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

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

This is an appeal from the district court's dismissal of Plaintiffs' claims under Rule 12(b)(6). The question is this: construing the pled facts—and those in the video—in Plaintiffs' favor, did Plaintiffs plausibly allege a clearly-established constitutional violation and claims for municipal liability? They did. *First*, on a viewing of the facts in favor of Plaintiffs, Tran shot Terry the very moment the vehicle started moving, despite nothing suggesting Terry posed a threat to Tran or the public. A reasonable officer in Tran's position would have known this was unconstitutional. *Second*, Harmon, as a passenger in the vehicle that was seized, has alleged a Fourth Amendment claim. *Third*, Plaintiffs alleged two plausible municipal liability claims, based on the City's customs of failing to discipline Tran despite knowing of his past bad and violent acts, and of turning a blind eye to APD's customs of employing excessive force and of racial bias against Black men.

Defendants' arguments to the contrary distill into a flat refusal to accept the standard of review and construe Plaintiffs' plausibly-alleged allegations (and the video) in Plaintiffs' favor.

The Court should reverse the dismissal of these claims.

ARGUMENT AND AUTHORITIES

I. Tran's Use of Force Was Excessive.

On the facts as pled, and confirmed by the video, Tran did not have probable cause to believe Terry posed an "immediate threat" to Tran or the public, and so his use of deadly force was unconstitutional. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *see also Williams v. Strickland*, 917 F.3d 763, 769 (4th Cir. 2019) ("Because deadly force is extraordinarily intrusive, it takes a lot for it to be reasonable."). Tran's arguments to the contrary are based on his own preferred version of the facts, which is impermissible at this stage of the case. *See Alexander v. City of Round Rock*, 854 F.3d 298, 305 (5th Cir. 2017) (reversing dismissal of Fourth Amendment claim where district court "erroneously failed to draw all inferences in favor of the nonmovant" and, properly "taking the facts as alleged," the officer violated a clearly-established right); *Winzer v. Kaufman Cty.*, 916 F.3d 464, 474 (5th Cir. 2019) (reversing district court's constitutional holding because of its "failure to credit" plaintiffs' version of the facts, "instead adopting the officers' characterizations of the events preceding the shooting").

A. Officer Danger

Appropriately construing both the facts pled and seen in the video in favor of the Plaintiffs, a reasonable officer in Tran's position would not have thought he was in "immediate and severe physical" danger at the moment the shots were fired, such that deadly force was constitutional. *Lytle v. Bexar Cnty.*, 560 F.3d 404, 411-12 (5th Cir. 2009). At that point, the vehicle had only just started to move, was moving slowly, and was moving away from where Tran had been standing. Video 12:39-12:47. Indeed, Tran concedes he "immediately fired" after the vehicle started moving, Tran Br. 47, and notes that the engine turned on and the shots were fired *within the same second*, *id.* at 7 (citing Video 29:57 for both).

To argue he was in imminent danger *at the moment he fired*, Tran points to what happened *afterwards*. Tran Br. 8, 22. But Tran's rolling off the vehicle (apparently uninjured) after the car drove for twelve seconds with a dying Terry at the wheel does not suggest that a reasonable officer would think his life was in danger at the moment the car had only just started moving. ROA.190-92 (Compl. ¶¶ 35-38); Video 12:46-12:59; 29:55-30:09. Quite the opposite.

Tran claims that he was "frighteningly close" to (but not in) the vehicle's path, that he was "certainly at great danger of being struck" by the vehicle (that was pulling *away* from where he had been standing), and that he "certainly would have faced the same danger if he had fallen off before firing shots" (even though the car had barely moved at that point). Tran Br. 22.[1] Tran is entitled to make these arguments after discovery and at summary judgment. But on the facts pled and the video, both appropriately construed in Plaintiffs' favor, a reasonable officer in Tran's position would not have perceived themselves in "immediate and severe physical" danger. *Lytle*, 560 F.3d at 412; *see also Amador v. Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020) (dismissing appeal from denial of qualified immunity where "[r]elying on their version of the facts, yet purportedly relying on the video, the officers argue that they reasonably believed that [subject] posed a threat of serious harm to the officers or others").

[1] Tran asserts a vague danger posed by "other vehicles." Tran Br. 21. The video depicts no vehicles that posed a reasonably perceived danger to Tran—who was against the curb on the opposite side of the vehicle from any oncoming traffic—at the time he fired the shots. Video 12:46.

