

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ELI WINKELMAN,
Plaintiff,

v.

AUSTIN POLICE DEPARTMENT, THE
CITY OF AUSTIN, TEXAS, OFFICER
RYAN HERRING, individually, et. al.,
Defendants.

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CIVIL ACTION NO. 1:22-cv-875

PLAINTIFF’S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Eli Winkelman (“Winkelman”) files this Original Complaint against Defendants Austin Police Department (hereinafter “APD”), the Austin Police Department and City of Austin, Texas (hereinafter “Austin,”), Officer Ryan Herring, individually, Officer Irvin Williams, individually, Officer Matthew Carvalho, individually, Officer Brandon Reinarz, individually, Officer Fausto Rodriguez, individually, Officer Trinithad Garcia, individually, Officer Thomas Tuminelli, individually, Officer Quint Sebek, individually, Officer Ryan Tedford, individually, Officer Rolan Rast, individually, Officer Zachary Vandervalk, individually, Officer Andrew McRae, individually, Officer Ortho Duboise, individually, Officer John Ridenour, individually, Officer Julian Ogle, individually, Officer Michael McMorrow, individually, Officer Stephen Yurco, individually, Officer Daniel McLeish, individually, Officer Eric Scott, individually, Officer Christopher Renzi, individually, Officer Jared Jordan, individually, Officer Jason Yoon, individually, Officer Joseph Spees, individually, Officer Edward Jaramillo, individually, Officer Chaz McGinnis, individually, Officer Alejandro Lopez, individually, Officer Corey Hale, individually, Officer Paul Basaulto, individually, Officer Jamie Bryans, individually, Officer

Justin Lockhart, individually, Officer Brent Pardinek, individually, Officer Ryan Mihalik, individually, and Officer Richard Smith, individually (collectively, the “Officer Defendants”), for the excessive force they inflicted on her as she was exercising her free speech and assembly rights and demonstrating against police violence.

I. PARTIES

1. Plaintiff Eli Winkelman is an individual who resides in Texas and during all times relevant to the allegations of this complaint was a citizen of the United States.
2. Defendant Austin Police Department is a unit of local government in the State of Texas. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.
3. Defendant City of Austin, Texas is a unit of local government in the State of Texas. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.
4. The Officer Defendants comprise the male APD officers whom the City of Austin has identified as being present at the August 29, 2020 protest. Plaintiff has undertaken a good-faith effort to identify the two specific officers who used excessive force against her but the City of Austin and APD have been unable or unwilling to narrow the field beyond these officers; Plaintiff has therefore named all of them as defendants (the Officer Defendants) at this time.
5. Defendant Officer Ryan Herring is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020

protest. At all times relevant to this action, Defendant Officer Ryan Herring was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

6. Defendant Officer Irvin Williams is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

7. Defendant Officer Matthew Carvalho is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

8. Defendant Officer Brandon Reinartz is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity

to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

9. Defendant Officer Fausto Rodriguez is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

10. Defendant Officer Trinithad Garcia is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

11. Defendant Officer Thomas Tuminelli is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept

service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

12. Defendant Officer Quint Sebek is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

13. Defendant Officer Ryan Tedford is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

14. Defendant Officer Rolan Rast is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

15. Defendant Officer Zachary Vandervalk is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

16. Defendant Officer Andrew McRae is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

17. Defendant Officer Ortho Duboise is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

18. Defendant Officer John Ridenour is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020

protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

19. Defendant Officer Julian Ogle is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

20. Defendant Officer Michael McMorrow is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

21. Defendant Officer Stephen Yurco is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity

to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

22. Defendant Officer Daniel McLeish is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

23. Defendant Officer Eric Scott is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

24. Defendant Officer Christopher Renzi is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept

service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

25. Defendant Officer Jared Jordan is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

26. Defendant Officer Jason Yoon is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

27. Defendant Officer Joseph Spees is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

28. Defendant Officer Edward Jaramillo is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

29. Defendant Officer Chaz McGinnis is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

30. Defendant Officer Alejandro Lopez is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

31. Defendant Officer Corey Hale is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At

all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

32. Defendant Officer Paul Basulto is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

33. Defendant Officer Jamie Bryans is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

34. Defendant Officer Justin Lockhart is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity

to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

35. Defendant Officer Brent Pardinek is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

36. Defendant Officer Ryan Mihalik is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

37. Defendant Officer Richard Smith is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept

service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

II. JURISDICTION

38. This action is brought pursuant to 42 U.S.C. §§ 1983, 1988 and the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

39. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1343(a)(3), (4) relating to actions arising under 42 U.S.C. § 1983 and by 28 U.S.C. § 1331 (federal question).

III. VENUE

40. Venue is proper in the United States District Court for the Western District of Texas, Austin Division, pursuant to 28 U.S.C. § 1391. Plaintiff's claims arose in whole or in part in the Western District of Texas.

IV. FACTUAL ALLEGATIONS

41. Plaintiff Winkelman attended a protest rally and march that started at the Seaholm Retail District on August 29, 2020. The rally was meant to commemorate the life of George Floyd, Michael Ramos, and other people who were killed in police shootings.

42. The purpose of the protest was to end police brutality and the use of violence and excessive force.

43. The march began at about 7 PM. Around 50 people attended.

44. Protestors have a First Amendment right to free expression and peaceful assembly.

45. Disproportionate use of force by police officers can turn an otherwise peaceful protest violent.

46. This was a peaceful protest.

47. Protestors, including Plaintiff Winkelman, were within their rights to free expression and peaceful assembly.

48. Plaintiff Winkelman attended this event to express her view that police brutality is wrong, and has no place in Austin, Texas and to document the event by filming it with her phone.

49. Around 8:15 PM, when the marchers were walking in the street near the corner of Congress Avenue and Cesar Chavez Street, APD officers aggressively approached the marchers and demanded that they move from the street to the sidewalks nearby.

50. Marchers attempted to comply with orders, but APD officers began pepper spraying and violently arresting them immediately after demanding they move.

51. The Austin Police department has repeatedly used physical force, chemical irritants such as tear gas and pepper spray, and kinetic impact projectiles as a first resort tactic against peaceful protestors rather than as a response to any sort of actual threat or violence.

52. Here, there was no threat of violence from the protestors. The Austin Police Department caused the violence.

53. Instead of de-escalating the situation, APD officers created a potentially dangerous situation by immediately resorting to physical force against peaceful protestors.

54. Plaintiff Winkelman was filming the officers when they resorted to physical force.

55. Winkelman was filming the officers because she was concerned about the safety of her friends and fellow protestors and wished to document the protest and the officers' actions.

56. Plaintiff Winkelman saw a member of her protest group being arrested and pepper sprayed by APD officers. She walked toward the police officer who was arresting her friend so that she could videotape the incident.

57. Within seconds, one of the Officer Defendants ("Officer Defendant 1") purposely struck Plaintiff Winkelman's phone with which she was filming out of her hand.

58. As Plaintiff Winkelman bent down to find the phone, she also began asking for the police officer's badge number.

59. Officer Defendant 1 ignored her request, took a few steps away from her, then turned back around and forcefully pushed Plaintiff Winkelman.

60. This use of force was excessive and unnecessary.

61. Winkelman was acting within her rights to merely film the officers' violent actions.

62. In the next moment, another of the Officer Defendants ("Officer Defendant 2") grabbed Plaintiff by the neck and violently slammed her to the ground, causing severe pain and trauma.

63. This use of force was also excessive and unnecessary.

64. This use of force appears calculated only to cause harm to Winkelman, since she was already on the sidewalk at the time the encounter with this officer began.

65. There is no discernable reason to slam an unarmed young woman who poses no threat to officer or public safety into the pavement, other than to harm her.

66. The two Officer Defendants were not attempting to effectuate an arrest of Winkelman at the time, and she was not resisting or disobeying any directive or command at the time.

67. The two Officer Defendants simply used force against Winkelman for the sole purpose of using force against her.

68. Winkelman is a young woman who is approximately five feet four inches tall and 130 pounds.

69. The two Officer Defendants who used force against her are significantly larger than Winkelman.

70. Winkelman posed no discernable threat to any of the officers at any time, especially when considering the significant and obvious discrepancy in size between her and the officers.

71. At no point in time was any force warranted against Winkelman.

72. Winkelman believes the fact that she happened to be wearing her bike helmet at the time saved her from serious head injuries, as her head hit the pavement so hard in this incident that she suffered post-concussive syndrome from it even with the helmet.

