No. 21-20544

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Jean Henderson; Christopher Devonte Henderson,

Plaintiffs - Appellants

v.

Harris County, Texas; Arthur Simon Garduno,

Defendants - Appellees

On Appeal from

United States District Court for the Southern District of Texas

4:18-CV-2052

BRIEF OF APPELLANT JEAN HENDERSON, AS NEXT FRIEND AND GUARDIAN OF AND FOR CHRISTOPHER DEVONTE HENDERSON

Bruce K. Thomas
Law Office of Bruce K. Thomas
Texas State Bar No. 19844300
bthomas@bthomaslaw.com
12900 Preston Rd, Ste 590
Dallas, Texas 75230
Phone/Fax: (214) 296-9650

T. Dean Malone
Law Offices of Dean Malone, P.C.
Texas State Bar No. 24003265
dean@deanmalone.com
900 Jackson Street, Suite 730
Dallas, Texas 75202
Telephone: (214) 670-9989
Telefax: (214) 670-9904

ATTORNEYS FOR APPELLANT

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 5th CIR 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 possible disqualification or recusal.

Defendants-Appellees:	**Counsel for Defendants-Appellees:**
Arthur Garduno	Suzanne Bradley, Harris County Attorney's Office Houston, TX
Harris County, Texas	Laura Hedge, Harris County Attorney's Office Houston, TX

Plaintiffs-Appellants:	**Counsel for Plaintiffs-Appellants:**
Christopher Henderson[1] and Jean Henderson, as next friend and guardian of and for Christopher Devonte Henderson	T. Dean Malone Michael T. O'Connor Kristen Leigh Homyk Law Offices of Dean Malone, P.C. Dallas, TX
Christopher Henderson and Jean Henderson, as next friend and guardian of and for Christopher Devonte Henderson	Bruce Thomas Law Office of Bruce K. Thomas Dallas, TX

/s/Bruce K. Thomas
Attorney of Record for Appellant

[1] Christopher Henderson was a named plaintiff when the lawsuit was filed, in addition to Jean Henderson, who is Christopher Henderson's grandmother. It was necessary during the course of this proceeding for Jean Henderson to obtain a guardianship over the person and estate of Christopher Henderson because he was unable to act for himself. Plaintiff filed a second amended complaint on September 6, 2019 (ROA.289) naming Jean Henderson as the sole plaintiff, on behalf of Christopher Henderson as both next friend and as the guardian of his person and estate. The official caption prepared by the Clerk for this appeal (used above) reflects the capacity of the parties prior to Plaintiff's second amended complaint. Hereafter, Plaintiff-Appellant Jean Henderson, as the representative of Christopher Henderson, is referred to in the singular as stated in the Second Amended Plaintiff's Original Complaint.

STATEMENT REGARDING ORAL ARGUMENT

This case presents important questions of law concerning the application of clearly established law principles to excessive force claims, and whether the District Court violated the "fair procedure" requirement for *sua sponte* dismissals by failing to provide notice and an opportunity for Plaintiff to respond, and to amend to conform Plaintiff's complaint to the summary judgment evidence on file, before dismissing with prejudice Plaintiff's *Monell* claim on grounds raised by the court *sua sponte*. Appellant therefore requests oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

JURISDICTIONAL STATEMENT

This court has jurisdiction over appeals from a district court's final decision. 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

ISSUE 1: The District Court erred in rendering summary judgment that Deputy Constable Garduno was entitled to qualified immunity on the basis that his constitutional violation was not clearly established.

ISSUE 2: The District Court erred in dismissing Plaintiff's *Monell* claim against Harris County with prejudice on grounds raised *sua sponte* by the Court 14 months after Harris County filed its motion to dismiss because the Court employed an unfair procedure when it dismissed the claim without first providing Plaintiff with notice of the grounds raised by the Court *sua sponte* and an opportunity to respond and amend to conform Plaintiff's pleading to the summary judgment evidence already before the Court.

ISSUE 3: The District Court erred in dismissing Harris County because Plaintiff's live pleading alleged a plausible *Monell* claim.

STATEMENT OF THE CASE

A. Summary Judgment Evidence supporting Plaintiff's excessive force claim against Deputy Garduno.

Garduno is a part-time deputy constable working at Harris County Precinct 6. (ROA.1144) On April 26, 2018, he and two other officers (Deputy Holbert and Patrolman Macias) went to Ingrando Park in Houston to conduct a "park check" for drug activity. (ROA.1145-1146) The three officers rendezvoused a block from the park in separate vehicles. (ROA.1146-1148, 1159-1160) They proceeded toward the park with all three vehicles, and Garduno leading. (ROA.1149, 1160-1161) Garduno claims that as he approached the edge of the park with his windows open, he could smell marijuana, and he could see three African-American males sitting at a circular-shaped picnic table. (ROA.1149-1150, 1152, 1155-1156) Garduno claims that one of these individuals was Chris Henderson. (ROA.1150) According to Garduno, Chris had what Garduno believed was a "marijuana cigar," or "blunt," tucked behind his ear, and another individual was "breaking up marijuana" i.e., stripping marijuana leaves and placing them in a blue shoebox. (ROA.1150-1151, 1154-1155, 1157-1158) Still in his vehicle, Garduno jumped the curb and drove his vehicle into the park, followed by the other two vehicles. (ROA.1149, 1152-1153, 1153, 1161-1162) According to Garduno, two men walked away from the table, including the individual allegedly stripping marijuana, while Chris allegedly threw down a clear

baggie and began to run through the park toward an apartment complex. (ROA.1150-1151, 1155) All three officers pursued Chris, and no one attempted to detain the men who did not run. (ROA.1150, 1151, 1153; ROA.1196) Garduno initially gave chase to Chris while still driving his vehicle through the park. (ROA.1151) Garduno concedes the park was crowded with families and children and that driving vehicles through the crowded park put innocent people in danger. (ROA.1150, 1183-1184) While in his vehicle, Garduno gave Chris no commands. (ROA.1166) Garduno claims the officers chased Chris into a large apartment complex some 1400 feet from the park. (ROA.1163) Chris lives in the complex with his grandmother. (ROA.1235-1236; ROA.1201) Garduno stopped, then states he gave chase on foot for about 200 feet and caught up to Chris in a parking lot. (ROA.1151-1152, 1163, 1167-1168) Garduno claims he yelled at Chris to stop or be tased. (ROA.1168, 1169) According to witnesses, Chris was wearing headphones, and wearing his pants in a "sagging" manner where his pants hung well below his waistline such that they could see his underwear. (ROA.1209, 1212, 1222, 1224, 1225, 1237, 1248)

According to multiple witnesses, Chris stopped running in response to Garduno's command, with his back to Garduno, turned his head slightly toward the deputy, and raised his hands in the air as if to surrender and give himself up; then Garduno shot Chris with his taser without any further command or warning.

(ROA.1202-1207, 1211-1221, 1234-1238, 1225-1227, 1229-1233, 1253, 1257-1259, 1265)

Before Garduno fired, he could see that Chris was standing in a parking lot with an asphalt surface, and Garduno admits that he knew that tasing an individual on a hard surface could result serious injury or death from a fall. (ROA.1164, 1170, 1189) Garduno nonetheless fired or discharged current at Chris three times. (ROA.1193) The first shot caused one of two taser prongs to lodge in Chris's face, while the second prong flew over Chris's head and hit a nearby truck, thereby failing to complete a circuit. (ROA.1177) Although being struck in the face, Chris did not attempt to flee. (ROA.1178, 1179, 1180) Without any further command, Garduno immediately shot Chris a second time. (ROA.1178, 1180) This time both taser prongs lodged in Chris's back, immobilized him, and caused him to fall straight backwards onto the asphalt without any ability to protect his head. (ROA.1181-1182; ROA.1258-1261) Chris's head smacked onto the asphalt surface with the full force of his fall. (ROA.1235) One witness described the sound of Chris's head hitting the pavement "as if a fifty-pound dumbbell had been dropped on the ground." (ROA.1235) Chris suffered traumatic brain injury when he struck his head. (ROA.1294) Later, Chris had to be carried to an ambulance. (ROA.1238)

Shortly after Chris fell, while he remained on the asphalt, three officers (Macias, Holbert, and Deputy Herberto Soto) joined Garduno to secure and handcuff

Chris. (ROA.1185) Initially Chris was not moving and appeared to be "knocked out cold." (ROA.1236) It was obvious to bystanders that Chris had major injuries. (ROA.1237) Chris was bleeding from his ears, nose, and mouth, and began saying "Mama, Mama." (ROA.1237) He made no attempt to get up or run. (ROA.1237) Nonetheless, Garduno *again* discharged his taser for a third time, inflicting an additional five second charge to Chris through the prongs still lodged in Chris's back. (ROA.1186-1187) The four deputies continued to surround Chris as he was writhing in pain, moaning and crying for his grandmother, who came upon the scene shortly after Chris was tased. (ROA.1193, 1237; ROA.1292, 2446 [Bodycam Video])

After the deputies handcuffed Chris, Garduno twice more threatened to tase Chris. (ROA.1292, 2446 [Bodycam Video]) Garduno never saw Chris possessing or discarding a weapon, and officers found no weapon after Chris was tased. (ROA.1173-1174, 1174) Other than claiming the Chris had reached for his waistband, which all witnesses disputed, Garduno admits that Chris made no aggressive movements and made no verbal threats. (ROA.1174, 1176)

No drugs, container, baggie, or drug paraphernalia was recovered from where Garduno claims to have observed marijuana. (ROA.1157-1158) Likewise, neither of the other two individuals at the table were detained. (ROA.1153, 1154, 1155) The single criminal charge alleged against Chris, possession of marijuana of less than 2

oz. in a drug free zone, was dismissed on the prosecution's motion, which states, "No probable cause exists at this time to believe the defendant committed the offense.") (ROA.1241-1244).