Nor do the cases Tran relies on support his use of deadly force. Tran Br. 26-30. They are all unpublished and/or out-of-circuit, and easily distinguishable. (They also all address officers' entitlement to qualified immunity at summary judgment, meaning they were not dismissed at the pleadings stage.) Briefly, then:

- In *Owens v. City of Austin*, the officer's "arms became *trapped* in the car" between the door and frame of the vehicle when it "rapidly accelerated," 259 F. App'x. 621, 623 (5th Cir. 2007) (emphasis added), so "*[w]hile being dragged*, the officer fired shots," Tran Br. 30 (emphasis added).

- In *Davis v. Romer*, the officer had been riding on the side of the vehicle *for some time* "*toward the freeway*" before shooting, 600 F. App'x 926, 931 (5th Cir. 2015) (emphasis added), after the car swerved *toward* the officer while pulling away, *see id.* at 927.

- In *Mazoch v. Carrizales*, the driver "was using the vehicle itself as a weapon" and when the officer fired her "partner was out of sight, possibly under the still-running vehicle controlled by the same person who had placed the officers in potentially grave danger just seconds before." 733 F. App'x 179, 180-81, 183, 184 (5th Cir. 2018).

- In *Adame v. Gruver*, the officer was "being dragged." Tran Br. 16. He had "his left knee kneeling on the passenger seat, and his right foot bouncing on the ground outside the [moving] vehicle," and "faced a serious risk of bodily injury" because of "the possibility that he would fall out of the moving car." 819 F. App'x. 526, 528-29 (9th Cir. 2010).

- In *Woolery v. City of Mineral Wells, Tex.*, the plaintiffs "conced[ed]" that the officer "was in fear of serious physical harm" at the moment of the shooting, where the officer "was

> dragged before being able to pull himself onto the bumper," and then "[t]he driver swerved from side to side, attempting to throw [the officer] from the car." No. 4:04-CV-415-A, 2005 WL 755762, at *2, *5 (N.D. Tex. Apr. 1, 2005).[2]

Tran also argues Terry's "possible" marijuana use would lead a reasonable officer to conclude that Terry posed a risk of serious and imminent danger at the moment Tran fired. Tran Br. 17-18. But Tran had no indication that Terry had been driving dangerously before the stop—Terry was pulled over for an expired tag, not for any moving violation, ROA.189 (Compl. ¶ 18), so Terry's "possible" marijuana use does not—in and of itself—give rise to an "immediate threat of serious harm" sufficient to justify deadly force. *Lytle*, 560 F.3d at 416.[3]

The precedent is in accord. First, Driving While Intoxicated here is (at most) a Class B misdemeanor under Texas law. *See* Tran Br. 18; Tex. Penal Code, § 49.04. And this Court has held officers' uses of deadly force not reasonable as a matter of law even in the context of more serious offenses. *See Mason v. Lafayette City-Par. Consol. Gov't*, 806 F.3d 268,

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[2] Tran presents a conveniently sanitized version of *Woolery*, in which the officer merely "rode on the outside of the vehicle," Tran Br. 26, rather than being dragged.

[3] For this same reason, that a DWI may be considered a crime of violence (*see* Tran Br. 19-20) is irrelevant to the Fourth Amendment inquiry.

271 (5th Cir. 2015) (reversing summary judgment on qualified immunity grounds for an officer who fatally shot a suspect in an armed robbery); *Lytle*, 560 F.3d at 414 (dismissing appeal from denial of qualified immunity where victim had stolen a car, left a known drug location, and was out on bond charges for felony theft and unlawfully carrying a weapon); *Amador*, 961 F.3d at 724 (same, where officers fatally shot a knife-armed man alleged to have "beat up his wife" and "gone crazy").

Second, Tran's attempt to align the facts here with *Brothers v. Zoss*, 837 F.3d 513 (5th Cir. 2016), is misplaced. There, it was uncontested that the driver was "heavily intoxicated," having just run up a $400 bar tab. *Id.* at 515-16. Moreover, the officers spent approximately two minutes "negotiating" with the driver "before deciding to resort to force," and the force sanctioned was *not* deadly force, but "only a proportional amount" in which officers pulled the driver from the vehicle, resulting in the driver hitting the ground and injuring his back. *Id.* at 519, 520. *Brothers* does not support Tran's bold position that it is constitutional for an officer to shoot and kill someone who pulls away from a traffic stop based on the officer's suspicion that the person *might* be under the influence of drugs or alcohol. *See* Tran Br. 17, 20.

