

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:

1:22-cv-00299

PLAINTIFF'S ORIGINAL COMPLAINT

Plaintiff Jane Doe brings this 42 U.S.C. § 1983 case against the City of Austin and Austin Police Department Officer Walter Dodds for the sexual assault she experienced at the hands of Officer Dodds.

I. PARTIES

1. Plaintiff Jane Doe is a resident of Travis County, Texas. Plaintiff files under a pseudonym to protect her privacy and safety.

2. Defendant City of Austin is a municipality that operates the Austin Police Department. Defendant City of Austin may be served through its City Clerk at 301 W. 2nd Street, Austin, TX 78701. The City's policymaker for policing matters was former Police Chief Brian Manley at the time of the incident and is currently Chief Joseph Chacon.

3. Defendant Officer Walter Tyson Dodds was at the time of this incident an Austin Police Department officer and he is sued in his individual capacity for compensatory and punitive damages. He can be served with process via his former employer at 715 E. 8th Street, Austin, Texas 78701; via his attorneys, Douglas K. O'Connell at 505 West 12th Street, Suite 200, Austin, Texas 78701 and Ken Ervin at 1301 Rio Grande St., Austin, Texas 78701; at his home in

Lexington, Texas; or wherever he may be found. Officer Dodds was acting under color of law as an Austin Police Department officer at all relevant times.

II. JURISDICTION AND VENUE

4. This Court has federal question jurisdiction over this 42 U.S.C. § 1983 action pursuant to 28 U.S.C. §§ 1331 and 1343.

5. This Court has general personal jurisdiction over Defendant City of Austin as it is located in Travis County, Texas and over Defendant Dodds as he resides in Lee County, Texas.

6. This Court has specific *in personam* jurisdiction over Defendants because this case arises out of conduct by Defendants that injured Plaintiff Jane Doe, and which occurred in Travis County, Texas, which is within the Western District of Texas.

7. Venue of this cause is proper in the Western District pursuant to 28 U.S.C. § 1391(b) because a substantial portion of the events or omissions giving rise to Plaintiff's claims occurred in Travis County, which is within the Western District of Texas.

III. FACTS

A. Dodds' attack on Doe

8. On April 18, 2020, Jane Doe and her boyfriend, A.G., had an argument during which A.G. had a breakdown, put a belt around his throat, and tightened it to threaten suicide.

9. Doe yelled to her nephew to go get help.

10. Doe's nephew went to his mother in a nearby apartment who called 911 to get help from APD.

11. At approximately 6:13pm, Defendant Officer Walter Dodds, while on duty as an Austin Police Officer, responded and arrived on scene.

12. Officer Dodds conducted interviews with Jane Doe and A.G.

13. Officer Dodds determined that A.G. was a danger to himself and needed to be placed under an emergency detention.

14. Austin Emergency Medical Services (EMS) arrived on scene and determined that A.G. would need to be transported to the hospital.

15. During Officer Dodds' interview with Doe, he asked for her phone number and told her that he would be calling her to tell her where A.G. was being taken.

16. At the end of the interview, Officer Dodds asked Doe about locking the door to her apartment.

17. Officer Dodds said, "What if someone sneaks in there? You don't want to be sleeping with some dude in there with you."

18. Officer Dodds then accompanied A.G. to the hospital and completed the required documentation for A.G.'s emergency detention.

19. Then at 6:54pm, Officer Dodds called Doe from his APD-issued cell phone.

20. Officer Dodds started the call by telling Doe which hospital A.G. had been taken to, but then began to ask if he could come over. Doe did not give consent for Officer Dodds to come to her home.

21. Officer Dodds then asked her if Doe would take off his uniform for him and again if he could come over. Again, Doe did not consent to allow the officer into her apartment or to take off his uniform. Doe ended the call.

22. Officer Dodds called Doe four more times from the same APD-issued cell phone between 6:54pm and 9:09pm, but Doe did not pick up any of these calls.

23. After 9:09pm, Doe fell asleep in her bedroom alone.

24. Sometime after Doe fell asleep, Officer Dodds again went to Doe's apartment and knocked on the door.

25. Doe's minor nephew opened the door and saw Officer Dodds in his full uniform, including his gun and full duty belt.

26. Officer Dodds walked by Doe's nephew, directly into Doe's bedroom, and shut the door behind him.

27. Doe awoke to Officer Dodds in her bedroom penetrating her vagina with his penis.

28. Doe was shocked, frightened, and confused about what was going on and never consented to any contact of any kind from Officer Dodds.