Deputy Holbert testified his dashcam should have captured the chase and that he activated his bodycam well before the first tasing. (ROA.1197—1199) Nonetheless, the only video produced to Plaintiff consists of approximately 6 minutes after Chris was already on the ground and had been tased a third time. (ROA.1190, 1191, 1192; *see also* ROA.1292, 2446 [Bodycam Video])

B. Plaintiff's allegations and summary judgment evidence supporting *Monell* liability.

The *Monell* allegations in Plaintiff's live pleading are set out in paragraphs 26-40 of Plaintiff's Second Amended Complaint, and Plaintiff pleads her *Monell* claim at paragraphs 45-46. (ROA.299-306, 309-311) Plaintiff asserts *Monell* liability based on Harris County's failure to implement any written policies and procedures governing the conduct of deputy constables in performing law enforcement functions, including Garduno; the failure of Harris County to train Garduno; and its failure to supervise Garduno. (ROA.299-306) Among other alternative allegations, Plaintiff alleged that Constable Sylvia Garduno was Harris County's chief policymaker for Constable Precinct 6, and that in response to Plaintiff's counsel's public information requests and several follow-up letters, Trevino failed to produce any written policies or procedures governing the conduct

of deputy constables in performing law enforcement. (ROA.300) Therefore, on information and belief Plaintiff alleged that Harris County has no policies that governed Deputy Garduno in the performance of his duties and use of a taser. (ROA.300) Plaintiff alleged that the County's decision to arm its deputy constables with taser weapons while failing to adopt and implement policies and procedures governing their use was a moving force behind the constitutional violations Chris suffered from Deputy Garduno. (ROA.300-302) Plaintiff further alleged that the County's custom and practice of failing to train deputy constables in their law enforcement functions, including the constitutional limits of using force, and similar failure to provide supervision, were moving forces in causing the constitutional violations that injured Chris. (ROA.302-306)

In response to Harris County's summary judgment motion, Plaintiff reasserted facts set forth in Response to Garduno's summary judgment motion. (ROA.1301-1306) Plaintiff additionally submitted evidence relevant to her *Monell* claim, including the deposition testimony of Harris County's designated representative (ROA.1820-1925) and Constable Trevino (ROA.1668-1819).

Harris County designated a Precinct 6 deputy constable, Sergeant Paul Fernandez, to speak for the County. (ROA.1820, 1836, 1841, 1843, 1845) As Harris County's representative, Sergeant Fernandez admitted that deploying a taser in the manner reported by Plaintiff's three independent witnesses, Garcia, Carlton, and

Pinion, is consistent with Precinct 6 policy. (ROA.1847, 1849) That is, as alleged in Paragraphs 11-18 of Plaintiff's live pleading (ROA.294-296), it is consistent with Precinct 6 policy that Garduno chose to tase an unarmed suspect who was not actively resisting arrest; who was not aggressive; who was not known to have a criminal record; who had stopped pursuant to Garduno's command, raised his hands, and did not thereafter attempt to flee; and who was sought for a misdemeanor violation. (ROA.1564-1865) Because Garduno's actions complied with Precinct 6 policy, it was unnecessary according to Sergeant Fernandez for Precinct 6 to conduct an internal affairs investigation into Garduno's use of force, even after reviewing witness statements and depositions. (ROA.1849).[2] Constable Trevino further testified that Garduno's use of force was reasonable and Garduno had not been instructed to do anything different in the future. (ROA.1745).

Constable Trevino further testified that she assumed her position as Harris County's Precinct 6 Constable after being elected in 2016. (ROA.1696) Trevino was previously fired in 2013 from her position as a lieutenant for Harris County Constable Precinct 7. (ROA.1691, 1695-1696) Although Garduno had previously been terminated as a deputy constable for Precinct 6 by Trevino's predecessor,

[2] Trevino and Fernandez state that they are unaware that counsel for Plaintiff provided transcripts of the witnesses' oral statements to the Harris County's attorney in 2018. (ROA.1889-1890; ROA.1747-1748)

Trevino rehired Garduno in 2017 after he worked in Trevino's campaign. (ROA.1736-1737)

Trevino sets policy for Precinct 6. (ROA.1696-1699, 1869) Constable Trevino testified that she does not understand that an officer's *use of force which is greater than necessary* for the circumstances is unconstitutional, but instead believes that using force greater than necessary "would be the officer's decision in the incident" and would be determined "on a case-by-case basis." (ROA.1771, 1773)

Constable Trevino testified she has never received training on how an officer is to decide on the type of force to be applied in a specific situation and she is unfamiliar with the term "use of force continuum." (ROA.1769)

Trevino testified that she believed that Precinct 6 had conducted inquiries concerning use of force incidents involving tasers between 5 and 10 times, and believed "maybe three" of those (i.e., a third to more than half) involved one part-time deputy, Garduno, in a force of over 80 patrol deputies. (ROA.1733, 1778-1779).

Constable Trevino testified that under her predecessor Precinct 6 lost its certification to provide TCOLE training for its deputy constables and does not provide training. (ROA. 1707-1709) Instead, deputy constables are sent to other precincts or law enforcement agencies for training. (ROA.1707-1709) The Precinct 6 training officer does not provide training, but instead makes appointments for

training at other law enforcement agencies if deputies request training. (ROA.1739-1741)

Constable Trevino further testified that Precinct 6 officers perform general law enforcement duties for Harris County outside the precinct pursuant to Harris County's contracts with other local governmental entities, including the Harris County Housing Authority, East End Management District, and Houston Independent School District. (ROA.1725, 1730-1732; ROA.2249-2417 [Harris Co. Interlocal Agreements for Law Enforcement Services]) For those contracted services, the local governmental entities pay Harris County 80% to 100% of the cost of the salaries and overhead attributed to the Precinct 6 officers providing law enforcement services. (ROA.1725-1727, 1731) These contracts are renewed yearly by the Harris County Commissioner's Court. (ROA.1730, 1735) When performing duties for Harris County pursuant to these contracts, or otherwise performing law enforcement services in Harris County outside Precinct 6, *Precinct 6 officers use whatever policies and procedures are established by Trevino as the elected constable for Precinct 6, including her use of force policies*. (ROA.1728-1729, 1732, 1762-1763) Pursuant to these contracts, Precinct 6 officers work throughout Harris County outside of Precinct 6. (ROA.1349, 1727-1732)

Deputy Garduno testified he never received any training concerning how to make a decision as to which weapon to use when applying force. (ROA.1375) He

also testified that he does not recall receiving training while employed at Precinct 6 concerning the constitutional use of force. (ROA.1376) Garduno is unfamiliar with the United States Supreme Court case of *Graham v. Connor*. (ROA.1378) Garduno explained the totality of his training concerning reasonable use of force as follows: "If someone is trying to hurt you, don't let them hurt you. Don't -- if somebody is trying to pull a gun on me, I pull a gun on them basically. . . . If I'm in fear of my life, I have to react to that." (ROA.1378)

According to Garduno and Trevino, deputy constables in Precinct 6 are required to file a use-of-force report anytime they deploy a weapon, which in turn should be evaluated by the precinct's internal affairs division. (ROA.1359-1360, ROA.1750) In response to questioning by Plaintiff's counsel, Garduno immediately estimated the number of times he has inflicted force with a baton (once); OC spray (six or seven); and hand strikes (eight or nine). (ROA.1366-1368) However, he professed to be unsure how many times he has used a taser aside from tasing Chris, but eventually estimated between 2 and 5 other tasings. (ROA.1366) He nonetheless indicated that he has deployed his taser often enough to have formed a "typical" practice: "Typically I request a supervisor to the location immediately [after deploying a taser]." (ROA.1444-1445)

Garduno testified that at the time he shot Chris, Garduno had on his person four weapons he could deploy: a firearm, an expandable baton (i.e., ASP baton), OC

spray (i.e., pepper spray), and a taser. (ROA.1336-1337, 1410) Notwithstanding Garduno's testimony, Constable Trevino testified that her deputy constables do not carry batons or pepper spray. (ROA.1768-1769)

Garduno also acknowledged that pursuant to contracts between Harris County and the Harris County Housing Authority, that he and other deputy constables routinely work throughout Harris County providing general law enforcement duties and that it is common for Precinct 6 law enforcement officers otherwise to assist in incidents outside the precinct. (ROA.1348-1350, 1365)

In addition to renting out Precinct 6 deputies to local governmental entities to provide general law enforcement services, Harris County Commissioners maintain the following supervisory powers over Constable Precinct 6: approval of officer bonds; approval of the Precinct budget; approval of all expenditures in excess of $4,000 at two-week intervals; approval of audits; and approval for all hires and terminations. (ROA.1695, 1714-1719) Harris County funds and pays all Precinct 6 salaries, unless reimbursed through an Interlocal Agreement. (ROA.1727-1728)

Neither Garduno nor any other deputy suffered any adverse employment action in connection with the tasering and arrest of Chris Henderson, even after his superiors reviewed transcripts of the witness statements of Garcia, Carlton, and Pinion and bodycam footage of post-tasering conduct. (ROA.1701, 1707, 1712, 1714, 1747-1748; ROA.1848-1849)

