifically, the vehicle took the officer on a "high speed [chase] within a residential area, [where] there were children playing somewhere nearby, and the [vehicle] had collided with another vehicle." *Id.* at 416. Thus, *Lytle* clearly established the following:

No officer danger + "some threat" to the public + deadly force = clearly established constitutional violation

Here, as explained above, Terry's vehicle posed no threat to any officers or to the public. We could express that as follows:

No officer danger + no threat to the public

Doing the "math," it is evident that *Lytle* clearly establishes that Tran's actions were unconstitutional, and he would have had "fair notice" of that fact. As in *Lytle*, there was deadly force. (The *same* deadly force: a gun being fired at a vehicle driving away, declining a traffic stop.) As in *Lytle*, there was no officer danger. And because Terry's vehicle posed *less* of a risk to the public than the vehicle in *Lytle*, Tran's use of deadly force was clearly unconstitutional under *Lytle*. *See, e.g.*, *Hatcher v. Bement*, 676 F. App'x 238, 245 (5th Cir. 2017) (holding that the officer violated a clearly established right since the suspect posed "an objectively lesser threat" than a suspect in a similar case where this Court rejected the officer's claim of qualified immunity).

While *Lytle* clearly establishes the unconstitutionality of Tran's actions here, it is worth noting that out-of-circuit precedent is in accord. The law in the other courts of appeals clearly establishes that although officers may use their own safety to justify deadly force when they are in the vehicle's trajectory, they may not shoot to kill when they are standing to the side or back of a vehicle, absent a serious risk of harm to the public.

In *Orn v. City of Tacoma*, the Ninth Circuit affirmed the denial of qualified immunity for an officer who was not in the path of a vehicle, yet

shot and severely wounded the driver after "a slow-speed" pursuit. 949. F.3d at 1171-73. The court held that the law was clearly established, observing that "[b]y the time of the shooting in October 2011"—seven years before Tran shot Terry—"*at least seven circuits* had held that an officer lacks an objectively reasonable basis for believing that his own safety is at risk when firing into the side or rear of a vehicle moving away from him." *Id.* at 1178 (emphasis added). For this proposition, the Ninth Circuit cited *Lytle*, along with cases from the Second, Third, Fourth, Sixth, Tenth, and Eleventh circuits. *See id.* (citing *Lytle*, 560 F.3d at 413; *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756, 763 (2d Cir. 2003); *Abraham v. Raso*, 183 F.3d 279, 293-94 (3d Cir. 1999); *Waterman v. Batton*, 393 F.3d 471, 482 (4th Cir. 2005); *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008); *Cordova v. Aragon*, 569 F.3d 1183, 1187, 1191 (10th Cir. 2009); *Vaughan v. Cox*, 343 F.3d 1323, 1327, 1330-31 (11th Cir. 2003)). The Ninth Circuit added a "see also" citation to an additional circuit (the Seventh) for good measure. *Orn*, 949 F.3d at 1178 (citing *Scott v. Edinburg*, 346 F.3d 752, 757-58 (7th Cir. 2003)). The fact that this Court, and a vast majority of its sister circuits, recognized well before Tran killed Terry that shooting into the "side or rear of a vehicle" cannot

be justified based on officer safety concerns decides this case. *Orn*, 949 F. 3d at 1178.[7]

The district court recognized that "[b]oth *Garner* and *Lytle* hold that an officer may not use deadly force to prevent the escape of a non-threatening suspect fleeing in a motor vehicle," but concluded that "the parameters" of prior cases "are not close enough to clearly establish that an officer may not use deadly force when he is on the side of the vehicle while the driver is driving away in blatant disregard of his instructions." ROA.355. But this is just another way of saying a plaintiff needs to identify a case on all fours before getting past qualified immunity. That is not what the law requires. *See Austin*, 328 F.3d at 210 (holding there does not need to be a case "specifically proscrib[ing]" the conduct at issue for officers to "have 'fair warning' that their conduct is unlawful").