Tran next posits that Terry's "determination to feloniously flee" somehow excuses Tran's decision to stop Terry by killing him. *See* Tran Br. 20-22. It does not. Flight is a baseline fact in cases arising under *Garner*, and does not itself excuse deadly force. As this Court noted in *Lytle*, there is no "open season on suspects fleeing in motor vehicles." 560 F.3d at 414. To be sure, the *manner in which* a person flees may become relevant to the excessive force inquiry, if that flight places officers or the public in imminent danger. *See, e.g.*, *Mullenix v. Luna*, 577 U.S. 7, 8-9, 12-13 (2015) (per curiam) (suspect drove over 100 miles-per-hour and threatened to shoot police officers); *Plumhoff v. Rickard*, 572 U.S. 765, 776 (2014) (suspect swerved between congested traffic lanes at over 100 miles-per-hour); *Scott v. Harris*, 550 U.S. 372, 380 (2007) (suspect engaged in "a Hollywood-style car chase of the most frightening sort"). But that is not this case. Ultimately, Tran's assertion that Terry was "very determined to leave the scene," Tran Br. 21, does nothing to justify Tran's use of deadly force.

B. Danger to Others

At the time Tran shot Terry, no reasonable officer would think Terry posed a danger to others such that deadly force was justified. *See*

Opening Br. 22-26. Tran does not argue that Terry had *previously* placed anyone in danger and appeared poised to do so again when Tran shot Terry. But that is precisely what the subjects of the deadly force had done in the cases surveyed in *Lytle*, where courts held the deadly force was reasonable. *See* Opening Br. 23.[4] Rather, Tran argues that Terry "could have been under the influence of marijuana, disobeyed Tran's orders and feloniously fled." Tran Br. 32. But if a high-speed chase and a car crash together were insufficient to justify deadly force in *Lytle*, suspected marijuana use and a refusal to yield are certainly not enough. *See* Opening Br. 22-23; *see also supra* at 6-8 (addressing marijuana use and flight).

Tran observes that *after* he shot Terry, the vehicle "crossed all four lanes of California [Lane], [drove] onto the grass, and veered back across California . . . on the wrong side of the road." Tran Br. 33. As explained above, that is what happened precisely *because* Tran shot Terry, and that

[4] Tran's citation to *Williams v. City of Grosse Pointe Park*, 496 F.3d 482 (6th Cir. 2007), suffers from this same flaw. Tran Br. 32. In *Williams*, the Sixth Circuit held that it was not unreasonable for officers to use deadly force where the subject had *already* placed people in harm's way—hitting a police cruiser, driving his vehicle onto a sidewalk, and knocking an officer down. 496 F.3d at 484, 486. There are no such facts here.

fact cannot be used to reverse-engineer any danger to the public to justify the shooting. At the time Tran shot Terry, and on the facts appropriately construed, there was nothing about Terry or his driving that suggested he posed a threat to the public. "Nearly any [person] fleeing in a motor vehicle poses some threat of harm to the public," but "the real inquiry is whether the fleeing [individual] posed such a threat that the use of deadly force was justifiable." *Lytle*, 560 F.3d at 415; *see also Reavis estate of Coale v. Frost*, 967 F.3d 978, 986 (10th Cir. 2020) ("When an officer employs such a level of force that death is nearly certain, he must do so based on more than the general dangers posed by reckless driving."). Here it was not.

Tran raises the specter of hypothetical future dangers to the public. He notes that "Officer Herlihy was in the immediate vicinity," Tran Br. 33, suggesting that she may at some point have become endangered (despite the fact that the video shows her *in her own cruiser* and *behind* Terry's vehicle as it drove *forward* and *away* from her, Video 24:00-26). "At any moment," Tran suggests, Terry "could have struck another vehicle" that may have driven by. Tran Br. 33. Or, "[a]t any time," Tran warns, "pedestrians or other vehicles could have entered the scene." *Id.*

But these ominous speculations are not tied to any real-world person subject to "immediate and severe physical harm," as required to excuse deadly force. *Lytle*, 560 F.3d at 412. At bottom, Tran asserts the wildly broad and dangerous claim that some imagined future dangerousness allows officers to shoot (to kill) a person who declines a traffic stop where they are suspected of marijuana use. *Garner* and *Lytle* prohibit this kind of thinking. *Garner*, 471 U.S. at 11 ("It is not better that all felony suspects die than that they escape."); *Lytle*, 560 F.3d at 414 (holding there is no "open season on suspects fleeing in motor vehicles"). On the properly-construed facts, no reasonable officer could have perceived any sufficiently imminent harm to the public to justify killing Terry.