C. Procedural history.

Plaintiff filed her complaint on June 20, 2018 (ROA.14), and amended as a matter of right on August 7, 2018 (ROA.70). Following abatement of the case to allow for guardianship proceedings in state court (ROA.246), the Court in September 2018 amended its Scheduling Order to provide, *inter alia*, for amended pleadings to be filed by September 30, 2019, and extended discovery until May 31, 2020. (ROA.286-287) Pursuant to the amended scheduling order, Plaintiff filed a Second Amended Complaint on September 6, 2019, to reflect that Plaintiff had obtained a guardianship over the person and estate of Chris Henderson. (ROA.289). Throughout 2019 and 2020 Plaintiff diligently pursued discovery and designated expert witnesses. (ROA.6-11, 1115-1294, 1297-2426, 2554) Shortly after Plaintiff filed her second amended complaint, Harris County filed its third motion to dismiss, renewing its previously filed motions. (ROA.321; *cf.* ROA.50, 108) In its motion, Harris County primarily asserted that it cannot be held liable for the policy decisions of a constable and further contested causation. (*See, e.g.*, ROA.325-328, 330) Defendant Garduno answered rather than moving to dismiss. (ROA.315)

While Harris County's motion to dismiss remained pending, the Court further amended the Scheduling Order on March 31, 2020, extending discovery until August 31, 2020, and providing for dispostive motions to be filed by September 30, 2020. (ROA.440-441) On September 30, 2020, both Harris County and Deputy Garduno

filed motions for summary judgment. (ROA.771, 916) Plaintiff filed responses opposing the motions, incorporating the extensive discovery undertaken by Plaintiff over the preceding year, including over 10 depositions. (ROA.6-11, 1115-1294, 1297-2426, 2554)

Plaintiff filed her response to Harris County's summary judgment motion subject to her pending motion to compel discovery relevant to Plaintiff's *Monell* claims, which Plaintiff had filed September 4, 2020. (ROA.496; ROA.1300) In her motion to compel, Plaintiff sought production of contracts by which Harris County essentially rents constables to local governmental units for general law enforcement services. (ROA.500-503) In summary, Plaintiff maintained that these documents are probative to her *Monell* claims to show that Harris County has a long history of delegating considerable policymaking authority for general law enforcement duties to its precinct constables and that it acquiesces to the policy decisions of its constables by using deputy constables for general law enforcement duties throughout the county pursuant to contracts it renews annually. (ROA.500-503, 1313-1315) Plaintiff maintained that as a result, Harris County may properly be held liable for unconstitutional law enforcement policies implemented and utilized by Harris County constables that are a moving force behind the unconstitutional conduct of its deputy constables, including the failure of Precinct 6 to train deputy constables in the constitutional use of force and the use of force continuum; allowing deputy

constables to use force greater than necessary at their discretion; and failing to adopt any policies governing the constitutional use of taser weapons. (ROA.500-503, 1313-1315) The District Court docket indicates the motion to compel was denied as moot in an order entered September 3, 2021, but the order of that date does not do so. (*Cf.* ROA.12 [entry for Doc. #116] *with* ROA.3686-3692 [Doc. #116])

Because the parties had extensively briefed the summary judgment motions and outstanding discovery dispute, Plaintiff did not believe it necessary to seek leave to amend to conform the pleadings to the summary judgment evidence. (ROA.2555) Plaintiff's liability theories and supporting evidence were before the Court, and neither Defendant raised any relevant objection that Plaintiff's summary judgment evidence was not supported by Plaintiff's pleadings. (ROA.2055; *see also* ROA.2473-2477 [Garduno Reply]; ROA.2459-2464 [Harris County Reply][3]) Plaintiff therefore assumed that the Court would address the claims on the merits as presented in the summary judgment filings, rather than on the pleadings as they existed prior to discovery. (ROA.2555) Nonetheless, on November 30, 2020, over 14 months after Harris County filed its motion to dismiss, after a year of discovery, and over a month after Plaintiff filed her summary judgment response, the court

[3] Harris County objected that Plaintiff did not plead "ratification" as discussed at page 15 of Plaintiff's Response. (ROA.2461) The cited passage appears to be to Plaintiff's discussion of *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985). (ROA.1310) Harris County cited no authority that a plaintiff is required to plead *Grandstaff*-type evidence offered to prove that policymakers were aware of the customs and practices of its employees. (*See* ROA.2461)

granted Harris County's motion to dismiss without reference to the summary judgment filings. (ROA.2508-2513)

Plaintiff thereafter sought relief pursuant to Rule 59(e), and argued that the pleading deficiencies the Court believed existed could be readily cured by allowing Plaintiff to conform her pleading to the summary judgment evidence on file. (ROA.2558-2568) Plaintiff therefore sought permission to replead her *Monell* claim. (ROA.2567-2568) The court denied Plaintiff leave to amend and denied Plaintiff's Rule 59(e) motion. (ROA.3686-392)

SUMMARY OF THE ARGUMENT

The District Court correctly determined that the summary judgment evidence would support a finding that Deputy Garduno used excessive force, but badly erred in concluding that the law was not clearly established. The court fixated on irrelevant distinctions, including the alleged "chase" and the particular weapon employed.

This Circuit has repeatedly held that lawfulness of force does not depend on the precise instrument used to apply it. *E.g*, *Newman v. Guedry*, 703 F.3d 757, 763 (5th Cir. 2012). In determining whether excessive force precedent is "clearly established," this Circuit has relied on precedent involving multiple force instruments. Garduno shot his taser at Chris notwithstanding that Chris was standing still, had no visible weapon, had his hands up in surrender, threatened no one, stopped as ordered, did not thereafter attempt to flee, and was suspected of only a

misdemeanor. There was no need to use *any* force against Chris, be it a taser, baton, fists, or other instrument. It is clearly established, and obvious, that after a suspect complies and surrenders, the need for force evaporates and with it the constitutional authority to inflict it. Garduno's decision to use force after Chris surrendered violated clearly established law. Additionally, it is clearly established that Garduno could not lawfully continue to tase Chris while Chris was subdued on the ground, surrounded by four deputies, with no means of evading custody.

Moreover, a jury could conclude that tasing Chris where he was likely to, and did, fall to a paved surface and strike his head, constitutes the use of deadly force. For this additional reason, the District Court erred in concluding Garduno's constitutional violations were not clearly established.

Multiple Harris County policies and practices, individually and collectively, were a moving force in causing the constitutional violations of excessive force that caused Chris Henderson's catastrophic injuries. Most directly, this included the wholesale failure of the County to provide policies and training to its deputy constables in the *constitutional* use of force. Garduno used excessive force because he had been taught nothing else. His precinct allowed deputy constables to use tasers at their discretion, and *to use excessive force at their discretion*. Plaintiff alleged (and produced evidence) that the County delegated final policymaking authority to its Precinct Constables, and used the deputy constables for general law enforcement

duties on behalf of the county, who, of course, acted pursuant to their unconstitutional precinct policies. Plaintiff's live pleading alleges a plausible claim against Harris County.

If Plaintiff's pleading was deficient, it was only because the District Court dismissed the *Monell* claims on conclusory and vagueness grounds raised *sua sponte* without providing Plaintiff and opportunity to respond and replead to state Plaintiff's best case.

ARGUMENT

ISSUE 1: The District Court erred in rendering summary judgment that Deputy Constable Garduno was entitled to qualified immunity on the basis that his constitutional violation was not clearly established.

A. Legal Standards

1. Qualified immunity and summary judgment standards.

On summary judgment, the court must accept the plaintiff's facts as true and review them through the lens of qualified immunity. *Kinney v. Weaver*, 367 F.3d 337, 348 (5th Cir. 2004) (en banc). Qualified immunity is judged according to a two-step standard: (1) whether the alleged facts make out a constitutional violation, and (2) whether the right was clearly established at the time of defendant's misconduct. *Darden v. City of Fort Worth, Texas*, 880 F.3d 722, 727 (5th Cir. 2018), *cert. denied*, __ U.S. __, 139 S. Ct. 69 (2018).

This Circuit recently summarized the "clearly established" prong as follows:

> Officers are entitled to qualified immunity "unless existing precedent 'squarely governs' the specific facts at issue." *Kisela v. Hughes*, —— U.S. ——, 138 S. Ct. 1148, 1153 (2018) (per curiam) (quoting *Mullenix v. Luna*, 577 U.S. 7, 15 (2015) (per curiam)). That does not require a showing that "the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Rather, there can be "notable factual distinctions between the precedents relied on ... so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (quoting *United States v. Lanier*, 520 U.S. 259, 269 (1997)).

Timpa v. Dillard, __ F.4th __, No. 20-10876, 2021 WL 5915553, at *9 (5th Cir. Dec. 15, 2021) (parallel citations omitted).

2. Clearly established legal principles.

Within the Fifth Circuit, the law is clearly established that an officer's continued use of force on a subdued subject is objectively unreasonable without regard to the precise instrument used to apply force. *See Timpa* 2021 WL 5915553, at *10 ("We have reaffirmed again and again that this principle [prohibiting the use of force against a subdued suspect] applies with obvious clarity to a variety of tools of force because the '[l]awfulness of force . . . does not depend on the precise instrument used to apply it.; " (citing, *inter alia*, *Newman v. Guedry*, 703 F.3d 757, 763 (5th Cir. 2012)).

It is also clearly established that officers cannot use force independent of a subject's "contemporaneous, active resistance." *Joseph ex rel. Est. of Joseph v. Bartlett*, 981 F.3d 319, 335 (5th Cir. 2020). Accordingly, "where an individual's

conduct amounts to mere 'passive resistance,' use of force is not justified." *Trammell v. Fruge*, 868 F.3d 332, 341 (5th Cir. 2017) (citing *Hanks v. Rogers*, 853 F.3d 738, 746 (5th Cir. 2017) (determining the plaintiff's initial refusals to follow a police officer's instructions amounted to, "at most, passive resistance" and did not justify the officer's use of a " 'half spear' takedown").