29. Officer Dodds then flipped her onto her stomach and forced his penis into her vagina two more times.

30. Officer Dodds was not wearing a condom and ejaculated onto the fitted sheet on her bed. Doe remained terrified.

31. That sheet was later tested for DNA evidence by APD. The DNA analysis confirmed that Officer Dodds' DNA was present on the sheet.

32. Over the next several days, Officer Dodds continued to call Doe and terrorize her.

33. On April 25, 2020, Officer Dodds called Doe, disguising his number.

34. Doe picked up the phone, recognized Dodds' voice immediately, and heard him ask who she was with and what she was doing.

35. Terrified, Doe answered that she was with her husband and hung up the phone.

36. On April 26, 2020, at approximately 5:30pm, Doe saw Officer Dodds drive by her apartment complex in his police vehicle, slowly drove down the dead end of her parking lot, turned

around and drove away. Doe's nephew took a photo of the vehicle, which APD later confirmed was Dodds' assigned police car for that day.

37. On April 27, 2020, at 4:40pm, Dodds called Doe again, using *67 to hide his phone number.

38. Officer Dodds again asked her what she was doing and if he could come over. Doe, recording the call, repeatedly asked him to say his name, but Dodds only responded, "It's me."

39. On April 29, 2020, Doe called 911 to report the sexual assault by Officer Dodds.

40. Officer Walter Dodds was criminally indicted for Sexual Assault and Official Oppression and was arrested on September 10, 2020.

B. APD's tolerance for sexual misconduct amongst its own ranks

41. Art Acevedo was the APD chief from 2007 until the end of 2016.

42. In May 2008, Acevedo fired APD Sergeant Dustin Lee, a 12-year veteran, for sexual harassment of a coworker. However, APD later rescinded the termination. In 2019, Lee, by then an APD Lieutenant who had been working in APD for 23 years, was arrested by Round Rock Police for sexual assault of a child.

43. In 2014, APD officers Michael Castillo and Mark Lytle were caught on their body worn cameras whistling at a woman walking by, mockingly suggesting she call the police, and then warning her that the police cannot "unrape you."

44. Despite the publicity, on information and belief, then-police chief Art Acevedo did not seriously discipline Castillo or Lytle.

45. Also while chief, on information and belief, Acevedo dismissed allegations by his subordinate female officers that male APD officers had assaulted them. While he was the

policymaker for law enforcement in Austin, Acevedo allegedly said some of these allegations of sexual violence by APD officers were just about “bad sex.”

46. On information and belief, during Acevedo’s tenure as chief, the sex crimes unit maintained a wall with photos of people the unit had unilaterally determined to have submitted a “false report” of sexual violence.

47. Acevedo was succeeded by Brian Manley, who served as chief from 2016 until 2021.

48. During Manley’s tenure, APD’s longstanding culture of sexual misconduct came to the forefront of the public consciousness.

49. In December 2018, Manley terminated an APD commander, Jason Dusterhoft, for allegedly beating his then-girlfriend, including by strangling her during sex.

50. Dusterhoft countered that Manley had intentionally used the sex crimes division to pressure his ex-girlfriend into fabricating the allegations, pointing out that Manley himself admitted the allegations were not credible.

51. Dusterhoft alleges, in an ongoing lawsuit, that he had personally alerted Manley to a then-dire backlog in sexual assault kit testing—a backlog which was a source of enormous public embarrassment for Manley and reinforced the belief that APD did not take allegations of sexual assault seriously.

52. A 2020 report by Lisa Tatum, ordered by the City of Austin’s City Manager and released the day before Dodds attacked Doe, found that APD retained a culture of sexism.

53. The Tatum report found that APD’s Senior Chaplain, Rick Randall, often makes sexist comments.

54. The Tatum investigation also received many reports from all across APD that sexist name calling, and use of derogatory terms associated with sex, persist.

C. APD's longstanding failure to investigate sexual violence

55. A 2018 study, sponsored by the U.S. Department of Justice, found that APD only made arrests in less than ten percent of sexual assault allegations during the year-long study period.

56. The percentage of arrests is even more abysmal for rape within the meaning of public reporting requirements,¹ and has been for at least the last ten years.