73. Plaintiff Winkelman was then lifted up by members of her protest group and taken to safety, but she could not find her phone.

74. She then returned to the area where she was slammed to the ground and saw her cell phone and bike light on the ground behind APD officers. She asked the police officers to return her belongings, but they never gave the items back.

75. Retaining Winkelman's property without charge or arrest is unreasonable and violates her rights to be free from unreasonable search and seizure.

76. Plaintiff Winkelman never recovered her property despite calling the APD phone line to ask for help.

77. Following the police assault of Plaintiff Winkelman, she had deep bruises on her hips that gave her pain whenever she sat. Additionally, she had severe swelling in her elbow, headaches for multiple days, and she likely had a concussion and suffered from symptoms of post-concussive syndrome.

78. A few weeks after the incident, Plaintiff Winkelman had to see a chiropractor for her injuries because she was in so much pain.

79. Plaintiff Winkelman still fears police officers and is fearful that she may be attacked again.

80. The APD officers' attacks on Winkelman were shocking, unreasonable, and would chill a person of ordinary firmness from continuing to engage in protected speech and assembly.

81. Video footage of the APD officers' attacks on Winkelman can be accessed at the following link:

<https://1drv.ms/u/s!AmR5VgwKtXTYioVsUeoLVVdhonmX4w?e=enaRow>

82. The City of Austin and Austin Police Department have an extensive history of using excessive force against unarmed individuals and peaceful protesters, especially when the protests concern police action and racial inequality, and particularly in the summer of 2020.

83. APD has a long history of employing excessive force against unarmed individuals over the last few years.

84. These individuals include, but are not limited to, Jesus Hernandez, Pete Hernandez, Sir Smith, Carlos Chacon, and Breiaon King, an African-American schoolteacher whose violent arrest in 2015 sparked nationwide outrage.

85. APD also has a long history of killing unarmed individuals.

86. These individuals include, but are not limited to, David Joseph, Larry Jackson, Jr., Kevin Brown, Byron Carter, Ahmede Bradley, Jason Roque, Nathan Sanders, Daniel Rocha, and Michael Ramos.

87. During the police violence protests in 2020, APD officers used excessive force numerous times.

88. For example, APD officers used grotesque excessive force against protestors on May 30, 2021 by seriously injuring several people with “bean bag” shotgun rounds, and otherwise attacking innocent protestors who posed no threat and were merely exercising their First Amendment rights. APD officers also shoved and pushed protestors to the ground using excessive and unnecessary force in those protests.

89. Victims of APD excessive force include Jason Gallagher, Saraneka Martin, Levi Ayala, Bomani Barton, Steven Arawn, Gemicaiah Volter-Jones, Meredith Williams, Nicole Underwood, and Joe Herrera.

90. Police force against Martin was not justified by any facts known to APD or its officers.

91. Police force against Gallagher was not justified by any facts known to APD or its officers.

92. Police force against Ayala was not justified by any facts known to APD or its officers.

93. Police force against Barton was not justified by any facts known to APD or its officers.

94. Police force against Arawn was not justified by any facts known to APD or its officers.

95. Police force against Volter-Jones was not justified by any facts known to APD or its officers.

96. Police force against Williams was not justified by any facts known to APD or its officers.

97. Police force against Underwood was not justified by any facts known to APD or its officers.

98. Police force against Herrera was not justified by any facts known to APD or its officers.

99. APD did not refrain from the use of excessive force following the serious injuries caused to protestors on May 30, 2020. Instead, the city of Austin and the Chief of Police permitted APD to continue using excessive force.

100. As a consequence, APD injured many other innocent protestors, including Justin Howell, Meredith Drake, Anthony Evans, Annette Chavez, Christen Warkoczewski, and Samuel Kirsch.

101. Police force against Howell was not justified by any facts known to APD or its officers.

102. Police force against Drake was not justified by any facts known to APD or its officers.

103. Police force against Evans was not justified by any facts known to APD or its officers.

104. Police force against Chavez was not justified by any facts known to APD or its officers.

105. Police force against Warkoczewski was not justified by any facts known to APD or its officers.

106. Police force against Kirsch was not justified by any facts known to APD or its officers.

107. Numerous officers watched all of the above incidents take place without attempting to stop them, just like multiple officers watched and participated in the use of excessive force against Plaintiff Winkelman.

108. It is, ironically, APD's policy and practice to use excessive force against anyone who dares protest APD's use of excessive force.

109. The City of Austin was made aware of happened to Winkelman no later than February 2, 2022, that two officers tried to inflict serious bodily injury on her for peacefully protesting police violence. The City was given the footage of this event. The City is well aware of that APD used excessive force on protestors. Yet, the City of Austin has inexplicably failed to take any action to remedy this.

110. On information and belief, APD is also well aware of the violence its officers used against Winkelman and has footage of this event but has failed to discipline the officers involved in any way or take reasonable steps to remedy this.

111. APD has a long-standing policy of providing paramilitary training for its officers to act as "warriors," and to see conflict with members of the public as inevitable parts of

an “us (police) vs. them (civilians)” culture. Officers were trained to be “indifferent to the community” according to a report commissioned by the city.

112. APD’s training academy taught cadets, who later became APD officers, to act as if they were at war with the community they were supposed to be protecting. In one incident, an academy instructor told cadets that if “anyone here says that want to be a police officer to ‘help people,’ I will punch you in the face.”

113. Another instructor told cadets to “pick someone out of a crowd and ask yourself ‘how could I kill that person?’”

114. A report commissioned by the City found that officers were trained to see “the Austin community [as] the enemy.”

115. Unsurprisingly, the report further found that “the culture of a police training academy reflects the culture of a department and impacts the mindset and approach to policing.” The report concluded that the City must provide “training for handling protests with non-militaristic approaches.”

116. On information and belief, neither the City, APD, nor then-Chief Manley reformed or changed the dangerous paramilitary culture of the police academy.

V. CAUSE OF ACTION: EXCESSIVE FORCE IN VIOLATION OF 42 U.S.C. § 1983

117. Plaintiff adopts and incorporates herein by reference all preceding paragraphs.

118. Plaintiff Winkelman brings claims against the Officer Defendants, in their individual capacities, pursuant to 42 U.S.C. § 1983 and § 1988 for excessive force.

119. Plaintiff Winkelman has a valid claim under this statute because Plaintiff Winkelman has cognizable liberty interests to due process of law and to be free from the

use of excessive force without probable cause by a police officer pursuant to the Fourth, Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

120. Plaintiff Winkelman likewise has cognizable liberty interests to engage in free speech and peaceably assemble and to be protected from retaliation for engaging in protected speech under the First Amendment.

121. Plaintiff Winkelman exercised her free speech and assembly rights by attending the demonstration against police violence, demonstrating near officers, and filming the officers' conduct at the protest.

122. Winkelman was deprived of her liberty interest when she was assaulted by two of the Officer Defendants.

123. The Officer Defendants acted under color of their office and employment as officers for APD.

124. The two Officer Defendants' use of excessive force against Plaintiff Winkelman took place under color of law. At all times, the officers acted within the course and scope of their employment with APD and under the color of law.

125. The two Officer Defendants were aware that their conduct was unlawful and violated Plaintiff Winkelman's civil rights by using excessive force against her without probable cause for alleged crimes.

126. Officer Defendant 1's use of force was unreasonable under the circumstances and thus excessive. Plaintiff Winkelman was not engaging in any criminal activity, she was simply asking the police officer for his badge number after Officer Defendant 1 knocked her phone out of her hand and forcefully shoved her. Plaintiff Winkelman posed no threat to Officer Defendant 1.

127. Officer Defendant 2's use of force was unreasonable under the circumstances and thus excessive. Plaintiff Winkelman was not engaging in any criminal activity. Officer Defendant 1 had just forcefully shoved her when Officer Defendant 2 grabbed her by the neck and slammed her to the pavement. Plaintiff Winkelman posed no threat to Officer Defendant 2.

128. Plaintiff Winkelman has suffered a violation of her civil rights as protected by the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution in violation of 42 U.S.C. § 1983 and § 1988.

VI. CAUSE OF ACTION: MONELL LIABILITY, CITY OF AUSTIN AND THE AUSTIN POLICE DEPARTMENT

129. Plaintiff adopts and incorporates herein by reference all preceding paragraphs.

130. Plaintiffs bring claims against the City of Austin and APD under 42 U.S.C. § 1983 and *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

131. Plaintiff Winkelman has cognizable liberty interests to be free from excessive force pursuant to the Fourth, Fifth, Eight, and Fourteenth Amendments to the United States Constitution.