Moreover, an officer's use of force must be reasonable to the circumstances and the force must be applied in a "measured and ascending" manner which is "calibrated to [the suspect's] conduct." *Trammell*, 868 F.3d at 342. When only a few seconds elapse between an officer's initial request that a suspect submit to being detained, and the officer's attempt to force compliance physically, "a reasonable jury could infer that the officers used very little, if any, negotiation before resorting to physical violence, and that the officers' conduct did not constitute the required 'measured and ascending' actions calibrated to [the suspect's] conduct." *Id.* (noting that only 3 seconds elapsed between officer's command and use of force).

" '[I]f enough time elapsed between the [subject's active resistance] and the use of force that a reasonable officer would have realized [the subject] was no longer resisting,' " the further use of force is unnecessary and objectively unreasonable." *Timpa* 2021 WL 5915553, at *10 (citing *Curran v. Aleshire*, 800 F.3d 656, 661 (5th Cir. 2015) (quoting *Newman*, 703 F.3d at 764)). "An exercise of force that is reasonable at one moment can become unreasonable in the next if the justification

for the use of force has ceased." *Lytle v. Bexar Cty.*, 560 F.3d 404, 413 (5th Cir. 2009).

"[D]eploying a Taser is a serious use of force" that is designed to "inflict[] a painful and frightening blow." *Yates v. Terry*, 817 F.3d 877, 886 (4th Cir. 2016) (citations omitted). Thus, the Fifth Circuit, like other circuits, has repeatedly held that the unwarranted use of a taser constitutes a constitutional deprivation. *Pena v. City of Rio Grande City, Texas*, 816 F. App'x 966, 974-77 (5th Cir. 2020) (tasing fleeing suspect allegedly to keep her from running into traffic violated clearly established law); *see also Samples v. Vadzemnieks*, 900 F.3d 655, 661 & n. 21 (5th Cir. 2018) (citing *Newman*, 703 F.3d at 763). Circuit courts therefore agree it is objectively unreasonable to tase suspects in cases involving minor, non-violent crimes, in which the suspect posed no objective threat and is not actively resisting arrest. *Pena*, 816 F. App'x at 975-76 (citing *Newman*, 703 F.3d at 761-64; *Autin v. City of Baytown*, 174 F. App'x 183, 186 (5th Cir. 2005); *Massey v. Wharton*, 477 F. App'x 256 (5th Cir. 2012); *see also Yates*, 817 F.3d at 886; *Powell v. Haddock*, 366 Fed. App'x. 29, 31 (11th Cir. 2010).

3. Standard of review.

This Court reviews the district court's grant of summary judgment *de novo*. *Timpa* 2021 WL 5915553, at *4.

B. Garduno's constitutional violation was clearly established at the time he used excessive force to tase a suspect who had surrendered and was subdued.

The District Court correctly determined that the summary judgment evidence would support a finding that Deputy Garduno used excessive force. (ROA.3708-3710) Each of the *Graham* excessive force factors weighs heavily in favor of Plaintiff. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Chris was suspected for only a misdemeanor offense for which the constable intended simply to issue a citation. (ROA.1239, 3708) Viewing the facts in the light most favorable to Plaintiff, Chris complied with the officer's command by stopping, raising his hands, and surrendering himself, and he threatened no one. (ROA.3708-3710)

Nonetheless, the District Court but badly erred in concluding that the law was not clearly established with sufficient specificity. The District Court relied on irrelevant distinctions, fixating on the deputy's alleged "chase" and the particular weapon he employed. The District Court also failed to consider all applicable law and further failed to consider each of the three tasings separately.

Among numerous other cases Plaintiff cited blow, Plaintiff relied on *Newman v. Guedry*, 703 F.3d 757, 762-64 (5th Cir. 2012), to demonstrate that the law was clearly established, well prior to these events in 2018, that an officer may not immediately resort to force against a nonviolent misdemeanant, regardless of the weapon the officer uses, when the suspect complies with the officer's command,

poses no immediate threat to the officer or anyone else, and is not actively resisting. Additionally, Plaintiff cited (among others) a recent tasing case, *Pena v. City of Rio Grande City, Texas*, 816 Fed. Appx. 966, 975-76 (5th Cir. 2020), which relied heavily on *Newman* for clearly established law applicable to the unnecessary tasing incident in *Pena*. Nonetheless, the District Court distinguished *Newman* and *Pena* on the basis that "a lengthy pursuit preceded the use of force, [the] person injured was suspected of a crime, and the officer issued a warning." (ROA.3711-3712)

The court's first reason, a lengthy pursuit, is a red-herring. It is well-settled that force must cease when the conditions justifying it cease. *See Lytle*, 560 F.3d at 413 ("An exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased."); *see also Amador v. Vasquez*, 961 F.3d 721, 730 (5th Cir. 2020) (five seconds sufficient time to evaluate changed conditions for firing weapons, even if previous encounters may have justified deadly force). Crediting Plaintiff's version of events, as the court must on summary judgment, the so-called "chase" had ended. Chris stopped and surrendered *before* Garduno tased Chris. Therefore, even if it had been justifiable for Garduno to use force before Chris stopped, that justification ceased. That Garduno may have been angry, excited, or flush with adrenaline from pursuing a misdemeanor suspect for a quarter mile is no justification for using force.

Similarly, the District Court's emphasis on whether Chris was suspected of a crime is severely overwrought. In *Trammell*, this Court rejected this precise argument, and concluded that the alleged distinction was only an inconsequential matter of degree:

> So, while in *Goodson* [*v. City of Corpus Christi*, 202 F.3d 730, 734, 740 (5th Cir. 2000)], the officers lacked reasonable suspicion that the plaintiff had committed any crime, here the officers believed the plaintiff was guilty of the minor offense of public intoxication. Although the severity factor may have weighed slightly more in favor of finding a use of force reasonable in this case than it did in *Goodson*, we nevertheless conclude that *Goodson* gave officers "fair warning" that their conduct was unconstitutional. *See Ramirez*, 716 F.3d at 379.

See also Timpa v. Dillard, __ F.4th __, No. 20-10876, 2021 WL 5915553, at *10 (5th Cir. Dec. 15, 2021) ("Like the subject in *Strain*, Timpa was suspected of only a minor offense. *See* [*Strain*], 513 F.3d at 496.").

Likewise, whether the injured party had committed a crime was not important to the holding of either *Newman* or *Pena*. As the *Pena* panel concluded after recounting the differing accounts concerning whether the injured party was suspected of a crime at the time the officers used force, "Regardless, the severity of the crime, if any, was minimal militating against the use of force." 816 Fed. Appx. at 971. The panel further quoted with approval a statement from an Eighth Circuit case, *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009), which involved "nonviolent misdemeanants." *Pena*, 816 Fed. Appx. at 976. This of course is the important takeaway from *Newman*, not that the injured party committed no

crime, but that any crime that may have been at issue during the encounter was a minor offense which did not justify an officer quickly resorting to force.

Finally, and perhaps most troubling, is the District Court's third distinction that the officer issued a warning. The court failed to acknowledge that although Garduno issued a warning that he would tase Chris if Chris did not stop, *Chris complied with Garduno's command and stopped*. Yet, Garduno shot Chris anyway; then tased Chris twice more. It cannot seriously be suggested that an officer is free to employ violence, regardless of whether the suspect complies, as long as the officer first announces he intends to shoot. *See Massey*, 477 F. App'x at 260–61 (rejecting qualified immunity where plaintiff attempted to comply at all times). The entire purpose of giving a warning it to allow the suspect an opportunity to comply, otherwise the warning is ineffective. *See, e.g., Cole v. Carson*, 935 F.3d 444, 449, 456–57 (5th Cir. 2019) (Noting that "officers provided 'no warning ... that granted [Ryan] a sufficient time to respond.' " Accordingly, "Ryan 'was not given an opportunity to disarm himself before he was shot.' ") Crediting the summary judgment evidence in the light most favorable to Plaintiff, Chris fully complied with Garduno's command, thus eliminating any reason for Garduno to tase Chris as he threatened. What Garduno failed to do was issue any *additional* command or warning *after* Chris complied. On this point the summary judgment evidence is undisputed. Further, Plaintiff's summary judgment evidence refutes any notion that

Chris's actions were threatening, because as Chris turned his head slightly to see the officer, he raised his hands in a universal sign of surrender. Garduno's reaction to shoot after Chris complied was nonsensical. It amounts to a warning that "If you don't stop I will shoot; if you do stop I will shoot." This sort of "heads I win, tails you lose" justification for exercising force is not reasonable, because the suspect always loses, and at great cost.

The important point is not whether Garduno at some point issued a warning, but whether Chris failed to comply with any command. In *Newman*, for example, this Court repeatedly emphasized that Newman did not fail to comply with any command. *See Newman*, 703 F.3d at 760, 762, 764 ("neither officer gave him any command with which he failed to comply"; "Again, Newman alleges, he was not given any commands with which he failed to comply."; "Newman denies that he resisted the officers or failed to comply with any commands."; "on Newman's account, he committed no crime, posed no threat to anyone's safety, and did not resist the officers or fail to comply with a command.") If Garduno thought the manner in which Chris complied with Garduno's command to stop was in some manner threatening, Garduno should have issued further instructions, such as ordering Chris to get on the ground. Instead, Garduno took aim and shot Chris in the face; then tased him twice more. This was obviously unreasonable and excessive because Chris did not fail to comply with any command. *See id*.