Simply put, this Court's decision in *Lytle* provided Tran with "fair warning" that his conduct was unconstitutional under the circumstances here, consistent with the law of the other circuit courts. It is beyond

[7] Although *Orn* looked only at law that predated 2011, the circuit courts have had subsequent opportunities to address these questions, and continue to draw the same line. *See, e.g.*, *Reavis Estate of Cole v. Frost*, 967 F.3d 978, 994 (10th Cir. 2020); *Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019).

clearly established that officers may not use deadly force to stop a suspect in a vehicle when they are not directly in harm's way of the vehicle, and where members of the public are not in danger. "[A] reasonable officer on the scene" would have known that using deadly force against Terry was unconstitutional. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

This is also an "obvious" case under *Garner*, which prohibits deadly force unless justified based on an immediate threat of harm to the officer or others. 471 U.S. at 11. This Court noted in *Cole* that "[t]he Supreme Court has repeatedly stated that this rule can be sufficient in obvious cases, and this [C]ourt has applied it in such cases, without dependence on the fact pattern of other cases." *Cole*, 935 F.3d at 453 & n.48 (citing *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam); *Mason v. Lafayette City-Par. Consol. Gov't*, 806 F.3d 268, 277-78 (5th Cir. 2015); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Newman v. Guedry*, 703 F.3d 757, 767 (5th Cir. 2012)); *cf. Taylor v. Rojas*, No. 19-1261, 2020 WL 6385693, at *2 (U.S. Nov. 2, 2020) (per curiam) ("Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that [the petitioner's] conditions of confinement offended the Constitution."). This is one such "obvious" case. Viewing the facts in

the light most favorable to Plaintiffs, Tran could not have reasonably perceived an "immediate threat" to his own safety or the safety of others, *see* Section I.B.i, I.B.ii, *supra*, and therefore his decision to shoot Terry one second after Terry took his foot off the brake to pull away from a traffic stop was unconstitutional under *Garner*—period. 471 U.S. at 11.[8]

II. The District Court Erred in Dismissing Harmon's Excessive Force Claim.

The district court concluded that Terrence Harmon's excessive force claim failed because "he was not a subject of Tran's use of force," describing Harmon as a "bystander" to Tran's use of force against Terry. ROA.353-54. The district court erred.

By deliberately shooting the driver of the moving car, Tran stopped the car, effectively seizing everyone inside, including Harmon. This

[8] A "growing, cross-ideological chorus of jurists and scholars" have recognized that the doctrine of qualified immunity, at least as currently conceived, strays far from both the text of 42 U.S.C. § 1983 and from the common law. *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2018) (Willett, J., concurring) (footnotes omitted); *see* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. (forthcoming 2021), at *38-46, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680714; Will Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55-61 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018). Plaintiffs preserve the right to challenge the doctrine in the Supreme Court on that basis.

Court's caselaw is unequivocal on this point. In *Jamieson By & Through Jamieson v. Shaw*, 772 F.2d 1205, 1210 (5th Cir. 1985), for example, the Court held that the passenger in a vehicle "was 'seized' for purposes of the Fourth Amendment when the officers deliberately placed [a] roadblock in front of the car in which they knew she was a passenger." And in *Flores v. City of Palacios*, 381 F.3d 391, 397 (5th Cir. 2004), the Court held that "an officer seizes a suspect when he intentionally shoots a fleeing suspect's car and the suspect stops immediately in response to the shot." *See also Blair v. City of Dallas*, 666 F. App'x 337, 341 (5th Cir. 2016) (holding that, as long as the act is intentional, a seizure occurs even when the person seized is not the intended object of the act). Because Tran intentionally applied force to stop the vehicle, and the vehicle stopped, he effected a seizure on both Terry and Harmon.

In holding that Harmon had not stated a cause of action, the district court relied on a trio of police shooting cases from this Court: *Petta v. Rivera*, 143 F.3d 895 (5th Cir. 1998), *Coon v. Ledbetter*, 780 F.2d 1158 (5th Cir. 1987), and *Grandstaff v. Borger*, 767 F.2d 161, 172 (5th Cir. 1985). ROA.352-53. Below is each case in turn.

In *Petta v. Rivera*, this Court held that passengers in a vehicle—the children of the driver—could bring an excessive force claim against the officer who fired at the vehicle before and after a high-speed pursuit, even though the children "were never taken into custody nor were they touched by any officers." 143 F.3d at 897-98, 900.

The district court observed that in *Petta* "[t]he Fifth Circuit allowed the children's excessive force claims on the grounds that the officers' actions were, quite literally, 'directed not only towards [the children's mother] but towards the car that [the children], too, occupied.'" ROA.353 (quoting 143 F.3d at 902-03). Yet the district court attempted to distinguish *Petta* from the case at hand, characterizing Harmon as someone who "sat nearby as Tran pointed his pistol directly at Terry from close range and fired." ROA.354.