132. Plaintiff Winkelman likewise has cognizable liberty interests to engage in free speech and peaceably assemble and to be protected from retaliation for engaging in protected speech under the First Amendment.

133. Plaintiff Winkelman exercised her free speech and assembly rights by attending the demonstration against police violence, demonstrating near officers, and filming the officers' conduct at the protest.

134. The Chief of Police of APD (including former APD Chief Brian Manley and current APD Chief Joseph Chacon) is responsible for establishing the policies, rules, regulations, ordinances, and procedures under which each and every one of the APD employees must act.

135. APD and Austin had a *de facto* policy or custom of using excessive force against protesters, even in the absence of any probable cause.

136. The use of excessive force against the citizens of Austin, Texas, including Plaintiff, by members of APD is so widespread and pervasive as to have the force of law.

137. The use of excessive force against protestors Austin, Texas, including Plaintiff, by members of APD is so widespread and pervasive as to have the force of law.

138. Further, the lack of policies and procedures to provide for the safe and lawful treatment of individuals detained or engaged by the police amounts to a widespread practice that, although not explicitly authorized by written law or express municipal policy, is so permanent and well-settled as to constitute a custom or usage with the force of law.

139. The lack of established policies, rules, regulations, and procedures caused the violation of Plaintiff's civil rights under the United States Constitution, and, consequently, the damages suffered by Plaintiff.

140. On information and belief, the policymakers within APD and the City of Austin actually or constructively knew or should have known that the lack of policy, rule, regulation or procedure would cause this type of civil rights violation. This is because of the widespread nature of the custom, general knowledge of its existence, and numerous opportunities and responsibilities of the responsible policymakers to be informed.

141. Manley and Chacon, as Chief of Police for Austin and APD, are policymakers with respect to Austin and the APD. As Chief, Manley and Chacon have final policymaking authority by direct delegation from the City of Austin governing body, both express and implied, with respect to the unconstitutional actions taken by APD and its officers, as well as the lack of action taken in response to constitutional violations.

142. Former Chief Manley and Chief Chacon ratified the unconstitutional actions of the Officer Defendants, specifically Officer Defendants 1 and 2.

143. As stated in paragraphs 9-84, above, the violation of Plaintiff's rights by Defendants was not an isolated incident; violating the rights of Plaintiff and those similarly situated to Plaintiffs was the rule, not the exception, of the City of Austin by and through the APD.

144. Former Chief Manley and Chief Chacon knew, as any reasonable policymaker would also know, that as a direct and proximate consequence of such practices, that innocent people like Plaintiff Winkelman would be seriously injured and victimized, and their constitutional rights violated.

145. As a direct and proximate result of APD's policies and practices of using excessive force, numerous protestors suffered severe and devastating injuries, as well as violations of constitutional rights.

146. As policymaker for the City, former Chief Manley and Chief Chacon explicitly approved the officers' actions, thus imputing liability to the County. *See Davidson v. City of Stafford*, 848 F.3d 384, 395-396 (5th Cir. 2017), as revised (Mar. 31, 2017) (citing *Monell*, 436 U.S. at 690-91)]. Ratification of an officer's decision by a policymaker with final decision-making authority may constitute the official policy of the municipality. *See*

City of St. Louis v. Praprotnik, 485 U.S. 112, 127, 108 S. Ct. 915, 926, 99 L. Ed. 2d 107 (1988).

147. To Plaintiff's knowledge, no officer has been disciplined by APD for using excessive force against Plaintiff Winkelman, nor has any officer been disciplined for tolerating, authorizing, or endorsing this type of unconstitutional conduct.

**VII. CAUSE OF ACTION: INADEQUATE TRAINING,
AUSTIN POLICE DEPARTMENT AND THE CITY OF AUSTIN**

148. Plaintiff adopts and incorporates herein by reference all preceding paragraphs.

149. Plaintiff brings claims against the City of Austin and the Austin Police Department under 42 U.S.C. § 1983 and *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

150. APD and the City of Austin provided inadequate training and supervision, leading to the constitutional violations in this case.

151. The training and supervision policy procedures of the City of Austin's policymaker were inadequate, the City of Austin's policymaker was deliberately indifferent in adopting such policies, and the inadequate training and supervision policies directly caused Plaintiff's injury and the violations of her constitutional rights.

152. This inadequate training and supervision includes but is not limited to failing to adequately discipline officers, failing to adequately supervise officers, failing to adequately train officers concerning de-escalation of force, crowd control, and use of force against non-violent protestors, failing to train officers regarding demonstrators' free speech and assembly rights, training officers to act as paramilitary "warriors" and creating an "us vs them" culture where officers were "at war" with the community that they were

supposed to be serving, which encouraged officers to use excessive force, and failing to train or instruct officers about specific incidents it considers unreasonable, excessive force, or in violation of the Constitution

153. These violations include but are not limited to the unlawful and unwarranted violent shoving and slamming into pavement of Plaintiff Winkelman, and taking away her personal property, and retaliation against Plaintiff for exercising her First Amendment rights.

154. The City of Austin and APD failed to train their officers to avoid using excessive force in situations where force is not warranted. This predictably led to the violations of citizens' constitutional rights, including the rights of the Plaintiff in this case.

VIII. DAMAGES

155. As a result of Defendants' unlawful conduct, Plaintiff has suffered economic and actual damages, including past and future pain and mental anguish, past and future pecuniary losses, emotional pain and suffering, inconvenience, mental anguish, loss of earning capacity, loss of enjoyment of life, injury to professional standing, injury to character and reputation, and other pecuniary and non-pecuniary losses.

IX. COMPENSATORY DAMAGES

156. Plaintiff additionally brings suit for compensatory damages, including emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, lost earning capacity in the past and future, and other pecuniary and non-pecuniary losses.

X. PUNITIVE DAMAGES

157. The conduct committed by the Officer Defendants against Plaintiff is the type of conduct demonstrating malice or reckless indifference to the rights of the Plaintiff. Therefore, Plaintiff additionally brings suit for punitive damages.

XI. ATTORNEYS' FEES AND EXPERT FEES

158. Plaintiff seeks all reasonable and necessary attorneys' fees in this case, including preparation and trial of this lawsuit, post-trial, pre-appeal legal services, and any appeals. Plaintiff additionally brings suit for expert fees.

159. As a result of Defendants' conduct and their deliberate indifference to Plaintiff's rights, Plaintiff was forced to retain counsel.

XII. DEMAND FOR JURY TRIAL

160. Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury of all the issues in this case and tenders herewith the requisite jury fee.

XIII. PRAYERS FOR RELIEF

161. WHEREFORE, cause having been shown, Plaintiff prays for, on trial of this just cause, judgment against Defendants as follows:

- a. Judgement against Defendants for violations of Plaintiff's civil rights, under 42 U.S.C. § 1983 and § 1988;
- b. Judgement jointly and severally against Defendants for the following damages:
 - i. Damages for medical expenses in the past and future;
 - ii. Damages for pain and suffering in the past and future;

- iii. Damages for mental anguish in the past and future;
- iv. Damages for impairment in the past and future;
- v. Exemplary damages against the Officer Defendants;
- vi. Reasonable attorneys' fees and costs of court;
- vii. Pre-judgment and post-judgment interest as allowed by law; and
- viii. Such other and further relief at law or in equity, special, or general to which Plaintiff may show herself to be justly entitled.