As argued below, multiple lines of authority put the issue beyond doubt that officers may not use force against a misdemeanor suspect who has given himself up and is not resisting or threatening. *See, e.g.*, *Scott v. White,* 810 Fed. Appx. 297, 301-02 (5th Cir. 2020) (citing *Darden*, 880 F.3d at 729–32 (describing clearly established law as of May 2013 and stating that "a constitutional violation occurs when an officer tases, strikes, or violently slams an arrestee who is not actively resisting arrest"); *Hanks*, 853 F.3d at 747 (describing clearly established law as of February 2013 and stating that excessive force is established where an officer "abruptly resorts to overwhelming physical force rather than continuing verbal negotiations with an individual who poses no immediate threat or flight risk, [and] who engages in, at most, passive resistance"); *Trammell*, 868 F.3d at 343 (holding that "the law [as of January 2013] clearly established that it was objectively unreasonable for several officers to tackle an individual who was not fleeing, not violent, not aggressive, and only resisted by pulling his arm away from an officer's grasp") (citing *Goodson*, 202 F.3d at 740).

The District Court dismissed *Scott* on the basis that "although the [*Scott*] court listed cases establishing that an officer's use of force against a suspect not actively resisting arrest was clearly established, it did not indicate which facts it relied upon in denying qualified immunity, such that the Court could consider them here." (ROA.3713) The District Court's statement is puzzling. *Scott*, like *Pena*, did not

establish new law but merely applied clearly established law to the facts before it. It is unpublished and relatively brief precisely because the law is so clearly established. The parenthetical descriptions *Scott* provides of the holdings in *Darden*, *Hanks*, and *Trammell*, restated above, provide sufficient factual context to put beyond doubt that Garduno's gratuitous tasing of Chris after he surrendered violated clearly established law. The District Court's apparent insistence on precisely identical factual precedent is at odds with the Supreme Court's admonishment in *Hope* that there can be "notable factual distinctions between the precedents relied on . . . so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Hope*, 536 U.S. at 741. It also fails to acknowledge this Circuit's repeated statements that '[l]awfulness of force ... does not depend on the precise instrument used to apply it.' " *Timpa*, 2021 WL 5915553, at * 10 (quoting *Newman*, 703 F.3d at 763).

The District Court further attempted to distinguish *Hanks*[4] by stating that "Plaintiff was an obvious flight risk, and there is no indication that Defendant should have initiated verbal negotiations rather than resort to physical force at the moment

[4] *Hanks v. Rogers*, 853 F.3d 738, 748 (5th Cir. 2017) ("Where, as here, an individual stopped for a minor traffic offense offers, at most, passive resistance and presents no threat or flight risk, abrupt application of physical force rather than continued verbal negotiating (which may include threats of force) is clearly unreasonable and excessive."); *see also Trammell v. Fruge*, 868 F.3d 332, 342 (5th Cir. 2017) ("[W]e find that a reasonable jury could infer that the officers used very little, if any, negotiation before resorting to physical violence, and that the officers' conduct did not constitute the required "measured and ascending" actions calibrated to Trammel's conduct.").

he deployed his taser." (ROA.3713-3714) The court's reasoning fails to view the facts in the light most favorable to the Plaintiff, but instead makes unwarranted inferences for the defendant.

First, the District Court gives no reason for its conclusion that Chris was "an obvious flight risk." The court apparently inferred that Chris was attempting to evade Deputy Garduno and might attempt to do so again. Plaintiff's summary judgment evidence is contrary to both inferences. First, Chris lived in a nearby apartment complex with his grandmother. (ROA.1204) No doubt like many other park patrons, Chris became scared when the officers dangerously stormed into the crowded park with multiple vehicles. (ROA.1150, 1183-1184) Chris was nearing the apartment he shared with his grandmother when Garduno stopped him. Chris testified, "Well, I got scared, so I was trying to go back home. And the police, he just pulled up. And then I had raised my hand up and that day he tased me about three times." (ROA.1202) Additionally, Chris was wearing earphones, which could have prevented him from hearing someone behind him, and he was also wearing his pants in a low "sagging" manner which would have restricted his leg movements had Chris actually attempted to outrun police vehicles in pursuit. (ROA.1209, 1212, 1222, 1224-1225, 1237, ROA.1248) Chris testified that he heard only one command from Garduno to stop or "freeze," and that he stopped and raised his hands when he heard it. (ROA.1202-1205)

Although there is no doubt that Garduno *pursued* Chris, there is every reason to doubt that Chris *knew* he was being pursued. It is a reasonable inference from the summary judgment evidence that Chris did not know he was being pursued and did not attempt to evade Garduno, but instead was simply returning home to avoid the chaos created by the constables when they stormed into the crowded park.

Secondly, the fact that Chris obeyed Garduno's command to stop as soon as he became aware of it, and raised his hands, shows that Chris was both willing and able to comply with the Garduno's verbal commands without the need for force. Even after Garduno shot Chris in the face for no reason, Chris did not attempt to flee, although he could have done so because Chris suffered no electrical shock from the first taser strike. (ROA.1178-1180; *see also* ROA.1585-1586) Consequently, there is no factual basis for the District Court's conclusions that Chris was an obvious flight risk and that further verbal commands would have been fruitless. The District Court's reasoning allows force to be used against any suspect who evades arrest (or is thought to have) regardless of the changed circumstance that the suspect subsequently surrenders. Because Chris did not actively resist arrest, but instead complied with the command to stop, and did not attempt to flee after stopping, it is clearly established that Garduno's immediate resort to force after Chris stopped was unreasonable. *See Scott*, 810 Fed. Appx. at 301-02 *Hanks*, 853 F.3d at 747; *Trammel*, 868 F.3d at 343; *Goodson*, 202 F.3d at 740.

This Court's recent decision in *Timpa* further confirms that this Circuit's precedent, despite notable factual distinctions, provided ample notice to Garduno that his conduct was unconstitutional. In *Timpa*, the Court relied on *Bush v. Strain*, 513 F.3d 492, 501 (5th Cir. 2008), and *Cooper v. Brown*, 844 F.3d 517, 524–25 (5th Cir. 2016), in concluding that the law was clearly established that an officer may not continue to hold a suspect in a prone, asphyxiating position after the suspect has been subdued and restrained. 2021 WL 5915553, at *9-11. Nether *Strain* nor *Cooper*, however, involved the fact pattern of holding a suspect in a prone position. Rather, they put beyond doubt the *principle* that an officer may not continue to use force after a suspect is subdued, regardless of the instrument of forced used. The *Timpa* panel noted that in *Strain* the officer shoved the detainee's face into a vehicle window "who was not resisting arrest or attempting to flee." *Timpa*, 2021 WL 5915553, at *9 (quoting *Strain*, 513 F.3d at 502). Similarly, the Court recounted that *Cooper* relied on *Strain*, where an officer failed to stop *a police dog attack* after the suspect was subdued (but not yet handcuffed). *Id*.

Additionally, *Timpa* noted that *Darden* also relied on *Strain* and *Cooper* for clearly established law. *Id*. at *10. *Darden* held that "it [is] clearly established that violently slamming or striking a suspect who is not actively resisting arrest constitutes excessive use of force." 880 F.3d at 733. *Darden* did not establish new law, but merely further confirmed that, despite notable factual distinctions, the

principle established in *Strain* and *Cooper* is clearly established and therefore provides fair notice to all officers that an officer may not continue to apply force, regardless of the instrument used, after a suspect is subdued.[5] The *Timpa* panel further relied on *Newman*, stating, "We have reaffirmed again and again that this principle applies with obvious clarity to a variety of tools of force because the '[l]awfulness of force ... does not depend on the precise instrument used to apply it.'" *Id.* at * 10 (quoting *Newman*, 703 F.3d at 763). *Timpa* further cites *Newman* and a number of other cases, involving a variety of force instruments, including tasings, for the established principle that the law prohibits the use of force against a subdued subject. *Timpa*, 2021 WL 5915553, at *10 (citing, *inter alia*, *Ramirez v. Martinez*, 716 F.3d 369, 379 (5th Cir. 2013) (tasing a restrained, subdued subject in the prone position)[6]; *Newman*, 703 F.3d at 764 (striking and tasing an unrestrained, subdued subject).

Thus, the established-law analysis in *Timpa* relied on cases involving a variety of force scenarios, including a police dog and tasers, rather than fixating only on cases where the suspect was held in a prone position and suffered from physical asphyxia as a result. *Timpa* uses an analysis that is almost identical to *Amador*, which is a deadly force case. *Amador*, 961 F.3d at 730. In the current case, however, the

[5] Plaintiff in her response likewise relied on *Darden*. (ROA.1126, 1128, 1134, 1136)
[6] Plaintiff also cited *Ramirez*. (ROA.1138)

District Court quickly disregarded authority that did not involve tasers or that involved deadly force. Consequently, the District Court ignored multiple lines of authority which provide abundant notice that using force against a compliant suspect who has surrendered is unreasonable. This includes authority disallowing force in cases involving only passive resistance, or where circumstances change and the need for force evaporates, or where officers immediately resort to force without employing measured and ascending means, all of which put beyond question that Garduno's gratuitous tasings of Chris after he surrendered were unreasonable.

Moreover, the Court's precedent applies to the current dispute with obvious clarity, making a close factual precedent unnecessary. *See Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (citing *Hope*, 536 U.S. at 741) It is obvious that it is unreasonable and grossly excessive for an officer to tase a suspect in the back who has obeyed an officer's command to stop; raised his hands to surrender; has no weapon; is not aggressive; and who is suspected only of a ticketable offense; and then to tase him again when he is on the ground surrounded by four officers.