C. Officer Reaction

Tran does not dispute that, under *Lytle*, part of the excessive force inquiry involves assessing the reasonableness of the officer's response to any perceived danger. *See* Opening Br. 26 (quoting *Lytle*, 560 F.3d at 412 (holding it mistaken "to focus entirely on the threat of harm" without "consider[ing] [the officer's] conduct in response to that threat")). This Court requires "measured actions that ascend in severity only as circumstances require." *Joseph on behalf of Estate of Joseph v. Bartlett*,

981 F.3d 319, 324 (5th Cir. 2020). It has explained that "[a] disproportionate response is unreasonable," and, if "inflicted by a police officer, it is unconstitutional." *Id.* Tran's response here was neither measured and ascending nor proportionate, and was therefore unconstitutional.

Tran claims that he was justified in shooting Terry rather than stepping down from the vehicle because "that itself would be dangerous." Tran Br. 34. Given that the vehicle was barely moving at the time Tran fired, this allegation strains credulity; indeed, as support for this proposition Tran cites the video footage of what happened when Tran rolled off the vehicle *after* he shot Terry—once the vehicle had sped up (and driven for about twelve seconds) because the dying Terry had his foot on the gas. ROA.190-91 (Compl. ¶¶ 32–37); Video 29:50-30:07. If anything, this shows that Tran could have easily dismounted from the vehicle rather than shoot Terry dead. At a minimum, construing the facts (including the video) in a light favorable to Plaintiffs, Tran's decision to fire the second the car started moving was not a reasonable response to the situation.

What is more, Tran failed to issue a warning that he was considering using deadly force, which this Court has described as "a critical component of risk assessment and de-escalation"—one that is required, if feasible, under *Garner*. *Cole v. Carson*, 935 F.3d 444, 453 (5th Cir. 2019) (en banc) (citing *Garner*, 471 U.S. at 11-12); *see also Winzer*, 916 F.3d at 475 ("It is far from clear that [the subject of the deadly force] had the opportunity to be deterred by the officers' warnings or to even register their commands."). Tran does not argue a warning was not feasible. He claims instead the warning requirement only applies if police need to alert the subject to their presence. *See* Tran Br. 37. This convenient limitation is found nowhere in the cases: In *Cole*, this Court broadly held that *Garner* required a warning "where feasible," and explained that on the view of the facts most favorable to the subject, the officers "had the time and opportunity to give a warning and yet chose to shoot first instead." 935 F.3d at 453; *see also Winzer*, 916 F.3d at 476 ("It is for a jury to determine whether a reasonable officer on the scene, when confronted with these facts, would have determined that [the subject] posed such an imminent risk to the officers that use of deadly force was justified within seconds."). So too here.

II. Clearly Established Law Prohibited Tran's Use of Deadly Force.

Tran's argument boils down to this: for the law to be clearly established, a plaintiff must point to a prior case on exactly the same facts. *See* Tran Br. 46-47. But because "fair notice" undergirds the clearly-established inquiry, "[t]he 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); *see also* Cato Amicus Br. 13-16. *Lytle* held that if an officer shoots at a fleeing vehicle without reasonable concerns that he or others were about to be seriously injured, he violates the Constitution—that is enough to clearly-establish the law here.[5] 560 F.3d at 412, 417; *see also* Opening Br. 29-33.

[5] None of the "[u]npublished persuasive decisions" that Tran cites undermines the "fair notice" provided by *Lytle*. Tran Br. 47-48. First, *Lytle* is binding law and those cases are not. Second, in those cases, the officers were entitled to qualified immunity because, even on the facts as properly construed, a reasonable officer could have feared for their own lives or the lives of other officers. *See supra* at 5-6. Not so here.