Respectfully Submitted,
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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Eli Winkelman
(b) County of Residence of First Listed Plaintiff Travis
(c) Attorneys (Firm Name, Address, and Telephone Number)
Kaplan Law Firm, PLLC, 3901 S. Lamar Blvd., #260
Austin, Texas 78704

DEFENDANTS
Austin Police Department, The City of Austin, Officer Ryan
County of Residence of First Listed Defendant Travis
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State [X] 1 [] 1
Citizen of Another State [] 2 [] 2
Citizen or Subject of a Foreign Country [] 3 [] 3
Incorporated or Principal Place of Business In This State [] 4 [] 4
Incorporated and Principal Place of Business In Another State [] 5 [] 5
Foreign Nation [] 6 [] 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)
CONTRACT: 110 Insurance, 120 Marine, 130 Miller Act, 140 Negotiable Instrument, 150 Recovery of Overpayment & Enforcement of Judgment, 151 Medicare Act, 152 Recovery of Defaulted Student Loans (Excludes Veterans), 153 Recovery of Overpayment of Veteran's Benefits, 160 Stockholders' Suits, 190 Other Contract, 195 Contract Product Liability, 196 Franchise
REAL PROPERTY: 210 Land Condemnation, 220 Foreclosure, 230 Rent Lease & Ejectment, 240 Torts to Land, 245 Tort Product Liability, 290 All Other Real Property
PERSONAL INJURY: 310 Airplane, 315 Airplane Product Liability, 320 Assault, Libel & Slander, 330 Federal Employers' Liability, 340 Marine, 345 Marine Product Liability, 350 Motor Vehicle, 355 Motor Vehicle Product Liability, 360 Other Personal Injury, 362 Personal Injury - Medical Malpractice
PERSONAL INJURY: 365 Personal Injury - Product Liability, 367 Health Care/Pharmaceutical Personal Injury Product Liability, 368 Asbestos Personal Injury Product Liability, 370 Other Fraud, 371 Truth in Lending, 380 Other Personal Property Damage, 385 Property Damage Product Liability
FORFEITURE/PENALTY: 625 Drug Related Seizure of Property 21 USC 881, 690 Other
LABOR: 710 Fair Labor Standards Act, 720 Labor/Management Relations, 740 Railway Labor Act, 751 Family and Medical Leave Act, 790 Other Labor Litigation, 791 Employee Retirement Income Security Act
IMMIGRATION: 462 Naturalization Application, 465 Other Immigration Actions
BANKRUPTCY: 422 Appeal 28 USC 158, 423 Withdrawal 28 USC 157
PROPERTY RIGHTS: 820 Copyrights, 830 Patent, 835 Patent - Abbreviated New Drug Application, 840 Trademark, 880 Defend Trade Secrets Act of 2016
SOCIAL SECURITY: 861 HIA (1395ff), 862 Black Lung (923), 863 DIWC/DIWW (405(g)), 864 SSID Title XVI, 865 RSI (405(g))
FEDERAL TAX SUITS: 870 Taxes (U.S. Plaintiff or Defendant), 871 IRS—Third Party 26 USC 7609
OTHER STATUTES: 375 False Claims Act, 376 Qui Tam (31 USC 3729(a)), 400 State Reapportionment, 410 Antitrust, 430 Banks and Banking, 450 Commerce, 460 Deportation, 470 Racketeer Influenced and Corrupt Organizations, 480 Consumer Credit (15 USC 1681 or 1692), 485 Telephone Consumer Protection Act, 490 Cable/Sat TV, 850 Securities/Commodities/Exchange, 890 Other Statutory Actions, 891 Agricultural Acts, 893 Environmental Matters, 895 Freedom of Information Act, 896 Arbitration, 899 Administrative Procedure Act/Review or Appeal of Agency Decision, 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)
[X] 1 Original Proceeding [] 2 Removed from State Court [] 3 Remanded from Appellate Court [] 4 Reinstated or Reopened [] 5 Transferred from Another District (specify) [] 6 Multidistrict Litigation - Transfer [] 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. § 1983 and § 1988, 436 U.S. 658 (1978)
Brief description of cause:
Excessive Force, Monell Liability, and Inadequate Training

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint:
JURY DEMAND: [X] Yes [] No

VIII. RELATED CASE(S) IF ANY (See instructions):
JUDGE DOCKET NUMBER

DATE August 26, 2022
SIGNATURE OF ATTORNEY OF RECORD /s/ Matthew Caponi

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ELI WINKELMAN,
Plaintiff,

v.

THE CITY OF AUSTIN, TEXAS, OFFICER
QUINT SEBEK, individually, AND
OFFICER THOMAS TUMINELLI,
individually,
Defendants

§
§
§
§
§
§
§
§

CIVIL ACTION NO. 1:22-cv-875

PLAINTIFF’S FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Eli Winkelman (“Winkelman”) files this First Amended Complaint against Defendants the City of Austin, Texas (hereinafter “Austin,” or “APD”), Officer Quint Sebek (“Sebek”), individually, and Officer Thomas Tuminelli (“Tuminelli), individually, (Sebek and Tuminelli hereinafter collectively, the “Officer Defendants”), for the excessive force they inflicted on her as she was exercising her free speech and assembly rights and demonstrating against police violence.

I. PARTIES

1. Plaintiff Eli Winkelman is an individual who resides in Texas and during all times relevant to the allegations of this complaint was a citizen of the United States.
2. Defendant City of Austin, Texas is a unit of local government in the State of Texas. The Austin Police Department (“APD”) is a Department of the City of Austin. Defendant has been served.

3. Defendant Officer Quint Sebek is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD and the City of Austin to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

4. Defendant Officer Thomas Tuminelli is a United States and Texas citizen and an Officer with the Austin Police Department who was present at the August 29, 2020 protest. At all times relevant to this action, Defendant was a police officer employed by APD and the City of Austin to perform duties in the City of Austin. Defendant will be extended the opportunity to accept service of process pursuant to FRCP 4(d). If Defendant fails or refuses to accept service as requested, then the Plaintiffs will request service of process pursuant to FRCP 4(e) upon Defendant.

II. JURISDICTION

5. This action is brought pursuant to 42 U.S.C. §§ 1983, 1988, and the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

6. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1343(a)(3), (4) relating to actions arising under 42 U.S.C. § 1983 and by 28 U.S.C. § 1331 (federal question).

III. VENUE

7. Venue is proper in the United States District Court for the Western District of Texas, Austin Division, pursuant to 28 U.S.C. § 1391. Plaintiff's claims arose in whole or in part in the Western District of Texas.

IV. FACTUAL ALLEGATIONS

8. Plaintiff Winkelman attended a protest rally and march that started at the Seaholm Retail District on August 29, 2020. The rally was meant to commemorate the life of George Floyd, Michael Ramos, and other people who were killed in police shootings.

9. The purpose of the protest was to end police brutality and the use of violence and excessive force.

10. The march began at about 7 PM. Around 50 people attended.

11. Protestors have a First Amendment right to free expression and peaceful assembly.

12. Disproportionate use of force by police officers can turn an otherwise peaceful protest violent.

13. This was a peaceful protest.

14. Protestors, including Plaintiff Winkelman, were within their rights to free expression and peaceful assembly.

15. Plaintiff Winkelman attended this event to express her view that police brutality is wrong, and has no place in Austin, Texas and to document the event by filming it with her phone.

16. Around 8:15 PM, when the marchers were walking in the street near the corner of Congress Avenue and Cesar Chavez Street, APD officers aggressively approached the marchers and demanded that they move from the street to the sidewalks nearby.

17. Marchers attempted to comply with orders, but APD officers began pepper spraying and violently arresting them immediately after demanding they move.

18. The Austin Police Department has repeatedly used physical force, chemical irritants such as tear gas and pepper spray, and kinetic impact projectiles as a first resort tactic against peaceful protestors rather than as a response to any sort of actual threat or violence.

19. Here, there was no threat of violence from the protestors. The Austin Police Department caused the violence.

20. Instead of de-escalating the situation, APD officers created a potentially dangerous situation by immediately resorting to physical force against peaceful protestors.

21. Plaintiff Winkelman was filming the officers when they resorted to physical force.

22. Winkelman was filming the officers because she was concerned about the safety of her friends and fellow protestors and wished to document the protest and the officers' actions.

23. Plaintiff Winkelman saw a member of her protest group being arrested and pepper sprayed by APD officers. She walked toward the police officer who was arresting her friend so that she could videotape the incident.

24. Within seconds, one of the Officer Defendants ("Officer Defendant 1") purposely struck Plaintiff Winkelman's phone with which she was filming out of her hand.

25. As Plaintiff Winkelman bent down to find the phone, she also began asking for the police officer's badge number.

26. Officer Defendant 1 ignored her request, took a few steps away from her, then turned back around and forcefully pushed Plaintiff Winkelman.

27. This use of force was excessive and unnecessary.

28. Winkelman was acting within her rights to merely film the officers' violent actions.

29. In the next moment, another of the Officer Defendants ("Officer Defendant 2") grabbed Plaintiff by the neck and violently slammed her to the ground, causing severe pain and trauma.

30. This use of force was also excessive and unnecessary.

31. This use of force appears calculated only to cause harm to Winkelman, since she was already on the sidewalk at the time the encounter with this officer began.

32. There is no discernable reason to slam an unarmed young woman who poses no threat to officer or public safety into the pavement, other than to harm her.

33. The two Officer Defendants were not attempting to effectuate an arrest of Winkelman at the time, and she was not resisting or disobeying any directive or command at the time.