The District Court also disregarded cases Plaintiff cited for the established proposition that an officer may not shoot a suspect merely because the officer believes the suspect has a weapon. (ROA.3712)[7] This was incorrect not only because

[7] Plaintiff cited *Cole v. Carson*, 935 F.3d 444, 447-449, 452-57 (5th Cir. 2019), *as revised* (Aug. 21, 2019), *cert. denied sub nom. Hunter v. Cole*, 141 S. Ct. 111 (2020); *Reyes v. Bridgwater*, 362

the lawfulness of force does not depend on the precise instrument used to apply it, but also because a jury could conclude that this case *does* involve deadly force. Although a taser is commonly referred to as a "less lethal" weapon (at least when implicitly compared to a firearm), tasers may cause very serious injury, including deaths, when misused. That was the case here where Garduno chose to tase Chris in a paved parking lot with no means of protecting his head. Because Chris's muscles were immobilized from the second taser shock, he was unable to protect himself when he fell. Predictably, Chris fell backwards after being tased in the back and struck his head directly against the pavement with great force. Witnesses recounted the gruesome sound of Chris's head smacking the pavement like a dumbbell. For Chris, this caused massive, traumatic brain injuries that have left him permanently disabled. And it could have just as easily killed him.

Timpa also addresses the issue of deadly force. A lean, healthy young person might be held in a prone position for a considerable time without deadly consequence. But this was not the case with Timpa, who had at least three obvious risk factors, and who died while held prone. The *Timpa* panel noted that whether a particular use of force is deadly force is a question of fact for a jury. 2021 WL

F. App'x 403, 407 (5th Cir. 2010); *Bacque v. Leger*, 207 F. App'x 374, 376 (5th Cir. 2006); and *Baker v. Putnal*, 75 F.3d 190, 193 (5th Cir. 1996).

5915553, at *7. Thus, the court determined that a jury could find the use of force in that case constituted deadly force. *Id.* at *8.

The same is true here. As discussed by Plaintiff's expert, the danger of serious injuries or death resulting from using a taser as Garduno did is well known and contrary to standard police practice. (ROA.1254-1255, 1259-1261) A jury could find that Garduno's use of a taser in this circumstance "carr[ied] with it a substantial risk of causing death or serious bodily harm." *Timpa*, 2021 WL 5915553, at *7 (quoting *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998) (in turn quoting *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988)). Thus, as did the plaintiff in *Timpa*, Plaintiff here has raised a genuine issue of material fact as to whether Garduno's use of a taser where Chris could fall and strike his head against a paved surface constitutes deadly force. *See id.* at *8. Accordingly, for this additional reason the district court erred in excluding from its analysis of clearly established law abundant authority prohibiting the potentially deadly force Garduno employed.

Finally, the District Court erred in failing to examine each of the three tasings individually. Even if one accepts the District Court's distinctions for the first or second tasings, they clearly do not apply to the third tasing where Chris was subdued on the pavement, surrounded by four officers, with no means of evading arrest. Chris laid helpless on the asphalt, at first stunned and likely unconscious, then writhing in pain and calling for his grandmother. Even if Chris had not been surrounded by four

officers, he was physically incapable of fleeing. Nonetheless, Garduno cycled his taser again, sending another burst of shocking voltage through Chris's body. By any measure, Chris was fully subdued while he was lying on the asphalt. He was surrounded by four officers and had no means of evading custody. As repeated in *Timpa*, clearly established law prevents officers from using force against a subdued suspect. *Timpa*, 2021 WL 5915553, at *7; *see also Joseph*, 981 F.3d at 335 ("Notably, 'subdued' does not mean 'handcuffed.' If the suspect lacks any means of evading custody—for example, by being pinned to the ground by multiple police officers—force is not justified.") For this additional reason, Garduno is not protected by qualified immunity.

Because Garduno's constitutional violations were clearly established by multiple lines of authority at the time of the tastings, and obvious, the District Court plainly erred in concluding that Garduno was entitled to summary judgment on his qualified immunity defense.

ISSUE 2: The District Court erred in dismissing Plaintiff's *Monell* claim against Harris County with prejudice on grounds raised *sua sponte* by the Court 14 months after Harris County filed its motion to dismiss because the Court employed an unfair procedure when it dismissed the claim without first providing Plaintiff with notice of the grounds raised by the Court *sua sponte*

and an opportunity to respond and amend to conform Plaintiff's pleading to the summary judgment evidence already before the Court.

A. Legal Standards.

1. *Sua sponte* dismissals.

A district court may dismiss *sua sponte* a complaint for failure to state a claim only if "the procedure employed is fair." *Davoodi v. Austin Indep. Sch. Dist.*, 755 F.3d 307, 310 (5th Cir. 2014). "[F]airness in this context requires both notice of the court's intention and an opportunity to respond" before dismissing *sua sponte* with prejudice. *Carver v. Atwood*, _ F.4th _, No. 21-40113, 2021 WL 5368678, at *3 (Nov. 18, 2021) (quoting *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006)); *accord* Fed. R. Civ. P. 56(f) (providing that district court may grant summary judgment on grounds not raised by a movant only "[a]fter giving notice and a reasonable time to respond"). This Circuit has repeatedly held that a district court's *sua sponte* dismissal of claims without providing a party notice of its intent to dismiss and an opportunity to respond is reversible error. *See, e.g. Carver*, 2021 WL 5368678, at *2–3; *Miller v. Sam Houston State University*, 986 F.3d 880, 888-90 (5th Cir. 2021); *Century Sur. Co. v. Blevins*, 799 F.3d 366, 372–73 (5th Cir. 2015); *Davoodi*, 755 F.3d at 310; *Gaffney v. State Farm Fire & Cas. Co.*, 294 F. App'x 975, 977 (5th Cir. 2008) (per curiam).

Moreover, although Plaintiff did file a motion seeking post-judgment relief, the dismissed party is not required to file a post-judgment motion to preserve the issue for appeal. *Miller*, 986 F.3d at 890; *Davoodi*, 755 F.3d at 309, 311. It is not a "fair procedure" for a district court to force a party to resort to a motion after dismissal as a proxy for arguments that might have been made before dismissal. *See Miller*, 986 F.3d at 890 (citing, *inter alia*, *Carroll*, 470 F.3d at 1177).

2. Standard of Review.

This Court reviews *de novo* a district court's *sua sponte* decision to dismiss. *Miller v. Sam Houston State University*, 986 F.3d 880, 888 (5th Cir. 2021).

B. The District Court employed an unfair procedure in dismissing Plaintiff's *Monell* claim against Harris County.

Although the District Court purported to grant Harris County's motion to dismiss, the court in fact raised grounds for dismissal which Harris County did not. (ROA.2511-2513) As the court recounted in its order, Harris County's motion to dismiss was based primarily on the arguments that a constable cannot be a policymaker for a county as a matter of law and that Plaintiff had not sufficiently alleged causation. (ROA.2509) But the Court did not address these arguments. (ROA.2509-2513) Instead it determined that Plaintiff's allegations that Harris County and Trevino failed to develop policies were conclusory (ROA.2511), and that Plaintiff's allegations of the County's deliberate indifference were too vague.

(ROA.2512-2513) Nowhere in its motion did Harris County identify any allegations as "conclusory" or "vague." (ROA.321-334) Accordingly, the Court's determination that Plaintiff's *Monell* allegations were conclusory and vague are grounds raised *sua sponte* without providing Plaintiff an opportunity to respond prior to dismissal.

Plaintiff was truly blindsided by the District Court's decision to dismiss Harris County as a defendant on grounds raised by the court *sua sponte*, 14 months after Harris County filed its motion to dismiss. The District Court had permitted extensive discovery to proceed to conclusion (aside from Plaintiff's pending motion to compel), and had required summary judgment motions to be filed and briefed. Plaintiff's counsel did not believe that responding to Harris County's summary judgment motion was a speculative exercise but reasonably believed the court would address Plaintiff's claims on the merits. Neither Defendant asserted any relevant objection that Plaintiff's summary judgment evidence was outside the scope of the pleadings. Consequently, Plaintiff's counsel had no reason to believe that it was necessary for Plaintiff to amend before the court addressed the merits. The District Court's procedure arbitrarily and unfairly mooted months of work preparing the case for trial and instead dismissed Plaintiff's *Monell* claim based on what are at most curable form issues.

The District Court should not have rendered judgment for Harris County on grounds raised by the court *sua sponte* without first providing Plaintiff with the

opportunity to respond and amend. *See Carver*, 2021 WL 5368678, at *2–3; *Miller*, 986 F.3d at 888-90; *Century Sur. Co*, 799 F.3d at 372–73; *Davoodi*, 755 F.3d at 310; *Gaffney*, 294 F. App'x at 977. This is particularly so when the alleged deficiencies were readily curable by reference to Plaintiff's summary judgment filings already before the Court. (*See* ROA.2558-2561) When there exists the possibility of a plaintiff amending to cure the deficiencies, the district court errs in failing to provide the plaintiff with the opportunity to do so. *See Carver*, 2021 WL 5368678, at *2-3.