But Harmon was not merely "nearby" the use of force against Terry; he was seated in the passenger seat of the vehicle when Tran deployed lethal force *in order to stop the vehicle*—just like the children in *Petta*. As in *Petta*, Tran's use of force demonstrated an "utter disregard for the safety and well-being of" anyone in the vehicle. *Petta*, 143 F.3d at 903. Thus, Harmon, like the Petta children, "asserted a valid claim under

§ 1983 for a constitutional violation of excessive force" because "[u]nder the[] circumstances, it was entirely unnecessary for [the officer] to use deadly force in an attempt to apprehend" the driver. *Id.* at 900, 902.

In *Coon v. Ledbetter*, the police arrived at Coon's trailer while investigating a hit-and-run. 780 F.2d at 1159. Things escalated and the officers shot into the trailer, hitting Coon. *Id.* at 1160-61. Coon; his wife, who "was not directly involved in the shooting and was with the deputies when it occurred"; and his daughter, who was in the trailer during the shootout, brought § 1983 claims, and a jury returned a verdict against the officers and awarded damages to all three plaintiffs. *Id.* On appeal, as the district court noted, "[the] Fifth Circuit found that Coon's daughter had proven a violation of her personal rights, as she was in the trailer with her father and was thus a subject of the gunfire. Coon's wife's claims failed, though, because she was not directly involved in the shooting and '[t]here was no evidence that any act of the deputies was directed toward [her].'" ROA.352-53 (quoting *Ledbetter*, 780 F.2d at 1160) (citations omitted).

Applying *Ledbetter* to the case at hand, the district court likened Harmon to Coon's wife, concluding that "Harmon's section 1983 claim

fails as he was not a subject of Tran's use of force." ROA.353. Harmon's claim was *unlike* that of the daughter in *Ledbetter*, the district court concluded: there, the officers' fire "was functionally directed at the trailer itself, including its inhabitants," whereas, here, "Tran's actions were not directed at Harmon." ROA.353.

But the district court got it wrong—Harmon is like Coon's daughter, not his wife. By lethally shooting the driver of the moving vehicle in which Harmon was a passenger, Tran "functionally directed [force] at the" *vehicle*, "including its inhabitants." ROA.353. Just as Coon's daughter could bring a § 1983 claim because she "was in the trailer" at which the police directed their fire, so, too, can Harmon for being "in the vehicle." Indeed, like the officers in *Ledbetter*, Tran targeted force at the vehicle despite *knowing* that someone besides the formal "target" was there. *See Ledbetter*, 780 F.2d 1161 ("[T]he jury could have concluded that the deputies knew or should have known that other persons besides Billy Dan Coon were in the trailer, so that the requisite level of reckless conduct . . . was met."). In short, Tran's force was "functionally directed" at the vehicle in which Harmon sat, like the daughter in *Ledbetter*, ROA.353, making Harmon quite unlike Coon's

wife, where "[t]here was no evidence that any act of the deputies was directed toward" her as she "was with the deputies when it occurred," 780 F.2d at 1161.

Grandstaff arose after the police shot and killed a man they mistook for a fugitive they had been pursuing. 767 F.2d at 164. The Court held that the man's widow and stepsons were not entitled to "damages against the City and the officers for their own emotional injuries suffered as bystanders when they witnessed the gunfire directed at Grandstaff in his pickup truck." *Id.* at 172.

The district court cited *Grandstaff* for the proposition that "there is no constitutional right to be free from witnessing . . . police action" as a "bystander." ROA.352. While that may be true, it is beside the point. Harmon's claim did not stem from his "witnessing" police action, but his *involvement* in it. Grandstaff's family members were not part of the action—they were inside their house, with the doors locked, and officers shot Grandstaff after he left the house and drove some distance. 767 F.2d at 165. In contrast, Harmon was not a bystander observing Tran's use of excessive force against Terry during the seizure; when Tran deployed force, he effectively seized Harmon as well. Indeed, after Tran shot Terry,

it was *Harmon* who stopped the car—and to do so he had to reach over Terry, who was incapacitated, grab the steering wheel of the careening car, wrestle Terry's legs off of the pedals, and use his hands to press on the brake. ROA.190 (Compl. ¶¶ 32, 35-37).