34. The two Officer Defendants simply used force against Winkelman for the sole purpose of using force against her.

35. Winkelman is a young woman who is approximately five feet four inches tall and 130 pounds.

36. The two Officer Defendants who used force against her are significantly larger than Winkelman.

37. Winkelman posed no discernable threat to any of the officers at any time, especially when considering the significant and obvious discrepancy in size between her and the officers.

38. At no point in time was any force warranted against Winkelman.

39. Winkelman believes the fact that she happened to be wearing her bike helmet at the time saved her from serious head injuries, as her head hit the pavement so hard in this incident that she suffered post-concussive syndrome from it even with the helmet.

40. Plaintiff Winkelman was then lifted up by members of her protest group and taken to safety, but she could not find her phone.

41. She then returned to the area where she was slammed to the ground and saw her cell phone and bike light on the ground behind APD officers. She asked the police officers to return her belongings, but they never gave the items back.

42. Retaining Winkelman's property without charge or arrest is unreasonable and violates her rights to be free from unreasonable search and seizure.

43. Plaintiff Winkelman never recovered her property despite calling the APD phone line to ask for help.

44. Following the police assault of Plaintiff Winkelman, she had deep bruises on her hips that gave her pain whenever she sat. Additionally, she had severe swelling in her elbow, headaches for multiple days, and she likely had a concussion and suffered from symptoms of post-concussive syndrome.

45. A few weeks after the incident, Plaintiff Winkelman had to see a chiropractor for her injuries because she was in so much pain.

46. Plaintiff Winkelman still fears police officers and is fearful that she may be attacked again.

47. The APD officers' attacks on Winkelman were shocking, unreasonable, and would chill a person of ordinary firmness from continuing to engage in protected speech and assembly.

48. Video footage of the APD officers' attacks on Winkelman can be accessed at the following link:

<https://1drv.ms/u/s!AmR5VgwKtXTYioVsUeoLVVdhonmX4w?e=enaRow>

49. The City of Austin, through the Austin Police Department, has an extensive history of using excessive force against unarmed individuals and peaceful protesters, especially when the protests concern police action and racial inequality, and particularly in the summer of 2020.

50. APD has a long history of employing excessive force against unarmed individuals over the last few years.

51. These individuals include, but are not limited to, Jesus Hernandez, Pete Hernandez, Sir Smith, Carlos Chacon, and Breiaon King, an African-American schoolteacher whose violent arrest in 2015 sparked nationwide outrage.

52. APD also has a long history of killing unarmed individuals.

53. These individuals include, but are not limited to, David Joseph, Larry Jackson, Jr., Kevin Brown, Byron Carter, Ahmede Bradley, Jason Roque, Nathan Sanders, Daniel Rocha, and Michael Ramos.

54. During the police violence protests in 2020, APD officers used excessive force numerous times.

55. For example, APD officers used grotesque excessive force against protestors on May 30, 2021 by seriously injuring several people with “bean bag” shotgun rounds, and otherwise attacking innocent protestors who posed no threat and were merely exercising their First Amendment rights. APD officers also shoved and pushed protestors to the ground using excessive and unnecessary force in those protests.

56. Victims of APD excessive force include Jason Gallagher, Saraneka Martin, Levi Ayala, Bomani Barton, Steven Arawn, Gemica Volter-Jones, Meredith Williams, Nicole Underwood, and Joe Herrera.

57. Police force against Martin was not justified by any facts known to APD or its officers.

58. Police force against Gallagher was not justified by any facts known to APD or its officers.

59. Police force against Ayala was not justified by any facts known to APD or its officers.

60. Police force against Barton was not justified by any facts known to APD or its officers.

61. Police force against Arawn was not justified by any facts known to APD or its officers.

62. Police force against Volter-Jones was not justified by any facts known to APD or its officers.

63. Police force against Williams was not justified by any facts known to APD or its officers.

64. Police force against Underwood was not justified by any facts known to APD or its officers.

65. Police force against Herrera was not justified by any facts known to APD or its officers.

66. APD did not refrain from the use of excessive force following the serious injuries caused to protestors on May 30, 2020. Instead, the city of Austin and the Chief of Police permitted APD to continue using excessive force.

67. As a consequence, APD injured many other innocent protestors, including Justin Howell, Meredith Drake, Anthony Evans, Annette Chavez, Christen Warkoczewski, and Samuel Kirsch.

68. Police force against Howell was not justified by any facts known to APD or its officers.

69. Police force against Drake was not justified by any facts known to APD or its officers.

70. Police force against Evans was not justified by any facts known to APD or its officers.

71. Police force against Chavez was not justified by any facts known to APD or its officers.

72. Police force against Warkoczewski was not justified by any facts known to APD or its officers.

73. Police force against Kirsch was not justified by any facts known to APD or its officers.

74. Numerous officers watched all of the above incidents take place without attempting to stop them, just like multiple officers watched and participated in the use of excessive force against Plaintiff Winkelman.

75. It is, ironically, APD's policy and practice to use excessive force against anyone who dares protest APD's use of excessive force.

76. The City of Austin was made aware of happened to Winkelman no later than February 2, 2022, that two officers tried to inflict serious bodily injury on her for peacefully protesting police violence. The City was given the footage of this event. The City is well aware of that APD used excessive force on protestors. Yet, the City of Austin has inexplicably failed to take any action to remedy this.

77. On information and belief, APD is also well aware of the violence its officers used against Winkelman and has footage of this event but has failed to discipline the officers involved in any way or take reasonable steps to remedy this.

78. APD has a long-standing policy of providing paramilitary training for its officers to act as "warriors," and to see conflict with members of the public as inevitable parts of an "us (police) vs. them (civilians)" culture. Officers were trained to be "indifferent to the community" according to a report commissioned by the city.

79. APD's training academy taught cadets, who later became APD officers, to act as if they were at war with the community they were supposed to be protecting. In one incident, an academy instructor told cadets that if "anyone here says that want to be a police officer to 'help people,' I will punch you in the face."

80. Another instructor told cadets to "pick someone out of a crowd and ask yourself 'how could I kill that person?'"

81. A report commissioned by the City found that officers were trained to see “the Austin community [as] the enemy.”

82. Unsurprisingly, the report further found that “the culture of a police training academy reflects the culture of a department and impacts the mindset and approach to policing.” The report concluded that the City must provide “training for handling protests with non-militaristic approaches.”

83. On information and belief, neither the City, APD, nor then-Chief Manley reformed or changed the dangerous paramilitary culture of the police academy.

84. Officer Thomas Tuminelli has a history of reckless, violent, and unlawful conduct that is known to the City of Austin and APD.

85. On May 23, 2020, Officer Tuminelli was speeding on Interstate 35 at times at an average speed of 96 mph, tailgating a driver as well as cutting in front of him and braking, which ultimately resulted in a crash.

86. After the crash, Officer Tuminelli jumped out of his vehicle and brandished his firearm at the other driver while engaging in a profanity-laced argument with the other driver.

87. Officer Tuminelli was ultimately suspended on November 11, 2020 through January 9, 2021, and placed on probation for a year. As part of his suspension, Tuminelli was required to be evaluated by an Austin police psychologist or another qualified professional designated by then-chief Brian Manley, which could potentially have resulted in placing him on leave.

88. Although Tuminelli’s reckless, dangerous, and violent conduct in this incident occurred prior to his unlawful conduct in the August 29, 2020 protest, he was not

disciplined until November 11, 2020, after his unlawful conduct in the August 29, 2020 protest.

V. CAUSE OF ACTION: EXCESSIVE FORCE IN VIOLATION OF 42 U.S.C. § 1983

89. Plaintiff adopts and incorporates herein by reference all preceding paragraphs.

90. Plaintiff Winkelman brings claims against Defendants Officer Quint Sebek and Officer Thomas Tuminelli, in their individual capacities, pursuant to 42 U.S.C. § 1983 and § 1988 for excessive force.

91. Plaintiff Winkelman has a valid claim under this statute because Plaintiff Winkelman has cognizable liberty interests to due process of law and to be free from the use of excessive force without probable cause by a police officer pursuant to the Fourth, Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

92. Plaintiff Winkelman likewise has cognizable liberty interests to engage in free speech and peaceably assemble and to be protected from retaliation for engaging in protected speech under the First Amendment.

93. Plaintiff Winkelman exercised her free speech and assembly rights by attending the demonstration against police violence, demonstrating near officers, and filming the officers' conduct at the protest.

94. Winkelman was deprived of her liberty interest when she was assaulted by Defendants Sebek and Tuminelli.

95. Defendants Sebek and Tuminelli acted under color of their office and employment as officers for APD.

96. Defendants Sebek's and Tuminelli's use of excessive force against Plaintiff Winkelman took place under color of law. At all times, the officers acted within the course and scope of their employment with APD and under the color of law.