Tran argues that *Lytle* cannot clearly establish the law because, he claims, the danger he faced was greater than in *Lytle*.[6] Tran Br. 47. But "whether [an officer] reasonably believed that [the subject] posed a threat of imminent danger . . . is a question of fact," *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004), and Tran is reading the facts in *his* favor, not Plaintiffs', which is anathema to this stage of the litigation. At the second step of the qualified immunity inquiry, "courts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions," *Tolan v. Cotton*, 572 U.S. 650, 657 (2014), and must construe material facts "in a light most favorable to" the nonmovant, *Brosseau v. Haugen*, 543 U.S. 194, 195 (2004); *see also Alexander*, 854 F.3d at 305 ("taking the facts as alleged" at the motion to dismiss stage, the officer violated a clearly established right). Plaintiffs alleged that at the moment he shot Tran was not in immediate danger of serious bodily harm, ROA.203 (Compl. ¶ 148), and the video does not

[6] Tran does not dispute that the danger Terry posed to the general public was less than in *Lytle*. *See* Opening Br. 32. Because Terry posed "an objectively lesser threat" than the driver in *Lytle*, *Lytle* clearly established the impermissibility of using deadly force against Terry based on any concerns for public safety. *See Hatcher v. Bement*, 676 F. App'x 238, 245 (5th Cir. 2017).

demonstrate otherwise. So, properly taking the facts in Plaintiffs' favor, *Lytle* and this case present *equal* amounts of risk to an officer of serious harm at the moment shots were fired: zero.[7]

In sum, "[t]he cases on deadly force are clear: an officer cannot use deadly force without an immediate serious threat to himself or others." *See Reyes v. Bridgewater*, 362 F. App'x 403, 409 (5th Cir. 2010). If the disputed question is whether the subject of the deadly force posed such an immediate threat—i.e., if "the *facts* are unclear"—qualified immunity is improper. *Id.* (emphasis added). Because "[t]he case presented here is not one where the law is not clearly established but rather one where the facts are not clearly established," Tran is not entitled to qualified immunity. *Id.*

Moreover*, at a minimum*, because this is an "obvious" case Tran is not entitled to qualified immunity. This Court has recognized—in the

[7] Even if the video demonstrated that Tran could have reasonably perceived a higher risk of serious danger to himself than in *Lytle*, *Lytle* would *still* clearly establish the unconstitutionality of Tran's conduct. *See Trammell v. Fruge*, 868 F.3d 332, 343 (5th Cir. 2017) (holding that although one factor of the *Graham* test "may have weighed slightly more in favor of finding a use of force reasonable in this case than it did in" a prior case, "we nevertheless conclude that [the prior case] gave officers 'fair warning' that their conduct was unconstitutional").

excessive force context, no less—that "[t]he Supreme Court has repeatedly stated that [*Garner*'s] rule can be sufficient in obvious cases, and this court has applied it in such cases, without dependence on the fact patterns of other cases." *Cole*, 935 F.3d at 453 (citing *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam); *Mason*, 806 F.3d at 277-78; *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012)); *see also Brosseau*, 543 U.S. at 199 (observing *Garner*'s rule can clearly-establish the law in an "obvious" case); *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam) ("Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that [petitioner's] conditions of confinement offended the Constitution."); *McCoy v. Alamu*, No. 20-31, 2021 WL 666347, at *1 (U.S. Feb. 22, 2021) (vacating and remanding to this Court for further consideration of excessive force claim in light of *Taylor v. Riojas*). Where, as here, "none of the [relevant] factors justifies" the force employed, an officer is not entitled to qualified immunity because the constitutional violation would have been obvious. *Newman*, 703 F.3d at 764. On the facts pled by Plaintiffs and confirmed by the video, clearly-established law would have

put a reasonable officer in Tran's position on notice of the unconstitutionality of his actions.

III. Harmon Stated a Clearly-Established Fourth Amendment Excessive Force Claim.

A. Constitutional Violation

A passenger is "'seized' for purposes of the Fourth Amendment when the officer[] deliberately" acts to bring to a stop a "car in which they knew [the person] was a passenger."[8] *Jamieson By & Through Jamieson v. Shaw*, 772 F.2d 1205, 1210 (5th Cir. 1985); *see also Brendlin v. California*, 551 U.S. 249, 255 (2007) (holding that "during a traffic stop an officer seizes everyone in the vehicle, not just the driver"); *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). Additionally, physical harm is not required

[8] The City claims this argument is new. *See, e.g.*, City's Br. 14; 49-51; *see also* Tran Br. 39. It is not. *See* ROA.203 (Compl. ¶¶ 146, 147) (pleading Fourth Amendment excessive force claim); ROA.216; ROA.280-81 (addressing same in motions to dismiss); ROA.327 (responding to same, arguing Harmon "was subject to the initial and ongoing seizure along with Terry"). Indeed, the district court addressed Harmon's Fourth Amendment excessive force claim, ROA.352, it just did so incorrectly. *See In re Lilieberg Enterprises, Inc.*, 304 F.3d 410, 428 n.29 (5th Cir. 2002) ("[A]n argument is not waived on appeal if the argument on the issue . . . was sufficient to permit the district court to rule on it.").

to sustain a Fourth Amendment claim; psychological injuries may suffice. *Flores*, 381 F.3d at 397-98.