In short, *Petta* and *Ledbetter* both support that Harmon has a valid excessive force claim against Tran and *Grandstaff* is distinguishable. The district court's dismissal of Harmon's excessive force claim should be reversed.

III. The District Court Erred in Dismissing Plaintiffs' Municipal Liability Claims.

To state a claim for municipal liability, a plaintiff must (1) "identify [a city] policy," (2) "connect the policy to the city itself;" and (3) "show that the particular injury was incurred because of the execution of that policy." *Bennett v. Slidell*, 728 F.2d 762, 768 (5th Cir. 1984) (en banc). City policy need not be written down—it can be "[a] persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Bennett v. Slidell*, 735 F.2d 861, 862 (5th Cir. 1984) (en banc) (per curiam).

In their Complaint, Plaintiffs made two central allegations against the City of Arlington. First, they alleged that the City had a custom of failing to discipline Tran, despite actual knowledge of his history of violent misconduct. ROA.357 (citing Compl. ¶ 133). Second, they alleged that the City had constructive knowledge of the APD's customs of using excessive force and engaging in racial discrimination, yet ignored them. ROA.357 (citing Compl. ¶ 134). The district court found fault with both of Plaintiffs' municipal liability theories and granted the City's motion to dismiss. Neither of the district court's conclusions withstand scrutiny.

A. Plaintiffs Sufficiently Alleged Municipal Liability with Respect to a Policy of Failing to Discipline Tran.

Plaintiffs sufficiently alleged the three prongs of the municipal liability test for their first theory regarding the City's actual knowledge of Tran's misconduct and failure to discipline him.

i. Plaintiffs Alleged a Custom of Failing to Discipline Tran.

With respect to the first prong of the municipal liability test—the existence of a City policy—the Complaint alleged nine previous incidents of Tran's misconduct, including at least two violent assaults against civilians. ROA.196-97 (Compl. ¶¶ 104-114). The Complaint further alleged that the APD did not "meaningful[ly]" discipline Tran for this

misconduct. ROA.200 (Compl. ¶ 133). By not addressing the first prong, the district court order reflects an assumption that the Complaint's allegations gave rise to a reasonable inference that the APD had policy of failing to discipline Tran. *See* ROA.357-58. That was correct. *See, e.g.*, *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 92 (5th Cir. 1992) (affirming the district court's holding that "nine occasions" of improper seizure were not "isolated incidents" but rather "widespread practice sufficient to constitute municipal policy").

ii. Plaintiffs Sufficiently Alleged Knowledge by the City.

With respect to the second prong of the test—the City's knowledge—the Complaint alleged that the City had actual knowledge of Tran's repeated misconduct and its failure to discipline or remove him. *See* ROA.200 (Compl. ¶ 133). The district court faulted the Complaint's allegation for purportedly "fail[ing] to [] identify a specific policymaker responsible for disciplining Tran" and further held that the Complaint's allegations of actual knowledge were "conclusory." ROA.357-358. In doing so, the district court committed reversible legal error on both fronts.

With respect to the district court's first conclusion, that Plaintiffs failed to identify a specific policymaker responsible, this Court's decision in *Groden v. City of Dallas*, 826 F.3d 280, 285 (5th Cir. 2016), is directly on-point. In *Groden*, the plaintiff alleged that Dallas police illegally arrested him pursuant to an unconstitutional city policy targeting street vendors. *Id.* at 282, 285. The district court dismissed the plaintiff's municipal liability claim for failing to identify the "specific municipal policymaker" responsible for promulgating the alleged policy. *Id.* at 282. This Court reversed. It ruled that at the motion to dismiss phase, the plaintiff need not assert the identity of the policymaker. The plaintiff need only (1) "allege facts that show an official policy, promulgated or ratified by the policymaker, under which the municipality is said to be liable," *id.* at 284, and (2) "name the *entity* that acted under the policy," *id.* at 284 n.4.