97. Defendants Sebek and Tuminelli were aware that their conduct was unlawful and violated Plaintiff Winkelman's civil rights by using excessive force against her without probable cause for alleged crimes.

98. Officer Defendant 1's use of force was unreasonable under the circumstances and thus excessive. Plaintiff Winkelman was not engaging in any criminal activity, she was simply asking the police officer for his badge number after Officer Defendant 1 knocked her phone out of her hand and forcefully shoved her. Plaintiff Winkelman posed no threat to Officer Defendant 1.

99. Officer Defendant 2's use of force was unreasonable under the circumstances and thus excessive. Plaintiff Winkelman was not engaging in any criminal activity. Officer Defendant 1 had just forcefully shoved her when Officer Defendant 2 grabbed her by the neck and slammed her to the pavement. Plaintiff Winkelman posed no threat to Officer Defendant 2.

100. Plaintiff Winkelman has suffered a violation of her civil rights as protected by the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution in violation of 42 U.S.C. § 1983 and § 1988.

VI. CAUSE OF ACTION: MONELL LIABILITY, THE CITY OF AUSTIN

101. Plaintiff adopts and incorporates herein by reference all preceding paragraphs.

102. Plaintiffs bring claims against the City of Austin under 42 U.S.C. § 1983 and *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

103. Plaintiff Winkelman has cognizable liberty interests to be free from excessive force pursuant to the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

104. Plaintiff Winkelman likewise has cognizable liberty interests to engage in free speech and peaceably assemble and to be protected from retaliation for engaging in protected speech under the First Amendment.

105. Plaintiff Winkelman exercised her free speech and assembly rights by attending the demonstration against police violence, demonstrating near officers, and filming the officers' conduct at the protest.

106. The Chief of Police of APD (including former APD Chief Brian Manley and current APD Chief Joseph Chacon) is responsible for establishing the policies, rules, regulations, ordinances, and procedures under which each and every one of the APD employees must act.

107. The City of Austin had a *de facto* policy or custom of using excessive force against protesters, even in the absence of any probable cause.

108. The use of excessive force against the citizens of Austin, Texas, including Plaintiff, by members of APD is so widespread and pervasive as to have the force of law.

109. The use of excessive force against protestors Austin, Texas, including Plaintiff, by members of APD is so widespread and pervasive as to have the force of law.

110. Further, the lack of policies and procedures to provide for the safe and lawful treatment of individuals detained or engaged by the police amounts to a widespread practice that, although not explicitly authorized by written law or express municipal

policy, is so permanent and well-settled as to constitute a custom or usage with the force of law.

111. The lack of established policies, rules, regulations, and procedures caused the violation of Plaintiff's civil rights under the United States Constitution, and, consequently, the damages suffered by Plaintiff.

112. On information and belief, the policymakers within the City of Austin actually or constructively knew or should have known that the lack of policy, rule, regulation or procedure would cause this type of civil rights violation. This is because of the widespread nature of the custom, general knowledge of its existence, and numerous opportunities and responsibilities of the responsible policymakers to be informed.

113. Manley and Chacon, as Chief of Police for Austin and APD, are policymakers with respect to the City of Austin and APD. As Chief, Manley and Chacon have final policymaking authority by direct delegation from the City of Austin governing body, both express and implied, with respect to the unconstitutional actions taken by APD and its officers, as well as the lack of action taken in response to constitutional violations.

114. Former Chief Manley and Chief Chacon ratified the unconstitutional actions of the Officer Defendants, specifically Officer Defendants 1 and 2.

115. As stated in paragraphs 9-84, above, the violation of Plaintiff's rights by Defendants was not an isolated incident; violating the rights of Plaintiff and those similarly situated to Plaintiffs was the rule, not the exception, of the City of Austin by and through the APD.

116. Former Chief Manley and Chief Chacon knew, as any reasonable policymaker would also know, that as a direct and proximate consequence of such practices, that

innocent people like Plaintiff Winkelman would be seriously injured and victimized, and their constitutional rights violated.

117. As a direct and proximate result of the City of Austin's policies and practices of using excessive force, numerous protestors suffered severe and devastating injuries, as well as violations of constitutional rights.

118. As policymaker for the City, former Chief Manley and Chief Chacon explicitly approved the officers' actions, thus imputing liability to the County. *See Davidson v. City of Stafford*, 848 F.3d 384, 395-396 (5th Cir. 2017), as revised (Mar. 31, 2017) (citing *Monell*, 436 U.S. at 690-91)]. Ratification of an officer's decision by a policymaker with final decision-making authority may constitute the official policy of the municipality. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S. Ct. 915, 926, 99 L. Ed. 2d 107 (1988).

119. To Plaintiff's knowledge, no officer has been disciplined by APD or the City of Austin for using excessive force against Plaintiff Winkelman, nor has any officer been disciplined for tolerating, authorizing, or endorsing this type of unconstitutional conduct.

**VII. CAUSE OF ACTION: INADEQUATE TRAINING,
THE CITY OF AUSTIN**

120. Plaintiff adopts and incorporates herein by reference all preceding paragraphs.

121. Plaintiff brings claims against the City of Austin under 42 U.S.C. § 1983 and *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

122. The City of Austin provided inadequate training and supervision, leading to the constitutional violations in this case.

123. The training and supervision policy procedures of the City of Austin's policymaker were inadequate, the City of Austin's policymakers were deliberately indifferent in adopting such policies, and the inadequate training and supervision policies directly caused Plaintiff's injury and the violations of her constitutional rights.

124. This inadequate training and supervision includes but is not limited to failing to adequately discipline officers, failing to adequately supervise officers, failing to adequately train officers concerning de-escalation of force, crowd control, and use of force against non-violent protestors, failing to train officers regarding demonstrators' free speech and assembly rights, training officers to act as paramilitary "warriors" and creating an "us vs them" culture where officers were "at war" with the community that they were supposed to be serving, which encouraged officers to use excessive force, and failing to train or instruct officers about specific incidents it considers unreasonable, excessive force, or in violation of the Constitution.

125. These violations include but are not limited to the unlawful and unwarranted violent shoving and slamming into pavement of Plaintiff Winkelman, and taking away her personal property, and retaliation against Plaintiff for exercising her First Amendment rights.

126. The City of Austin failed to train its officers to avoid using excessive force in situations where force is not warranted. This predictably led to the violations of citizens' constitutional rights, including the rights of the Plaintiff in this case.

VIII. DAMAGES

127. As a result of Defendants' unlawful conduct, Plaintiff has suffered economic and actual damages, including past and future pain and mental anguish, past and future

pecuniary losses, emotional pain and suffering, inconvenience, mental anguish, loss of earning capacity, loss of enjoyment of life, injury to professional standing, injury to character and reputation, and other pecuniary and non-pecuniary losses.

IX. COMPENSATORY DAMAGES

128. Plaintiff additionally brings suit for compensatory damages, including emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, lost earning capacity in the past and future, and other pecuniary and non-pecuniary losses.

X. PUNITIVE DAMAGES

129. The conduct committed by the Officer Defendants against Plaintiff is the type of conduct demonstrating malice or reckless indifference to the rights of the Plaintiff. Therefore, Plaintiff additionally brings suit for punitive damages.

XI. ATTORNEYS' FEES AND EXPERT FEES

130. Plaintiff seeks all reasonable and necessary attorneys' fees in this case, including preparation and trial of this lawsuit, post-trial, pre-appeal legal services, and any appeals. Plaintiff additionally brings suit for expert fees.

131. As a result of Defendants' conduct and their deliberate indifference to Plaintiff's rights, Plaintiff was forced to retain counsel.

XII. DEMAND FOR JURY TRIAL

132. Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury of all the issues in this case and tenders herewith the requisite jury fee.

XIII. PRAYERS FOR RELIEF

133. WHEREFORE, cause having been shown, Plaintiff prays for, on trial of this just cause, judgment against Defendants as follows:

- a. Judgement against Defendants for violations of Plaintiff's civil rights, under 42 U.S.C. § 1983 and § 1988;
- b. Judgement jointly and severally against Defendants for the following damages:
 - i. Damages for medical expenses in the past and future;
 - ii. Damages for pain and suffering in the past and future;
 - iii. Damages for mental anguish in the past and future;
 - iv. Damages for impairment in the past and future;
 - v. Exemplary damages against the Officer Defendants;
 - vi. Reasonable attorneys' fees and costs of court;
 - vii. Pre-judgement and post-judgement interest as allowed by law; and
 - viii. Such other and further relief at law or in equity, special, or general to which Plaintiff may show herself to be justly entitled.