By deliberately shooting the driver of the moving car, Tran stopped the car, seizing those inside: Terry and Harmon. This fact pattern is indistinguishable for Fourth Amendment purposes from the passengers in *Brendlin*, 551 U.S. at 254-55, and *Jamieson*, 772 F.2d at 1210, who were seized when the cars they were riding in stopped due to police force or shows of force, or the seizure in *Flores*, 381 F.3d at 394, 396, that was effectuated when the police shot the vehicle, causing the driver to stop. Thus, the district court erred in concluding that Harmon's Fourth Amendment claim failed because "he was not a subject of Tran's use of force." ROA.353.

Respondents do not meaningfully engage with this precedent. The City argues only that "Harmon never alleges any use of force by Officer Tran was directed at Mr. Harmon" and that "Harmon had no physical injury." City Br. 37. Neither carries water under the caselaw. *See Brendlin*, 551 U.S. at 255; *Flores*, 381 F.3d at 397-98; *Jamieson*, 772 F.2d at 1210. For his part, Tran observes that in *Jamieson* and *Flores* "the controlling records raised a jury issue as to whether the officers had

violated Fourth Amendment standards." Tran Br. 41; *see also* Tran Br. 42. Perhaps. But this demonstrates that (1) individuals other than the driver can bring Fourth Amendment claims; and (2) those claims survived (at least) motions to dismiss.[9]

Defendants' attempts to bolster the district court's improper reliance on *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 (5th Cir. 1985), fare no better.

Tran claims that *Petta* and *Ledbetter* would allow for suits only where an officer "indiscriminately aimed shots from a distance at the entire SUV." Tran Br. 42, 44. Similarly, the City claims that in *Petta*, the plaintiff's ability to bring a claim turned on the fact that she "was in the line of fire." City Br. at 47. But the cabining of these cases to their facts is found nowhere in the decisions; to the contrary, the Court in *Ledbetter* observed that the daughter, unlike the mother, was "directly involved in

[9] Tran also misreads *Blair*. *See* Tran. Br. 40-41. In *Blair*, this Court held that the officers were entitled to qualified immunity as to Fourth Amendment claims brought by the girlfriend and child in the apartment because "there [was] no evidence that the officers knew [they] were inside the apartment when they fired the shots" and this Court's caselaw was unclear under such circumstances. 666 F. App'x. at 342. Undoubtedly, Tran knew Harmon was in the car.

the shooting," 780 F.2d at 1161—just like Harmon; *see also Petta*, 143 F.3d at 904 n.8 (citing *Ledbetter* for same proposition).

The City's pages-long exegesis on the district court decision in *Khansari v. City of Houston*. 14 F. Supp. 3d 842 (S.D. Tex. 2014), is irrelevant. City's Br. 37-41. The parents in *Khansari*, unlike Harmon here, were not seized by the police—there was no force or show of force intentionally directed at them, and no resulting restriction on their movements. 14 F. Supp. 3d at 862. Indeed, the police told Mr. Khansari *to go away*, and Mrs. Khansari "interposed herself between certain Officers"—demonstrating they were not stopped. *Id.*; *see Torres v. Madrid*, No. 19-292, 2021 WL 1132514, at *3 (U.S. Mar. 25, 2021) (observing seizure "can take the form of 'physical force' or a 'show of authority' that 'in some way restrain[s] the liberty' of the person"). Even farther afield is the unreported district court opinion in *Young v. Green*, *see* City Br. 48-49, which stands for the unremarkable proposition that bystanders who were not seized had no cause of action because "[t]here is no constitutional right to be free from witnessing police action." No. H-11-1592, 2012 WL 3527040, *4 (S.D. Tex. Aug. 15, 2012).