57. In 2011, out of 211 rapes reported to APD, APD made no arrests.

58. In 2012, out of 209 rapes reported to APD, APD made just 1 arrest.

59. In 2013, out of 217 rapes reported to APD, APD made no arrests.

60. In 2014, out of 571² rapes reported to APD, APD only made 4 arrests.

61. In 2015, out of 487 rapes reported to APD, APD only made 2 arrests.

62. In 2016, out of 747 rapes reported to APD, APD only made 3 arrests.

63. In 2017, out of 834 rapes reported to APD, APD only made 9 arrests.

64. In 2018, out of 787 rapes reported to APD, APD made 89 arrests.

65. This is partly because the agency intentionally underfunded investigating sexual assault.

¹ The Texas Penal Code does not use the term "rape," but the State of Texas and City of Austin often report the crime of "rape" when publishing statistics on crimes and arrests. as they rely upon the FBI's definition of the crime to organize their reporting.

² Prior to 2014, the FBI's definition of "rape" was narrower, causing the number of reports and arrests so classified to be lower. APD also underreported the number of reported rapes in 2014, 2015, and 2016.

66. In 2020, APD assigned only 19 detectives to handle about 1,000 sexual violence cases per year.

67. APD only had 17 sex crimes detectives in 2018, investigating 787 rapes. By comparison, APD had 12 detectives assigned to investigate 32 murders in 2018.

68. Sexual violence is rarely prosecuted arising from a complaint to APD when compared to other crimes such as murder, assault, and theft of an automobile. This fact was reported to the Austin City Council in 2019.

69. Mayor Steve Adler remarked that the City of Austin has “far too many sexual assaults that are resulting in too few perpetrators being taken off our streets.”

70. But APD is not just unskilled in investigating sexual violence; it instead chooses not to press charges for the supermajority of those cases despite sufficient evidence to do so.

71. For years, APD affirmatively chose to close investigations without adequate investigation. APD covered up its lack of investigations by “exceptionally clearing” about 2 of every 3 rape cases that it closed during the years leading up to the attack on Doe. A case is only supposed to be “exceptionally cleared” if there is an identified suspect, the suspect’s location is known, and there is enough information to support an arrest, charge, or turning over the case to the court for prosecution, but for some reason the case does not lead to an arrest, charge, or other prosecution. That means that APD nonetheless did not arrest, charge, or turn over the case to the court system a supermajority of rape cases even when they had enough evidence to do so.

72. Even worse, in an audit of late 2017 rape cases handled by APD, the Texas Department of Public Safety determined that the Austin Police Department had wrongfully “exceptionally cleared” nearly one-third of its exceptionally cleared rape cases during the audited period.

73. The Texas Department of Public Safety audit further confirmed that nearly half of those wrongfully “exceptionally cleared” cases had “enough information to support an arrest, charge, and turning over to the court for prosecution.”

74. APD Chief Manley agreed with nearly all of DPS’s findings, admitting the majority of cases identified by DPS were closed improperly or should not have been closed at all.

75. But this intentional misclassification was not new information to APD’s policymaker. On information and belief, APD’s former head of sex crimes, Elizabeth Donegan, had internally complained about and resisted the practice for years.

76. Moreover, Donegan’s superiors within APD had pressured her to deliberately cover up the department’s poor investigating success by improperly “exceptionally clearing” cases. After she was pushed out of the department, the rate of “exceptional clearance” rose. Manley admitted he had a “difference of opinion” with Donegan about this issue when he had her transferred.

77. Aside from Donegan’s prophetic complaints about “exceptional clearance,” she also publicly warned that APD’s sexual assault investigations were not adequately thorough.

78. These mirror problems with APD’s investigation in specific incidents that have been publicized.

79. For example, on information and belief, in the investigation of the sexual assault of Hanna Senko from 2006, APD never visited the scene of the crime, never interviewed witnesses, and decided to “exceptionally clear” the case before Senko’s blood test results even came back—even though she reported her assailant had suspiciously had pills in his pocket before the attack.

80. In investigating an October 2008 sexual assault, on information and belief, APD questioned the victim’s truthfulness, asked her about other men she had had sex with, and asked her whether she had a boyfriend.

81. To investigate the 2010 sexual assault of Julie Ann Nitsch, on information and belief, APD failed to collect physical evidence including the cords the assailant used as a weapon, broken locks, the glass door the assailant used to enter, or anything else that could be used to identify the assailant. Instead, APD asked Nitsch how much she had to drink, what she had been wearing, and why she lived in a bad neighborhood.