In Plaintiff's Rule 59(e) motion, Plaintiff detailed the evidence in her summary judgment response which Plaintiff maintained would have mooted the conclusory and vagueness deficiencies the District Court believed existed. (ROA. 2558-2561, 2575-3730; *see also* ROA.1297-2446) Nonetheless, Plaintiff was not required to file a rule 59(e) motion. *Miller*, 986 F.3d at 890; *Davoodi*, 755 F.3d at 309, 311. Plaintiff was entitled to an opportunity to respond prior to dismissal, not afterwards. *Miller*, 986 F.3d at 890. Accordingly, it is not necessary for Plaintiff to establish in this appeal that she necessarily would have prevailed had the District Court provided notice and an opportunity to be heard prior to dismissal. *See, e.g.*, *Carver*, 2021 WL 5368678, at *2-3; *Gaffney v. State Farm Fire & Cas. Co.*, 294 F. App'x 975, 977 (5th Cir. 2008) (per curiam). For example, in *Carver* not only did the appellant not offer any theory upon which she intended to pursue the dismissed claim, the appellate panel speculated about options she could "perhaps" pursue with

future amendments. 2021 WL 5368678, at *2 ("[p]erhaps she could have amended her complaint"; and "perhaps [she] could have avoided [the defendant's] sovereign immunity [defense] by adding a new defendant or a new claim."). Although Plaintiff believes she has valid theories for pursuing her *Monell* claim, addressing Plaintiff's arguments for the first time on appeal would effectively eviscerate the rule in *Davoodi* and like cases by allowing district courts to employ unfair procedures that run roughshod over due process, and would improperly shift the duties of the district court to the court of appeals to consider in the first instance arguments which should first be considered by the district court. It is the unfair procedure employed by the District Court which injured Plaintiff and requires reversal. *See Carver*, 2021 WL 5368678, at *2–3; *Miller*, 986 F.3d at 888-90; *Century Sur. Co*, 799 F.3d at 372–73; *Davoodi*, 755 F.3d at 310; *Gaffney*, 294 F. App'x at 977.

Nonetheless, Plaintiff's complaint, if conformed to include Plaintiff's summary judgment evidence as summarized *supra* at pages 15-20, is more than sufficient to state a plausible *Monell* claim. The District Court did not state otherwise in denying Plaintiff's Rule 59(e) motion. Rather, it held that Plaintiff had unduly delayed in requesting leave to amend and stated this was "procedurally fatal." (ROA.3691) This is not a fair criticism, first because Plaintiff was never on notice that the Court deemed Plaintiff's allegations to be conclusory and unduly vague. And second, because an amendment conforming Plaintiff's complaint to the

summary judgment evidence would cause no delay in deciding the case on the merits, nor would it cause any prejudice to Harris County. Furthermore, Plaintiff never maintained that she had pleaded her "best case," nor did she elect to stand on its pleading in the face of any deficiency identified by the court. To the contrary, in Plaintiff's response to Harris County's motion to dismiss, Plaintiff contemplated amending in the event the Court deemed Plaintiff's complaint to be deficient. Because at the time the County filed its motion to dismiss, limitations would not expire for several months, Plaintiff requested that any dismissal of the County be without prejudice so that Plaintiff could add Harris County as a party at a later date after Plaintiff obtained discovery on her claims against Garduno. (ROA.353-354) Plaintiff believed this to be a reasonable, and frankly innocuous, request given that a dismissal would remain interlocutory and subject to reconsideration absent a Rule 54(b) order rendering it final and subject to appeal. Additionally, Plaintiff consistently maintained that she needed requested discovery withheld by the County to plead Plaintiff's "best case." (ROA.1300, 2568)

Plaintiff's prior amendments were made before any significant discovery. The first was made as a matter of right at the outset of the case. (ROA.70) The second made no substantive allegations to the complaint but was done merely to change Plaintiff's capacity to include guardian of Chris Henderson's person and estate. (ROA.250) Because Chris Henderson's condition required it, the court abated the

case for Plaintiff to obtain a guardianship order and to amend accordingly. (ROA. 174-235, 246)

The Court also criticized Plaintiff for not attaching a proposed amendment to her Rule 59(e) motion. (ROA.3690) Again, this criticism is unfair because Plaintiff was not required to file *any* Rule 59(e) motion, and Plaintiff detailed the additional facts in her motion. Moreover, this Court has never required a plaintiff to file a proposed amended complaint before obtaining relief from a *sua sponte* dismissal. *See Carver*, 2021 WL 5368678, at *2–3; *Miller*, 986 F.3d at 888-90; *Century Sur. Co*, 799 F.3d at 372–73; *Davoodi*, 755 F.3d at 310; *Gaffney*, 294 F. App'x at 977.

Prior the Court's order, Plaintiff was not on notice that the Court considered Plaintiff's allegations to be conclusory or vague. The opportunity for a plaintiff to replead to state its best case, if it is to have meaning, must be provided in response to a *court ruling* which puts the plaintiff on notice of what the court deems to be the legal deficiency in the plaintiff's pleading. *Accord Gaffney*, 294 F. App'x at 977 ("[P]laintiffs were not given an opportunity to amend their complaint to cure any deficiencies *that the district court thought* warranted dismissal.") (emphasis added). Any suggestion that Plaintiff should be limited to the single revision of their pleading made as a matter of course at the outset of the case makes a mockery of the federal policy of liberal amendment arising from the admonishment in Rule 15(a)(2) that "*the court* should freely grant leave [to amend] when justice so requires." (emphasis

added). Because Plaintiff can plead specific facts in support of her *Monell* allegations, as set forth in her summary judgment response and summarized in her Rule 59(e) motion, the Court should have allowed Plaintiff the opportunity to replead to address the perceived deficiency prior to dismissing the *Monell* claim with prejudice.

ISSUE 3: The District Court erred in dismissing Harris County because Plaintiff's live pleading alleged a plausible *Monell* claim.

A. Legal Standards.

1. *Monell*[8] liability pursuant 42 U.S.C. § 1983.

To establish municipal liability under § 1983, a plaintiff must show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right. *E.g.*, *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). An official policy can derive from "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." *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc).

A plaintiff must also show that the policy or custom in question "results from the decision *or acquiescence* of the municipal officer or body with 'final

[8] *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978).

policymaking authority' over the subject matter of the offending policy." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (emphasis added). The policy must have been the moving force behind the constitutional violation, which simply means that "there must be a direct causal link" between the policy and the violation. *Piotrowski*, 237 F.3d at 580.

2. Policymaking authority generally.

"A city's governing body may delegate policymaking authority (1) by express statement or formal action or (2) it may, by its conduct or practice, encourage or acknowledge the agent in a policymaking role." *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 167 (5th Cir. 2010). " '[T]he specific identity of the policymaker is a legal question that need not be pled' in the complaint to survive a motion to dismiss." *Balle v. Nueces County, Texas*, 690 Fed. App'x. 847, 852 (5th Cir. 2017).

3. Policymaking authority of Texas constables.

Texas courts have found that Harris County constables have policymaking authority for the county under certain circumstances. *See Walsweer v. Harris Cnty*, 796 S.W.2d 269, 273 (Tex. App.—Eastland 1990, writ denied), *cert. denied*, 502 U.S. 866 (1991); *see also Harris Cnty. v. Nagel*, 349 S.W.3d 769, 793 (Tex. App.—Houston [14th Dist.] 2011, pet. denied), *cert. denied*, 571 U.S. 823 (2013). This issue recently divided the en banc 14th Court of Appeals evenly. Dissenting from denial of en banc reconsideration on a tied vote, Justice Poissant wrote, "The panel's

[majority] conclusion [that the evidence in that case did not show that a constable was a policymaker] is contrary to the law, the evidence presented at trial, and the jury finding in this case. Based on the evidence presented in this case, the jury could have reasonably found implied delegation by Harris County of policymaking authority on law enforcement matters to Constable Hickman." Justice Bourliot in separate dissent was more succinct: "The majority [panel] opinion neuters the protections set forth in *Monell*." *Harris County v. Coats*, 607 S.W.3d 359, 394, 398-99 (Tex. App.—Houston [14th Dist.] 2020) (Poissant, J., and Bourliot, J., dissenting from denial of en banc reconsideration) (citing, *inter alia*, *Harris Cnty. v. Nagel*, 349 S.W.3d 769).

4. Ratification of conduct as evidence of policy.

"[T]he disposition of the policymaker may be inferred from his conduct after the events" which constitute the wrongdoing of the governmental unit's employees. *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985). When the policymaker responds to wrongdoing by failing to punish those responsible and refusing to make changes to address the wrongdoing, a jury is entitled to conclude that the officers' conduct "was accepted as the way things are done" by the governmental entity; otherwise it would have responded differently. *See id*. at 171; *see also Duvall v. Dallas County*, 631 F.3d 203, 208-09 (5th Cir. 2011) When police officers know at the time of their wrongdoing that disregard for the rights and safety

of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force requirement for *Monell* liability is satisfied. *Grandstaff*, 767 F.2d F.3d at 170; *see also Sanchez v. Young Cty., Texas*, 956 F.3d 785, 793 (5th Cir.), cert. denied, 141 S. Ct. 901 (2020) (explaining that *Grandstaff* held that "because the city policymaker failed to change policies or to discipline or reprimand officials, the jury was entitled to conclude that the complained-of practices were 'accepted as the way things are done and have been done in' that city").

5. Failure to adopt policies.

A failure to adopt a policy can be deliberately indifferent when it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights. *See City of Canton v. Harris*, 489 U.S. 378, 390 (1989); *see also Connick v. Thompson*, 563 U.S. 51, 61-64 (2011); *Doe v. Dallas I.S.D.*, 153 F.3d 211, 217 (5th Cir. 1998). Thus, even when the plaintiff cannot identify a pattern of past constitutional violations similar to the complained-of violation, liability may nonetheless be demonstrated when the prospect of constitutional violations was "highly predictable" or "patently obvious." *See, e.g., Kitchen v. Dallas Cnty.*, 759 F.3d 468, 485 (5th Cir. 2014). A local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983. *Hicks-Fields v. Harris*

Cnty., 860 F.3d 803, 811 (5th Cir.), *cert. denied sub nom. Hicks-Fields v. Harris Cnty.*, 138 S. Ct. 510 (2017) (citing *Connick*, 563 U.S. at 61).