The district court dismissed Harmon's claims because it thought (incorrectly) that he did not have a cause of action; it did not address his excessive force claim on the merits. This Court should hold that Harmon has a cause of action because he was "seized," and hold that the seizure was unreasonable for the same reasons the seizure of Terry was unreasonable. *See supra* at 2-13.[10]

B. Clearly Established.

Tran asserts that Harmon's right to be free from seizure through excessive force was not clearly established. Tran Br. 44-45. The district court did not address this issue, ROA.355, and this Court need not do so in the first instance, *see Arnold v. Williams*, 979 F.3d 262, 269 (5th Cir. 2020)—but if this Court decides to reach the question, Harmon's right to bring a Fourth Amendment claim in these circumstances was clearly established. This Court (and the Supreme Court) has consistently held that when a police officer intentionally uses force or a show of force that stops a vehicle, it seizes the vehicle's occupants. *Brendlin*, 551 U.S. at

[10] If the Court finds any ambiguity as to whether Harmon pled a proper Fourth Amendment claim (and it should not), the Court should remand to the district court with instructions that Harmon be given the opportunity to amend. *See In re Burzynski*, 989 F.2d 733, 744 (5th Cir. 1993).

255-56; *Jamieson*, 772 F.2d at 1210; *Flores*, 381 F.3d at 397. Because Tran intentionally applied force to stop the vehicle, and the vehicle stopped, he seized both Terry and Harmon.

Tran cites an alleged split of authority referenced in a footnote in *Plumhoff v. Rickard*, 572 U.S. 765, 778 n.4 (2014), to argue that the law was not clearly established as to a passenger's ability to bring an excessive force claim. Tran Br. 45. But the existence of a circuit split is irrelevant; the question is whether the law was clearly established *in this Circuit*. *See Boddie v. City of Columbus, Miss.*, 989 F.2d 745, 748 (5th Cir. 1993). It was: *Brendlin*, *Jamieson*, and *Flores* amply demonstrate that a passenger in a car that is seized can bring a Fourth Amendment claim. As to the *substance* of the excessive force claim, the law clearly established that Officer Tran's actions were unconstitutional for the reasons discussed above. *See supra* at 14-18.

IV. Plaintiffs Sufficiently Alleged Municipal Liability.

Plaintiffs sufficiently alleged municipal liability for their claims based on the City's failure to discipline Tran and its customs of excessive

force and racial bias.[11] To state a claim for municipal liability, a plaintiff must allege three elements: (1) a policy or custom, (2) knowledge, and (3) causation. *Bennett v. Slidell*, 728 F.2d 762, 768 (5th Cir. 1984) (en banc). The City meaningfully addresses just one of the prongs—custom.

A. Plaintiffs Sufficiently Alleged Municipal Liability for the City's Policy of Failing to Discipline Tran.

The City argues Plaintiffs' allegations of a custom of failing to discipline Tran are "conclusory," yet acknowledges the Complaint alleged *nine* previous incidents of Tran's misconduct, including at least two violent assaults on civilians. City Br. 33; ROA.196-97 (Compl. ¶¶ 104-114).[12] In the first such assault, an off-duty Tran threatened a man with a knife while identifying himself as an APD officer. In the second, Tran donned his police shirt during a road rage assault, despite being off duty. ROA.197 (Compl. ¶¶ 106-114).

As to these assaults, the City complains Plaintiffs did not plead "the conduct of the other parties to the two incidents." City Br. 33. To the

[11] The City is correct in one respect: Plaintiffs have declined to pursue an appeal regarding any municipal liability claim based on the City's failure to train Tran. City Br. 30-32.

[12] The district court did not address this issue, and apparently concluded (correctly) the Complaint's allegations were sufficient on this front. *See* ROA.357-58.

extent the City argues it was justified in not imposing significant discipline on Tran for those incidents, that question must be resolved at summary judgment, or by a jury—the Complaint sufficiently alleged both Tran's behavior and the City's ostrich-like response.

The City attempts to fault Plaintiffs for providing "no description of" the other seven episodes. City Br. 33.[13] But "the question at the motion to dismiss stage is not . . . whether [a plaintiff] has made 'detailed factual allegations.'" *Flagg v. Stryker Corp.*, 647 F. App'x. 314, 319 (5th Cir. 2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Rather, the pleading stage "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" to support the claim. *Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007). Moreover, the City does not argue these allegations lack plausibility—nor could it. It is plausible that an off-duty officer who threatens an individual at knifepoint and intimidates a road rage victim—while using his identity as a police officer during both incidents—might have additional episodes of bad behavior. ROA.197 (Compl. ¶¶ 106-114).