82. On December 24, 2014, on information and belief, Heather Sin was drugged at a bar and sexually assaulted by several men. The next morning, Sin awoke at railroad tracks and called the police. A physical exam confirmed many injuries including genital injuries consistent with sexual assault. An APD detective later spoke to her and made clear that he did not believe anything had happened to her and would wait on DNA results before investigating at all. After Sin pressed for an explanation, APD suggested they were not pursuing the case because Sin had been drinking. Sin's case remained pending for at least 3 years.

83. On August 9, 2015, on information and belief, Marina Conner was sexually assaulted. During the assault, Conner made a phone call that recorded her cries for help. Conner spoke to an APD detective on the phone who promised to come meet her, but he never did. Conner obtained a written confession from the assailant. Despite this evidence, APD decided not to pursue the case.

84. On January 7, 2016, on information and belief, Anisha Ituah was sexually assaulted by a patient at a state hospital. Her family called APD, but APD refused to dispatch anyone, so APD never collected forensic evidence from Ituah. APD's detective also complained to Ituah that he had a huge case load of over 300 rape victims and he cannot get every case done. The detective also blamed Ituah for her own assault and suggested he would not investigate. Travis County later told her family that APD was not pursuing the case.

85. Even more alarming is APD's response to a series of sexual violence that Amanda Day reported to APD. In 2018, on information and belief, APD told her that it would not investigate because she had previously consented to "kissing and stuff" with her violent assailant who repeatedly sexually assaulted her. The APD officer also asked her what panties she was wearing and inaccurately told the victim that the sexual assaults were "family violence," before refusing to investigate further.

86. Also in 2018, on information and belief, APD closed a case investigating sexual assault allegations by Jessica Ragsdill. In that case, APD obtained video footage confirming the suspect had entered a hotel room with the victim while she was so intoxicated that she could not stand. APD also had photographic evidence reflecting that the sexual assault was so violent that Ragsdill was bleeding and bruised. But APD decided not to pursue the case regardless, and "exceptionally cleared" the report of sexual assault.

87. In January 2018, on information and belief, Emily Borchardt was repeatedly and violently sexually assaulted by a ring of sex traffickers who abducted her, locked her in a motel room, and repeatedly threatened to kill her. After at least 10 hours, Borchardt finally escaped and called APD. The first officer to respond rolled his eyes and was impatient. APD failed to collect surveillance video or other physical evidence from the motel. The detective assigned to the case told Borchardt's mother that some of the events "sounded consensual." The detective later characterized the bruising on Borchardt's neck where her assailants had strangled her as a "hickey." Eventually APD declined to pursue the investigation further.

88. On information and belief, during the years leading up to the attack on Doe, APD officers routinely told sexual assault victims that their assaults "sounded consensual."

89. On information and belief, during the years leading up to the attack on Doe, APD officers routinely characterized victims of sexual violence as “bad victims” if they knew their attacker.

90. On information and belief, during the years leading up to the attack on Doe, APD detectives assigned to investigate sexual violence often rolled their eyes at the victim’s allegations, then dismissed them because the assailant claimed the encounter was consensual.

91. On information and belief, during the years leading up to the attack on Doe, APD officers assigned to investigate sexual violence routinely criticized victims for their clothing, for where they live, and for drinking alcohol.

92. On information and belief, during the years leading up to the attack on Doe, APD officers have been accused of sexual assault but not prosecuted.

93. Because APD systemically refused to properly investigate sexual violence, systemically covered up their failures, and maintained a culture that tolerated sexual violence even by police officers, predators like Officer Dodds were emboldened and believed they could engage in sexual violence with impunity.

IV. CAUSES OF ACTION

A. FOURTH AND FOURTEENTH AMENDMENT VIOLATIONS – AS TO DEFENDANT OFFICER DODDS

94. Plaintiff incorporates the preceding paragraphs as if alleged herein.

95. Austin Police Department Officer Dodds, while acting under color of law, violated Plaintiff Doe’s substantive due process right to bodily integrity by penetrating her with his penis without her consent.

96. Doe has suffered significant injuries as a result of Officer Dodds’ sexual assault.

97. Austin Police Department Officer Dodds' assault shocks the conscience. Without any legitimate reason, Officer Dodds entered Plaintiff's home at night, penetrated her without her consent, and proceeded to intentionally terrify her by driving by her home in his APD cruiser and calling her cell phone from blocked numbers.