6. Standard of Review.

Review is *de novo*, accepting well-pleaded facts as true and viewing them in the light most favorable to the plaintiff. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007).

B. Plaintiff's live pleading alleges a plausible *Monell* claim based on single incident liability.

Although in 1989 the Supreme Court in *Canton* may not have foreseen the widespread use of "stun guns" in law enforcement, the Court's footnote 10 nonetheless foreshadowed this case. Harris County armed its deputy constables with tasers and unleashed them on the public without any policies or guidelines controlling their use. Although tasers do not ordinarily inflict the same lethal consequence as firearms, they are nonetheless potent weapons that can inflict substantial and potentially life-threatening injuries, as evidenced by Chris Henderson's injuries in this case. *See Yates v. Terry*, 817 F.3d 877, 886 (4th Cir. 2016) ("[D]eploying a taser is a serious use of force," that is designed to "inflict[] a painful and frightening blow."). This Circuit has repeatedly held that "a taser is a force that, deployed when not warranted, can result in a constitutional deprivation." *Samples v. Vadzemnieks*, 900 F.3d 655, 661 (5th Cir. 2018) (citing *Newman*, 703

F.3d at 763.

Deputy constables are law enforcement officers similar to sheriff's deputies. Consequently, it is highly predictable that deputy constables will encounter suspects who may initially resist questioning or arrest, and will therefore need to determine whether to pursue the individual and the appropriate level of force, if any, to utilize in apprehending him. Thus, Harris County policymakers know to a moral certainty that their deputy constables will be required to detain and arrest suspects, and will use the weapons that Harris County provides. Consequently, the need to train such officers in the constitutional limitations on the use of taser weapons and to have policies in place which limit their use to those circumstances where such force is proper, is "so obvious" that the failure to do so can properly be characterized as "deliberate indifference" to the constitutional rights of citizens that deputy constables will encounter during the course of their law enforcement duties. The present case fits *Canton's* hypothetical in footnote 10 even more closely than does *Littell*. *See Littell*, 894 F.3d at 625 (noting that the plaintiff's allegations mirror *Canton's* hypothetical in footnote 10 in all material respects).

Plaintiff alleged in detail the factual basis for why she asserts that Harris County has failed to adopt policies to regulate the proper use of taser weapons by its deputy constables. Plaintiff's counsel made repeated written requests to Constable Trevino to produce any such written policies that exist. Constable Trevino had a duty

to comply with the Texas Public Information Act and produce any such documents without delay. *See* Tex. Gov't. Code §§ 552.001(a), 552.021, 552.221(a). She nonetheless provided no documents, nor did she claim to have such documents but assert that they were exempt from disclosure. *See* Tex. Gov't. Code § 552.301-.302. Accordingly, it is a reasonable inference that no such documents exist, and therefore no such policies exist. This is the same inference that the Federal Rules of Evidence allow to permit hearsay testimony concerning the absence of a public record. If no public record can be found after a diligent search, this is evidence that no such records exist and the matter at issue did not occur. *See* Fed. R. Evid. 803(10). Accordingly, it cannot properly be maintained that Plaintiff failed to state the factual basis for her claim in her amended complaint. Plaintiff's amended complaint could not be clearer in setting forth the factual basis for Plaintiff's assertion that Harris County has failed to adopt written policies and/or procedures to protect the public from unconstitutional use of taser weapons by deputy constables.

In its order of dismissal, the District Court further stated that "the Complaint contains no 'specific facts' as to whether Trevino or Harris County had a 'custom or practice' of not creating or implementing policies governing Precinct 6 deputies" (ROA.2511 [Order at 4]) But this is not the pleading standard. Rather, this statement conflates two separate issues: (1) a pattern of conduct providing policymakers with notice of a custom or practice, and (2) the failure to have a policy. The failure to

have a policy, by itself, is sufficient to state a *Monell* claim when the failure is a moving force in causing constitutional violations. *City of Canton,* 489 U.S. at 390 & n. 10 (1989); *Doe,* 153 F.3d at 217. There is no authority requiring the plaintiff to plead or prove the existence of *a custom or practice* of not creating or implementing policies.

In addressing Plaintiff's failure to train claim, the District Court stated that Garduno received training and states that the facts supporting Plaintiff's single-incident are unduly vague. (ROA.2512-2513 [Order at 5-6]) The Court, however, fails to distinguish between two very different types of training: training in the mechanics of using a taser weapon; and training in the constitutional limitations of the use of force with a taser weapon. Garduno was trained in the former, but not the latter, and it is the latter that caused Chris Henderson's injuries. Moreover, it is the type of injury that is highly predictable. It is one thing to know how to use a weapon; it is quite another to know *when* to use it. Placing officers on the street without any training as to when they may constitutionally use a taser to immobilize a suspect is unconscionable, and it is highly predictable that without such training that deputy constables will misuse the weapon in an unconstitutional manner.

This is precisely the situation the Supreme Court warned of in *Canton*:

> [C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. *Thus, the need to train officers in the constitutional limitations on the use of*

> *deadly force, see Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L.Ed.2d 1 (1985), *can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights*.

Id. at 390 n. 10 (emphasis added). Thus, the Supreme Court recognized that a plaintiff need not necessarily establish a pattern of unconstitutional activities for municipal policymakers to be on notice that municipal agents are likely to commit constitutional violations. Such "single-incident liability" arises in those circumstances where a constitutional violation would result as "the highly predictable consequence" of the governmental body's inaction. *See id*; *see also Connick v. Thompson*, 563 U.S. 51, 61-64 (2011). A local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983. *Hicks-Fields*, 860 F.3d at 811 (citing *Connick*, 563 U.S. at 61).

This case is as close to the Supreme Court's example in *Canton* as anyone could fear encountering thirty years later. *See Canton*, 489 U.S. at 390 n. 10 ("The city has armed its officers with firearms . . . .Thus, the need to train officers in the constitutional limitations on the use of deadly force . . . can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights."). Although tasers do not *necessarily* involve deadly force, the need for training to use the weapon consistent with constitutional use-of-force requirements is equally obvious. It is perfectly predictable that an officer who has

not been trained in the constitutional use of force would use the weapon inappropriately. This should have been obvious even to Trevino when one part-time deputy is responsible for the lion's share of tasings in a department of 80 patrol officers. This occurrence cries out for further training and close supervision. Yet Garduno had neither. It is therefore obvious and predictable that Garduno continues to shoot citizens with his taser, including two deployments in the backs of suspects, as well as the unnecessary and unreasonable tasing of Chris Henderson. (ROA.2418-2425 [Plaintiff's Ex. L (Garduno Use of Force File)])

It is no response that Garduno may have met the minimum TCOLE requirements for retaining a peace officer license. This does not preclude a failure to train claim. That is like saying that an attorney malpractice claim should be barred merely because an attorney has met minimum CLE requirements. Although necessary for a license, these requirements do not prevent its misuse. Notwithstanding minimum training in the mechanics of firing weapons, the Precinct 6 standards, adopted by or acquiesced in by Harris County, are subjective standards inconsistent with the Constitution. *See Graham,* 490 U.S. at 388. It is therefore highly predictable that deputies will follow those and that constitutional violations will occur as a result of the policy. Accordingly, under Plaintiff's version of the facts regarding the County's failure to train its officers on the proper standard for use of force, a finding of liability is justified under the single-incident exception. *See, e.g.,*

Hobart v. City of Stafford, 784 F.Supp.2d 732, 754 (S.D. Tex. 2011) ("even where officers have met state training requirements, the Fifth Circuit permits plaintiffs to prove deliberate indifference from failure to train"); *Davis v. Montgomery Cnty.*, No. H:07-505, 2009 WL 1226904, at *7-8 (S.D. Tex. Apr. 30, 2009) (denying summary judgment on failure to train claim notwithstanding that deputies received minimum TCLEOSE [now TCOLE] training).

CONCLUSION

Appellant prays that the Court reverse the order granting summary judgment for Defendant Garduno and order granting the motion to dismiss of Harris County, and remand for further proceedings. Appellant further prays for such other relief to which she may be justly entitled.

Respectfully submitted,

/s/ Bruce K. Thomas
Bruce K. Thomas
State Bar No. 19844300
Law Office of Bruce K. Thomas
12900 Preston Rd., Suite 590
Dallas, Texas 75230
Phone/Fax: 214/296-9650
bthomas@bthomaslaw.com

T. Dean Malone
Texas State Bar No. 24003265
dean@deanmalone.com
Law Offices of Dean Malone, P.C.
900 Jackson Street
Suite 730
Dallas, Texas 75202
Telephone: (214) 670-9989
Telefax: (214) 670-9904

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I certify that on January 6, 2022, the foregoing document was served, via the Court's CM/ECF Document Filing System, upon the following registered CM/ECF users:

Suzanne Bradley
Attorney for Appellee Arthur Simon Garduno

Laura Beckman Hedge
Attorney for Appellee Harris County, Texas

/s/Bruce K. Thomas
Bruce K Thomas

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 5th CIR. R. 32.1: this document contains 13000 words.

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/s/Bruce K. Thomas
Bruce K. Thomas