Respectfully Submitted,
KAPLAN LAW FIRM, PLLC
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Austin, Texas 78704
Telephone: (512) 553-9390
Telecopier: (512) 692-2788
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By: /s/ Matthew Caponi

Austin Kaplan

State Bar No. 24072176

Matthew “Maff” Caponi

State Bar No. 24109154

Andrew Eckhous

State Bar No. 24127926

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

**ELI WINKELMAN,
Plaintiff,**

v.

**THE CITY OF AUSTIN, TEXAS,
OFFICER QUINT SEBEK, individually,
AND OFFICER THOMAS
TUMINELLI, individually,
Defendants.**

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CIVIL ACTION NO. 1:22-cv-875-LY

**DEFENDANT CITY OF AUSTIN'S ANSWER
AND AFFIRMATIVE DEFENSES
TO PLAINTIFF'S FIRST AMENDED COMPLAINT**

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant, City of Austin (sometimes referred to hereafter as COA or Austin Police Department or APD or Defendant[s]), by and through counsel, files this Answer and Affirmative Defenses to Plaintiff's First Amended Complaint (Doc. No. 2). Pursuant to Rules 8 and 12 of the Federal Rules of Civil Procedure, Defendant respectfully shows the Court the following:

ANSWER

Pursuant to Federal Rule of Civil Procedure 8(b), Defendant responds to each of the specific averments in Plaintiff's First Amended Complaint as set forth below. To the extent that Defendant does not address a specific averment made by Plaintiff, Defendant expressly denies that averment.¹

I. PARTIES

1. Upon information and belief, admitted.

¹ Paragraph numbers in Defendants' Answer correspond to the paragraphs in Plaintiff's First Amended Complaint.

2. Defendant, City of Austin, has accepted service of process directed to Austin Police Department.

3. The City of Austin will be accepting service for the two named officers in the Amended Petition upon receipt of the appropriate forms for process as contemplated by FRCP. The allegations of this paragraph are referring to and asserting conclusions of law or fact without stating a claim upon which relief can be granted, and do not require a response as stated. To the extent any response is required, the Defendant denies any allegations asserting fault or liability.

4. The City of Austin will be accepting service for the two named officers in the Amended Petition upon receipt of the appropriate forms for process as contemplated by FRCP. The allegations of this paragraph are referring to and asserting conclusions of law or fact without stating a claim upon which relief can be granted, and do not require a response as stated. To the extent any response is required, the Defendant denies any allegations asserting fault or liability.

II. JURISDICTION

5. Admitted.

6. Defendant admits that this Court has personal jurisdiction over the Defendants.

Defendant denies the remaining allegations contained in Paragraph 6.

III. VENUE

7. Admitted.

IV. FACTUAL ALLEGATIONS

8. The allegations of subheading IV., and this paragraph 8., are referring to and asserting conclusions of law or fact without stating a claim upon which relief can be granted, and do not require a response as stated. To the extent any response is required, the Defendant denies any allegations asserting fault or liability.

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V. CAUSE OF ACTION: EXCESSIVE FORCE IN VIOLATION OF 42 U.S.C. § 1983

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VI. CAUSE OF ACTION: *MONELL* LIABILITY, THE CITY OF AUSTIN

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VII. CAUSE OF ACTION: INADEQUATE TRAINING, THE CITY OF AUSTIN

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VIII. DAMAGES

127. Denied in the context stated. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendant denies any allegations asserting fault or liability.

IX. COMPENSATORY DAMAGES

128. Denied in the context stated. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendant denies any allegations asserting fault or liability.

X. PUNITIVE DAMAGES

129. Denied in the context stated. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendant denies any allegations asserting fault or liability.

XI. ATTORNEYS' FEES AND EXPERT FEES

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131. Denied in the context stated. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendant denies any allegations asserting fault or liability.

XII. DEMAND FOR JURY TRIAL

132. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendant denies any allegations asserting fault or liability.

XIII. PRAYERS FOR RELIEF

133. Denied in the context stated. The allegations of this paragraph, including subparts a., b. (i.,ii.,iii,iv.,v.,vi.,vii.,viii.) are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendant denies any allegations asserting fault or liability.

AFFIRMATIVE DEFENSES & IMMUNITIES

1. Defendant City of Austin asserts the affirmative defense of governmental immunity as a municipal corporation entitled to immunity while acting in the performance of its governmental functions, absent express waiver.
2. Defendant City of Austin asserts the affirmative defense of governmental immunity since its employees are entitled to qualified/official immunity for actions taken in the course and scope of their employment, absent express waiver.
3. As a political subdivision, Defendant City of Austin denies that it can be liable for exemplary/punitive damages under 42 U.S.C. § 1983.
4. Defendants reserve the right to assert additional affirmative defenses throughout the development of the case.
5. Pleading further and in the alternative, Plaintiff's injuries and damages were caused in whole or in part by the conduct of other persons or entities for whom these defendants have no responsibility.
6. To the extent applicable and subject to withdrawal, Defendants assert the affirmative defense of comparative fault and that Plaintiff failed to mitigate damages, if any, and assert failure to mitigate as both an affirmative defense and as a reduction in the damage amount, if any, due Plaintiff.
7. Defendants assert the affirmative defense of statute of limitations as to all claims outside the applicable limitations period(s), both statutory and administrative, if any.
8. Defendants deny deprivation of rights under color of statute, ordinance, custom, or abuses of any rights, privileges, or immunities secured to the Plaintiff by the United States Constitution, state law, or 42 U.S.C. § 1983, *et seq.*

9. Defendants hereby invoke applicable defenses based on the doctrine of Qualified Immunity, Official Immunity, and any related defenses. Defendants discharged their obligations and public duties in good faith, its actions were objectively reasonable in light of the law and the information possessed at that time.

10. To the extent applicable and subject to withdrawal, Defendants assert the incident in question and the resulting harm to Plaintiff were caused or contributed to by Plaintiff's own conduct.

11. Defendants further plead that, in the unlikely event liability is found, such liability be reduced by the percentage of the causation found to have resulted from the acts or omissions of other persons.

12. Defendants plead legal justification for the actions and conduct relating to this incident.

13. To the extent Defendants did not address a specific averment made by Plaintiff, Defendants expressly deny all such averments.

14. Defendants reserve the right to assert additional affirmative defenses as may be applicable throughout the development of the case, including immunity, estoppel, illegality, laches, waiver, or any other matter which may constitute an avoidance or affirmative defense.

15. Defendant Officers deny any deprivation under color of statute, ordinance, custom, or abuses of any rights, privileges, or immunities secured to the Plaintiff by the United States Constitution, state law, or 42 U.S.C. § 1983, *et seq.*

16. Defendants hereby invoke the doctrine of Qualified Immunity and Official Immunity. Defendants discharged their obligations and public duties in good faith, and would show that their actions were objectively reasonable in light of the law and the information possessed at that time.

17. Pleading further, alternatively, and by way of affirmative defense, to the extent applicable and subject to being withdrawn, Defendants would show that at the time and on the occasion in question, Plaintiff failed to use any degree of care or caution that a person of ordinary prudence would have used under the same or similar circumstances, and that such failure was a producing cause or the sole proximate cause of the incident and alleged damages that arise therefrom. Defendants invoke the comparative responsibility provisions of the Texas Civil Practice & Remedies Code.

18. Defendants assert that punitive damages are not available and would be contrary to the protections of the United States Constitution by allowing a jury or fact finder standardless discretion..

DEFENDANTS' PRAYER

Defendant prays that all relief requested by Plaintiff be denied, that the Court dismiss this case with prejudice, and that the Court award Defendant costs and attorney's fees, and any additional relief to which Defendant may be entitled under law or equity.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN L. RILEY, CHIEF, LITIGATION

/s/ Monte L. Barton Jr.
MONTE L. BARTON JR.
State Bar No. 24115616
monte.barton@austintexas.gov
City of Austin
P. O. Box 1546
Austin, Texas 78767-1546
Telephone (512) 974-2409
Facsimile (512) 974-1311

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this 14th day of November, 2022.