Groden mandates reversal here. The Complaint met the two requirements that this Court articulated in *Groden*: It alleged the City of Arlington had an official policy of refusing to "meaningful[ly]" discipline or control Tran in response to his repeated misconduct, ROA.200 (Compl. ¶ 133), and it named the Defendant City of Arlington, which is

responsible for operation and oversight of the APD, as the entity that acted under this policy. ROA.188, 200 (Compl. ¶¶ 15, 133). Specifically, the Complaint alleged nine prior incidents that demonstrate Tran's unfitness for duty, including an instance in which he committed felony assault and threatened to stab his victim with a knife. ROA.196-97 (Compl. ¶¶ 104-114). The Complaint alleged that the City had actual knowledge of these incidents, yet Tran was never referred for prosecution nor meaningfully disciplined. ROA.196-197, 200 (Compl. ¶¶ 104, 110-112, 115-116, 133). Indeed, the Complained alleged that APD suspended Tran for a just single day in response to the knife incident. ROA.197 (Compl. ¶ 112). The Complaint pled that the City had ultimate responsibility "for the funding, budget, policies, operation, and oversight" of the APD. ROA.188 (Compl. ¶ 15).

The district court also erred in concluding that the Complaint's allegations of the City's actual knowledge were conclusory. *See* ROA.358. At the motion to dismiss stage, pleadings need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Wooten v. McDonald Transit Assocs.*, 788 F.3d 490, 498 (5th Cir. 2015). Moreover, "[t]he factual allegations in the complaint need only 'be

enough to raise a right to relief above the speculative level' . . . 'detailed factual allegations are not required.'" *Id.* Federal courts may not apply a more stringent pleading standard to § 1983 claims. *See Leatherman v. Tarrant Cty.*, 507 U.S. 163, 168 (1993) (holding that in evaluating § 1983 claims, this Court could not employ a "heightened" pleading standard beyond that which is required by the Federal Rules).

The district court suggested the Complaint failed to "provide a sufficient factual basis from which to infer knowledge" by the City. ROA.357. But to the contrary, the Complaint alleged that APD suspended Tran for a single day in response to the knife-wielding episode, rather than terminating him—surely demonstrating knowledge. ROA.197 (Compl. ¶ 112). That was just one of *nine* alleged incidents of misconduct by Tran, of which the Complaint alleged APD had knowledge. ROA.196-97 (Compl. ¶¶ 104-114, 133). These other allegations of knowledge are plausible given that the City demonstrably did know about the knife-threat, and was "responsible for," among other things, "operation" and "oversight" over the APD. ROA.188 (Compl. ¶ 15). This is "more than an unadorned, the-defendant-unlawfully-harmed-me"

allegation, and is therefore sufficient at the motion to dismiss stage. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

What is more, the actions of Police Chief Will Johnson himself—in failing to discipline Tran—could render the municipality liable if the City had delegated authority to Johnson, a question Plaintiffs should be given the opportunity to pursue in discovery. Indeed, this Court has "previously found that Texas police chiefs are final policymakers for their municipalities, and it has often not been a disputed issue in the cases." *Garza v. City of Donna*, 922 F.3d 626, 637 (5th Cir. 2019) (collecting cases); *see also Gros v. City of Grand Prairie, Tex.*, 181 F.3d 613, 616 (5th Cir. 1999).

In short, under *Groden* and the usual rules of notice pleading, Plaintiffs met their burden of alleging non-conclusory allegations against the City regarding the police department's failure to discipline or control Tran.

iii. Plaintiffs Sufficiently Alleged Causation.

Finally, the third prong of the test—causation—directly follows from the Complaint's allegations of the first two prongs. Plaintiffs alleged that APD failed to adequately discipline Tran for a string of misconduct,

including violence, and that doing so emboldened him and led him to believe the City would ratify his actions, which caused him to use excessive force here. ROA.187-88, 197 (Compl. ¶¶ 8-9, 117). The district court did not take issue with causation as to the City's failure to discipline Tran, and therefore implicitly held that Plaintiffs met this prong. *See* ROA.358. That was correct. *See, e.g.*, *Grandstaff*, 767 F.2d at 170 (causation met "[w]here police officers know at the time they act that their [actions] . . . will meet with the approval of city policymakers"); *Webster v. City of Houston*, 735 F.2d 838, 859 (5th Cir. 1984) ("This custom could not have existed without City policymakers condoning it, deliberately ignoring it, or closing their eyes to its possible existence" and "[t]hrough such action or omission, the City itself was at fault.").

B. Plaintiffs Sufficiently Alleged Municipal Liability with Respect to the APD's Customs of Excessive Force and Racial Bias.