98. Therefore, Austin Police Department Officer Dodds violated Doe's clearly established Fourteenth Amendment right to bodily integrity in such a way that clearly shocks the conscience and directly and proximately caused Doe to suffer significant injuries.

99. In addition, Austin Police Department Officer Dodds, while acting under color of law, entered Plaintiff Doe's home without permission and used excessive force on Plaintiff Doe by penetrating her with his penis without her consent in her own home.

100. Officer Dodds unlawfully entered Doe's home and then seized Doe by using force on her, trapping her in her bedroom, restraining her freedom to leave, and restraining her freedom to decline his unwanted sexual conduct and penetration.

101. Austin Police Department Officer Dodds' use of force was wholly excessive to any conceivable need, objectively unreasonable in light of clearly established law, conscience shocking and directly caused Plaintiff Doe to suffer serious injuries.

102. Therefore, Austin Police Department Officer Dodds violated Doe's clearly established Fourth Amendment rights.

103. Officer Dodds acted under color of law in the course of his violations of Plaintiff Doe's rights when he used his police investigation of her 911 call as pretext to find out where she lived, her phone number, and whether she would be vulnerable to his assault; used his police investigation as a pretext to contact her again and press unwanted sexual advances; used his police-issued phone to call her repeatedly before the sexual assault; used his APD badge and uniform to

gain access to her home; kept his uniform on—including his APD badge and APD issued gun—while sexually assaulting Doe; intimidated her nephew with his authority as a police officer as well as his uniform, badge, and service weapon; and terrified her with his service weapon and police authority. Officer Dodds also drove by her home in his APD cruiser in order to further terrify and intimidate her in an effort to prevent her from reporting the misconduct and prepare to attack her again.

104. As a direct and proximate result of Austin Police Department Officers Dodds' actions, Doe suffered and continues to suffer significant injuries.

105. Doe brings these claims pursuant to 42 U.S.C. § 1983.

B. PUNITIVE/EXEMPLARY DAMAGES – AS TO DEFENDANT DODDS

106. Plaintiff incorporates the preceding paragraphs as if alleged herein.

107. Defendant's conduct was egregious, reckless, and endangered countless community members. Plaintiff seeks punitive damages as well to deter future similar violations of constitutional rights.

C. FOURTH AND FOURTEENTH AMENDMENT – FAILURE TO TRAIN, SUPERVISE, AND PROTECT AS TO DEFENDANT CITY OF AUSTIN

108. Plaintiff incorporates the preceding paragraphs as if alleged herein.

109. The City of Austin, had the following policies, practices, or customs in place when APD Officer Dodds sexually assaulted Doe:

- a. Failure to train officers about preventing sexual harassment and sexual assault;
- b. Failure to supervise officers known or that should have been known to have sexually harassed or sexually assaulted in the past;
- c. Failure to discipline officers for domestic violence or sexual assault in the past;

- d. Wrongfully clearing complaints that officers and members of the public engaged in sexual assault;
- e. Wrongfully failing to investigate complaints that officers and members of the public engaged in sexual assault;
- f. Adopting a culture of tolerance for sexual violence and unjustified skepticism of reports of sexual violence;
- g. Failure to adequately investigate officers' history of sexual harassment or sexual assault in the past;
- h. Failure to protect the public from known dangerous servants while giving them the tools and authority to perpetrate attacks on innocent civilians with impunity; and
- i. Failure to investigate APD officers accused of sexual assault.

110. Each of the policies, practices, or customs delineated above was actually known, constructively known, approved, and/or ratified by City of Austin and its policymaker for law enforcement purposes, Chief of Police, Brian Manley, and was promulgated with deliberate indifference to Doe's Fourth and Fourteenth Amendment rights under the United States Constitution. Moreover, the known and obvious consequence of these policies, practices, or customs was that Austin Police Department officers would be placed in recurring situations where constitutional violations similar to those inflicted on Doe would result. Accordingly, these policies also made it highly predictable that the particular violations alleged here, all of which were under color of law, would result.

111. Consequently, the policies and conduct delineated above were a moving force of Plaintiff's constitutional deprivations and injuries, and proximately caused severe damages to Plaintiff.