Via CM/ECF:

Matthew “Maff” Caponi

State Bar No. 24109154

mcaconi@kaplanlawatx.com

Austin Kaplan

State Bar No. 24072176

akaplan@kaplanlawatx.com

Andrew Eckhous

State Bar No. 24127926

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Kaplan Law Firm, PLLC

3901 S. Lamar Blvd. #260

Austin, Texas 78704

Telephone: (512) 553-9390

Facsimile: (512) 692-2788

ATTORNEYS FOR PLAINTIFF

/s/ Monte L. Barton Jr.

MONTE L. BARTON JR.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

**ELI WINKELMAN,
Plaintiff,**

§
§
§
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§
§

v.

CIVIL ACTION NO. 1:22-cv-875-LY

**THE CITY OF AUSTIN, TEXAS,
OFFICER QUINT SEBEK, individually,
AND OFFICER THOMAS
TUMINELLI, individually,
Defendants.**

**ANSWER AND AFFIRMATIVE DEFENSES
BY DEFENDANTS SEBEK AND TUMINELLI
TO PLAINTIFF’S FIRST AMENDED COMPLAINT**

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants, Officer Quint Sebek (now Corporal), individually, and Officer Thomas Tuminelli, individually, (sometimes referred to hereafter as Defendants, Defendant Officers, or Defendant Sebek or Defendant Tuminelli), by and through counsel, file this Answer and Affirmative Defenses to Plaintiff’s First Amended Complaint (Doc. No. 2). Pursuant to Rules 8 and 12 of the Federal Rules of Civil Procedure, Defendant respectfully shows the Court the following:

ANSWER

Pursuant to Federal Rule of Civil Procedure 8(b), Defendant Officers respond to each of the specific averments in Plaintiff’s First Amended Complaint as set forth below. To the extent that Defendant Officers do not address a specific averment made by Plaintiff, then Defendant Officers expressly deny that averment.¹

¹ Paragraph numbers in Defendants’ Answer correspond to the paragraphs in Plaintiff’s First Amended Complaint.

I. PARTIES

1. Upon information and belief, admitted.
2. Defendant, City of Austin, has accepted service of process directed to Austin Police Department.
3. Officer Quint Sebek (now Corporal), individually, has accepted service. Defendant Sebek admits that he was a police officer employed by the City of Austin on August 29, 2020. The allegations of this paragraph are referring to and asserting conclusions of law or fact without stating a claim upon which relief can be granted, and do not require a response as stated. To the extent any response is required, the Defendant Officer denies any allegations asserting fault or liability.
4. Officer Thomas Tuminelli, individually, has accepted service. Defendant Officer Tuminelli admits that he was a police officer employed by the City of Austin on August 29, 2020. The allegations of this paragraph are referring to and asserting conclusions of law or fact without stating a claim upon which relief can be granted, and do not require a response as stated. To the extent any response is required, the Defendant Officer Tuminelli denies any allegations asserting fault or liability.

II. JURISDICTION

5. Admitted.
6. Defendants admit that this Court has personal jurisdiction over the Defendants. Defendants deny the remaining allegations contained in Paragraph 6.

III. VENUE

7. Admitted.

IV. FACTUAL ALLEGATIONS

8. The allegations of subheading IV., and this paragraph 8., are referring to and asserting conclusions of law or fact without stating a claim upon which relief can be granted, and do not require a response as stated. To the extent any response is required, the Defendant Officers deny any allegations asserting fault or liability.

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V. CAUSE OF ACTION: EXCESSIVE FORCE IN VIOLATION OF 42 U.S.C. § 1983

89. Denied in the context stated. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendants deny any allegations asserting fault or liability.

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VI. CAUSE OF ACTION: *MONELL* LIABILITY, THE CITY OF AUSTIN

101. Denied in the context stated. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendant denies any allegations asserting fault or liability.

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VII. CAUSE OF ACTION: INADEQUATE TRAINING, THE CITY OF AUSTIN

120. Denied in the context stated. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendant denies any allegations asserting fault or liability.

121. Denied in the context stated. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendant denies any allegations asserting fault or liability.

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126. Denied in the context stated. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendant denies any allegations asserting fault or liability.

VIII. DAMAGES

127. Denied in the context stated. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendants deny any allegations asserting fault or liability.

IX. COMPENSATORY DAMAGES

128. Denied in the context stated. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendants deny any allegations asserting fault or liability.

X. PUNITIVE DAMAGES

129. Denied in the context stated. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendant Officers deny any allegations asserting fault or liability.

XI. ATTORNEYS' FEES AND EXPERT FEES

130. Denied in the context stated. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendants deny any allegations asserting fault or liability.

131. Denied in the context stated. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendants deny any allegations asserting fault or liability.

XII. DEMAND FOR JURY TRIAL

132. The allegations of this paragraph are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendants deny any allegations asserting fault or liability.

XIII. PRAYERS FOR RELIEF

133. Denied in the context stated. The allegations of this paragraph, including subparts a., b. (i.,ii.,iii,iv.,v.,vi.,vii.,viii.) are referring to and asserting conclusions of law or fact which do not require a response as stated. To the extent any response is required, the Defendants deny any allegations asserting fault or liability.

AFFIRMATIVE DEFENSES & IMMUNITIES

1. Defendant Officers deny any deprivation under color of statute, ordinance, custom, or abuses of any rights, privileges, or immunities secured to the Plaintiff by the United States Constitution, state law, or 42 U.S.C. § 1983, et seq.

2. Defendants hereby invoke the doctrine of Qualified Immunity and Official Immunity. Defendants discharged their obligations and public duties in good faith, and would show that their actions were objectively reasonable in light of the law and the information possessed at that time.

3. The incident in question and the resulting harm to Plaintiff were caused or contributed to by Plaintiff's own conduct. Pleading further and in the alternative, Plaintiff's injuries and damages were caused in whole or in part by the conduct of other persons or entities who are not currently parties to this lawsuit. Pleading further, alternatively, and by way of affirmative defense, to the extent applicable and subject to being withdrawn, Defendant Officers would show that at the time and on the occasion in question, Plaintiff failed to use any degree of care or

caution that a person of ordinary prudence would have used under the same or similar circumstances, and that such failure was a producing cause or the sole proximate cause of the incident and alleged damages that arise therefrom.

4. Defendant Officers invoke the comparative responsibility provisions of the Texas Civil Practice & Remedies Code.

5. Defendants further plead that, in the unlikely event they are found to be liable, such liability be reduced by the percentage of the causation found to have resulted from the acts or omissions of other persons.

6. Defendants plead that they had legal justification for each and every action taken by them relating to this incident.

7. Defendants assert the limitations and protections of Chapters 41 & 101 of the Texas Civil Practice & Remedies Code, and the due process clause of the United States Constitution.

8. Defendants reserve the right to assert additional affirmative defenses throughout the development of this case.

9. To the extent Defendants did not address a specific averment made by Plaintiff in his Amended Complaint, Defendants expressly deny all such averments.

10. Defendants assert the affirmative defense that Plaintiff failed to mitigate damages, if any, and assert this failure to mitigate as both an affirmative defense and as a reduction in the damage amount, if any, due Plaintiff.

11. Defendants assert the affirmative defense of statute of limitations as to all claims outside the applicable limitations period(s), both statutory and administrative, if any.

12. To the extent Defendants did not address a specific averment made by Plaintiff in the Complaint, Defendants expressly deny all such averments.

13. To the extent applicable and subject to withdrawal, Defendants assert the affirmative defense of comparative fault and that Plaintiff failed to mitigate damages, if any, and assert failure to mitigate as both an affirmative defense and as a reduction in the damage amount, if any, due Plaintiff.

14. Defendants reserve the right to assert additional affirmative defenses as may be applicable throughout the development of the case, including immunity, estoppel, illegality, laches, waiver, or any other matter which may constitute an avoidance or affirmative defense.

15. Defendants assert that punitive damages are not available and would be contrary to the protections of the United States Constitution by allowing a jury or fact finder standardless discretion..

DEFENDANTS' PRAYER

Defendant Officers pray that all relief requested by Plaintiff be denied, that the Court dismiss this case with prejudice, and that the Court award Defendant Officers costs and attorney's fees, and any additional relief to which each Defendant Officer may be entitled under law or equity.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN L. RILEY, CHIEF, LITIGATION

/s/ Monte L. Barton Jr.
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City of Austin
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Austin, Texas 78767-1546
Telephone (512) 974-2409
Facsimile (512) 974-1311

ATTORNEY FOR DEFENDANT OFFICERS

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this 17th day of February, 2023.

Via CM/ECF:

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Facsimile: (512) 692-2788

ATTORNEYS FOR PLAINTIFF

/s/ Monte L. Barton Jr.

MONTE L. BARTON JR.