The Complaint makes detailed factual allegations that support the three prongs of the municipal liability test for Plaintiffs' second theory, regarding the City's constructive knowledge of excessive force, racial bias, and systemic training failures within the APD.

i. Plaintiffs Sufficiently Alleged APD Customs of Excessive Force and Racial Bias.

With respect to the first prong of the municipal liability test—the existence of customs of excessive force and racial bias within the APD—the Complaint contains over forty paragraphs of factual allegations reflecting the APD's customs of responding to routine police encounters with excessive and often deadly force and of racial hostility towards Black men. *See* ROA.193-96 (Compl. ¶¶ 61-103).

For example, the Complaint alleges that the City is ranked third in the state of Texas for deadly police encounters, ROA.196 (Compl. ¶ 100), and describes five recent incidents of excessive force by the APD, which ended in the death of unarmed citizens who did not pose a threat to officers, ROA.193-196 (Compl. ¶ 64-97). The Complaint also alleges that three of the five victims of the recent deadly force episodes described in the Complaint were Black men, as are 70% of the victims of deadly APD shootings. ROA.196 (Compl. ¶¶ 99-100). The Complaint further alleges multiple documented instances of APD officers using racial slurs—including Chief Johnson recently using the n-word. ROA.196 (Compl. ¶¶ 101-103).

The district court held that these allegations give rise to an inference of customs within the APD. ROA.358. That holding was correct.

ii. Plaintiffs Sufficiently Alleged the City Had Constructive Knowledge.

With respect to the second prong of the test—the City's knowledge—the Complaint alleged that the City "completely ignor[ed] the multiple signs" of these unlawful customs within the APD, of which it knew or should have known. ROA.187, 200-01 (Compl. ¶¶ 6, 134). The district court acknowledged that the Complaint's extensive factual allegations satisfy the standard for constructive knowledge by alleging that "the City, as the governing body, 'would have known of the violations if it had properly exercised its responsibilities.'" ROA.358 (quoting *Bennett*, 728 F.2d at 768). Here too, the district court's ruling was correct.

iii. Plaintiffs Sufficiently Alleged APD Customs Were the Moving Force Behind Tran's Actions.

As to the third prong of the municipal liability test—that the alleged customs were the moving force behind Tran's actions—the district court held that the Complaint failed to show that "any of the

alleged customs were the moving force behind Tran's actions." ROA.358.[9]

This conclusion defies logic and constitutes reversible error.

To recap, the district court held that:

(1) As to prong 1, the Complaint sufficiently alleged a custom of excessive force, particularly against Black men, among APD officers; *see supra* at III.B.i; and that

(2) As to prong 2, the Complaint sufficiently alleged the City had constructive knowledge of these failures and ignored "'the multiple signs' of excessive force [and] racial bias . . . in the Arlington Police Department.'" ROA.358 (quoting Compl. ¶ 134); *see also supra* at III.B.ii.

And yet, the district court held that

(3) As to prong 3, the Complaint failed to "meet the required standard of alleging a direct causal relationship at a level surpassing a mere but-for coupling of cause and effect" between these customs and the incident here—one in which an APD officer used excessive force against a Black man. ROA.359.

[9] The district court also faulted Plaintiffs for alleging the City's "customs, patterns, and practices," "were *a* moving force in the deprivation of O'Shae Terry's constitutional rights," ROA.358 (quoting Compl. ¶ 135) (emphasis added), rather than "*the* moving force." ROA.358 n.4 (emphasis added). This Court uses these phrases interchangeably. *See, e.g.*, *Valle v. City of Hous.*, 613 F.3d 536, 540, 541, 542 n.3, 543, 549 (5th Cir. 2010) (using both "a moving force" and "the moving force"). Thus, the Complaint's reference to "a moving force" did not misstate the standard. Moreover, even if there was some daylight between the articulations of the standard—and there is not—the facts alleged are sufficient to meet either.