112. Plaintiff Doe brings this claim pursuant to 42 U.S.C. § 1983.

V. DAMAGES

113. Plaintiff Doe seeks the following damages:

- a. Past and future medical expenses;
- b. Past and future economic damages, including (but not limited to) loss of earning capacity;
- c. Past and future physical pain and mental anguish;
- d. Past and future impairment;
- e. Past and future disfigurement;
- f. Punitive damages at to Defendant Dodds only;
- g. Loss of consortium; and,
- h. Attorneys' fees pursuant to 42 U.S.C. § 1988.

VI. JURY DEMAND

114. Pursuant to Federal Rule of Civil Procedure 48, Plaintiff hereby requests a jury trial.

VII. PRAYER FOR RELIEF

115. To right this injustice, Plaintiff requests the Court:

- a. Award compensatory damages against Defendants;
- b. Award exemplary damages against Defendant Dodds only;
- c. Award Plaintiff costs and fees, including but not limited to expert fees and attorneys' fees, pursuant to 42 U.S.C. § 1988;
- d. Award pre-judgment and post-judgment interest at the highest rate allowable under the law; and,
- e. Award and grant such other just relief as the Court deems proper.

Dated: March 30, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature below I certify that a true and correct copy of this document has been filed with the Court's electronic case filing system. No other parties have appeared to be served via this filing. Diligent efforts to serve this filing will be made in accordance with the Federal Rules of Civil Procedure.

/s/ Jeff Edwards

Jeff Edwards

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

JANE DOE,
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CITY OF AUSTIN and WALTER
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CIVIL ACTION NO. 1:22-cv-00299

DEFENDANT CITY OF AUSTIN’S MOTION TO DISMISS

TO THE HONORABLE ROBERT PITTMAN, UNITED STATES DISTRICT JUDGE:

Defendant City of Austin (the “City”), files this Motion to Dismiss Plaintiffs’ Complaint (Doc. 1) pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). In support of the Motion, City respectfully shows the following:

I. Summary of Motion

In this civil rights case, Plaintiff, the victim of an alleged sexual assault, sued the City claiming it violated her rights under the fourth and fourteenth amendments to the U.S. Constitution¹ by fostering a culture within its police department wherein sworn officers believed it was OK for them to commit sex crimes on duty. By Plaintiff’s theory, the City somehow tacitly promoted the idea of its officers committing sex crimes, thus the City’s actions were the “moving

¹ While this motion focuses on the lack of municipal liability for Dodd’s actions, Plaintiff has also failed to clearly allege a constitutional violation. The 5th Circuit has found an instance where sexual assault by a government employee violated the substantive due process clause of the 14th Amendment. *Doe v. Taylor Indep. School Dist.*, 15 F.3d 443, 451 (5th Cir. 1994). But the 5th Circuit has also held that supervisory employees or the government can only be held liable for 14th Amendment substantive due process violations involving sexual abuse if the official or government learned of a pattern of inappropriate sexual behavior by the subordinate and acted with deliberate indifference to stop or prevent the abuse. *Id.* at 454; *Whitley v. Hanna*, 726 F.3d 631, 640 (5th Cir. 2013). This is not alleged in this case. There is very little case law on the issue of whether a sexual assault by an officer violates the 4th Amendment and given that Plaintiff does not allege she was under arrest or detained at the time of her assault, it is arguable this assault would not fit as a 4th Amendment violation. *Guillot v. Castro*, No. 17-6117, 2018 WL 3475294, at *6 (E.D. La. July 19, 2018) (citing *Rogers v. City of Little Rock*, 152 F.3d 790, 795 (8th Cir. 1998) (noting that sexual assault by an officer “does not fit the mold of a typical fourth amendment search and seizure case”)).

force” of former officer Dodds’ crimes, thereby entitling Plaintiff to damages from the City caused by Dodds’ actions.

Factually, nothing could be further from the truth. Legally, Plaintiff’s theory ignores well-established constitutional authority that wisely prohibits *respondeat superior* liability in claims such as these. Plaintiff’s pleading seeks to pioneer new frontiers of municipal culpability for the unauthorized acts of (former) employees who commit crimes. Neither the alleged facts or the law support a claim against the City. That claim must be dismissed.