[13] Plaintiffs requested documents regarding these episodes, and the City refused. *See* ROA.249.

The City does not dispute that Plaintiffs adequately pled the second element of a municipal liability claim—knowledge. The City is correct to concede this point. *See* Opening Br. 45-49. The Complaint alleged that APD suspended Tran for a single day in response to the knife-wielding incident—indisputably demonstrating knowledge of this episode, and plausibly suggesting the City knew of others as well. ROA.197 (Compl. ¶ 112).

As to the final element—causation—the district court implicitly held that Plaintiffs met this prong by not addressing it. *See* ROA.358. That was correct. Plaintiffs alleged 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. *See* Opening Br. 49-50. The City makes no meaningful argument to the contrary in its short, near-boilerplate paragraph on the issue. City Br. 34.

B. Plaintiffs Sufficiently Alleged Municipal Liability for the City's Customs of Excessive Force and Racial Bias.

The Complaint contains over forty paragraphs of factual allegations reflecting 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). The district court held these allegations gave rise to an inference of such customs within the APD. ROA.358. That holding was correct. Opening Br. 50-52.

The City plays whack-a-mole with these allegations, attempting to distinguish (or, when it suits the City, point out similarities with) Plaintiffs' pled episodes of excessive force and racial bias. The City observes that one episode involves excessive, but not deadly force; another involves pepper spray (and not a taser or firearm); and not all these episodes involved Tran. City Br. 24-25. These distinctions are irrelevant, as all these incidents support Plaintiffs' pled custom: APD's excessive force problem. Moreover, it is well-established that nothing resembling qualified immunity applies to municipalities and that a "municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983." *Owen v. City of Independence, Mo.*, 445 U.S. 622, 638 (1980). The City points out that the incidents involving Christian Taylor, Tavis Crane, and Terry all involved deadly force against a victim who was not complying with police orders. City Br. 26-27. Far from exonerating the City, however, that claim reinforces Plaintiffs' allegations: APD had a custom of using excessive—and often

deadly—force when the situation did not call for it. (More than that: all three victims were Black men. *See* ROA.196 (Compl. ¶ 99))

The City also suggests Plaintiffs' allegations of APD use of excessive and deadly force against citizens who were *not* Black men somehow undermine Plaintiffs' claims of racial bias. City Br. 28-29. No. The allegations were customs of excessive force and racial bias against Black men—Plaintiffs were not required to allege (implausibly) that APD officers *only* employed excessive force against Black men or that every use of excessive force was racially motivated. They did allege, however, that a disproportionate number of these excessive force episodes involved Black men, ROA.196 (Compl. ¶¶ 99-100), which the City does not dispute. The district court rightly concluded these allegations were sufficient at the pleading stage. ROA.358.

To demonstrate the second element—knowledge—Plaintiffs alleged the City "completely ignor[ed] the multiple signs" of these unlawful customs within APD, of which it knew or should have known. ROA.187, 200-01 (Compl. ¶¶ 6, 134); *see also* Opening Br. 52. The district court correctly held the Complaint sufficiently alleged constructive knowledge by alleging "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). The City does not dispute this determination, thereby conceding this element of the municipal liability test is met.

As for the third element—causation, Plaintiffs explained in detail why the district court was incorrect in holding their allegations insufficient. Opening Br. 52-57. In its only sentence on the subject, the City claims Plaintiffs did not sufficiently allege causation because "Tran was faced with a unique situation where he was forced to make a split second decision." City Br. 30. The City's argument, notably asserted without legal support, would essentially wipe away municipal liability for police action, since police invariably face "unique situation[s]." *Id.* That is not the law. *See Owen*, 445 U.S. at 638 ("[T]he municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.").

* * *

In short, to the extent the City chooses to argue that no customs of failing to discipline Tran, of excessive force, and of racial bias existed, it can do so at summary judgment, or before a jury. But its arguments do

not appreciably dispute that Plaintiffs *plausibly alleged* that such customs exist, which is the question before this Court.

CONCLUSION

For the reasons stated above, this Court should reverse the dismissal of Plaintiffs' federal claims and request for punitive and exemplary damages against Tran.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2021, 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: March 26, 2021

/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 6,435 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: March 26, 2021

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