That is incorrect. In holding that the Complaint did not sufficiently "tie [the pattern of similar misconduct] to Tran's actions," the district court employed an analysis of "moving force" that is inapplicable to the theory of municipal liability alleged in the Complaint. ROA.358-359. A plaintiff may allege municipal liability on two grounds: That a custom or practice was unconstitutional on its face, or that a facially valid custom or practice was deficient and foreseeably led to the unconstitutional harm alleged. *See Webb v. Town of Saint Joseph*, 925 F.3d 209, 219 (5th Cir. 2019). The court's analysis differs depending on which of the two grounds the municipal liability allegation is based. This municipal liability claim falls into the former category—that is, that the City had an unconstitutional policy of sanctioning the APD's use of excessive force and racial animus by simply ignoring it. The Supreme Court has explained that "[w]here a plaintiff claims that a particular municipal action *itself* violates federal law, . . . resolving these issues of fault and causation is straightforward" because "the conclusion that the action taken . . . by the municipality . . . itself violates federal law will also determine that the municipal action was the moving force behind the

injury of which the plaintiff complains." *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 404-05 (1997).

Grandstaff is instructive. In *Grandstaff*, as discussed above, multiple officers fired a barrage of shots that killed Grandstaff, an innocent bystander who they mistook for a fugitive. 767 F.2d at 165. This Court held that the events demonstrated an unconstitutional custom of excessive force by officers, which the City tacitly approved, and held that "[w]here police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force requirement is satisfied." *Id.* at 170. The facts alleged in the Complaint, which include widespread use of excessive force, especially against Black men, coupled with knowledge and a failure to respond on the City's part, give rise to an inference that Tran would have known at the time he shot Terry that such conduct would be "me[]t with the approval of city policymakers," satisfying the "moving force" requirement. *Id.*; *see also* ROA.196-97 (Compl. ¶¶ 104-117).

This Court's ruling in *Groden* is also helpful. As explained above, Groden alleged that the City of Dallas promulgated an illegal arrest

policy that encouraged officers to arrest street vendors who were engaging in unpopular but legally protected speech. 826 F.3d at 282-83. This Court held that Groden satisfied the moving force prong of the municipal liability test because he alleged that Dallas had an unconstitutional policy and that he was harmed (there, arrested) pursuant to the facially unconstitutional policy. *See id.* at 286-87. Likewise, here, the Complaint sufficiently alleged that the City's facially unconstitutional policy of using excessive force, particularly against Black men, was the "moving force" behind Tran's use of excessive force against Terry (a Black man) in this particular instance.

In contrast to the appropriate analysis for unconstitutional policies demonstrated by *Grandstaff* and *Groden*, the district court performed an analysis that only applies to municipal liability claims based on a policy that was not itself unconstitutional, but "was adopted with deliberate indifference to the 'known or obvious fact that such constitutional violations would result.'" *Webb*, 925 F.3d at 219. This is relevant where, for example, a municipal liability theory is based on a failure to train, which is alleged to have led to the incident in question. *See, e.g.*, *Shumpert v. City of Tupelo*, 905 F.3d 310, 317 (5th Cir. 2018); *Littell v.*

Hous. Indep. Sch. Dist., 894 F.3d 616, 625 (5th Cir. 2018). But it does not apply where, as here, a complaint alleges a policy that *itself* authorizes unconstitutional conduct.

However, even applying this erroneous standard, Plaintiffs sufficiently alleged that the City's customs were the moving force behind Tran's actions. The Complaint contains extensive factual allegations reflecting the APD's custom of responding to routine police encounters with excessive and often deadly force, and a culture of racial hostility towards Black men. *See* ROA.193-96 (Compl. ¶¶ 61-103). "Given the relatively egregious nature of the alleged constitutional violation in this case," it is "plausible that even a modicum" of intervention on the City's part "would have alerted" Tran that the deadly seizure he effectuated was unconstitutional. *Littel*, 894 F.3d at 629.

* * *

In short, the district court committed reversible error when it dismissed Plaintiffs' municipal liability claims. Plaintiffs sufficiently alleged two different theories of municipal liability, supported by plausible factual allegations. Under the liberal pleading standards at the

motion to dismiss phase, this Court should allow Plaintiffs' claims to proceed on both theories.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's dismissal of Plaintiffs' federal claims. Because the district court dismissed Plaintiffs' request for punitive and exemplary damages against Tran based on its erroneous dismissal of their federal claims against him, these Counts should be reinstated as well.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

All counsel of record are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Date: December 7, 2020

/s/ Devi M. Rao
Devi M. Rao

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) and 5th Cir. R. 32.3, I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,172 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) but including the Appendix below.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Century Schoolhouse typeface.

Date: December 7, 2020

/s/ Devi M. Rao
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