II. Facts Alleged in Complaint

A. Dodds sexually assaults Plaintiff in April 2020.

Plaintiff’s Original Complaint details a sexual assault that took place on the evening of April 18, 2020. Earlier that evening, Plaintiff alleges her family summoned police to her apartment after she and her boyfriend quarreled and he tried to kill himself. *Dkt. 1, ¶8-11*. Defendant Walter Dodds, then an officer with the Austin Police Department (APD), responded to the call and interviewed plaintiff and her boyfriend at the scene. *Dkt. 1, ¶11-12*. Dodds determined the boyfriend was dangerous and needed to be hospitalized, which EMS on the scene confirmed. *Dkt. 1, ¶13-14*. Plaintiff alleges while Dodds was interviewing her, he asked for her phone number so he could let her know where her boyfriend was taken. *Dkt. 1, ¶15*. Before leaving the scene, Dodds asked Plaintiff “about locking the door” and told her “What if someone sneaks in there? You don’t want to be sleeping with some dude in there with you.” *Dkt. 1, 15-17*. Dodds then took the boyfriend to the hospital. Later, Dodds called Plaintiff on his APD-issued phone, told her where her boyfriend was and “began to ask if he could come over” and “take off his uniform.” Plaintiff did not agree to that and the call ended. *Dkt. 1, ¶18-21*.

Dodds phoned Plaintiff several more times that night but she did not answer and went to bed around 9:00 p.m. *Dkt. 1, ¶¶22-23*. Later, while she was sleeping, Dodds returned to Plaintiff's apartment in his APD uniform, knocked on the door and was let in by her nephew. *Dkt. 1, ¶¶24-25*. There is no allegation Dodds was conducting a police search, interviewing anyone or carrying out any other police business. He entered Plaintiff's apartment and went to her bedroom, shutting the door behind him. Plaintiff woke up to Dodds sexually assaulting her. *Dkt. 1, ¶¶26-28*. Dodds ejaculated on Plaintiff's bed, then left the apartment where Plaintiff "remained terrified." *Dkt. 1, ¶¶30*. She alleges in the days that followed, Dodds phoned her several times and they spoke at least twice. His APD vehicle was once seen driving near Plaintiff's apartment complex. *Dkt. 1, ¶¶32-38*. Ten days after the sexual assault, on April 29, Plaintiff reported what had happened to APD. *Dkt. 1, ¶¶39*. On September 10, 2020, Dodds was indicted for sexual assault and official oppression. *Dkt. 1, ¶¶40*. Those criminal charges remain pending.²

B. Allegations APD "culture" tolerated officers committing sex crimes and ignored reports of sexual assaults.

Plaintiff does not allege any APD managers, or anyone else employed there, were aware of Dodds' sexual assault, that he was carrying out any police duties at the time he committed the crime, or that APD management responded to her criminal complaint improperly. Rather, Plaintiff alleges APD had a culture of tolerating sexual misconduct by its officers. Specifically, Plaintiff claims APD failed to properly train officers to prevent sexual harassment and assault, wouldn't supervise known sexual harassers on the force, wouldn't discipline officers for domestic violence, "wrongfully-cleared" officers who sexually assaulted people and "wrongfully failed to investigate" such complaints, wouldn't "adequately investigate" officers with a "history of sexual

² APD put Dodds on restricted duty the day after Plaintiff reported the assault. Dodds remained on restricted duty pending an internal affairs investigation until he quit APD on August 31, 2020. The City does not represent Dodds in this case.

harassment or sexual assault”, and “failed to protect the public from known “dangerous servants” by allowing them to “attack . . . innocent civilians” with impunity. *Dkt. 1, ¶109.*

As explained below, the actual *facts* alleged by Plaintiff do not support these rhetorical characterizations of unrelated events, many of which go back for more than a decade before Dodds’ assault of the Plaintiff. In fact, as explained below, the actual facts alleged in the Complaint demonstrate APD *did* take action against police officers who were determined to have assaulted females, firing one in 2018 “for allegedly beating his then-girlfriend, including by strangling her during sex.” *Dkt. 1, ¶49.* Yet the Complaint finds fault with APD even for that action.

Plaintiff sued Dodds in his individual capacity for violating her Fourth and Fourteenth Amendment rights under 42 U.S.C. §1983, when he assaulted her. She sued the City on the same claims, asserting Dodds’ assault was “highly predictable” because of the “policies, practices, or customs” of the City, which were “a moving force” of Dodds’ crime. *Dkt. 1, ¶109-111.*

III. ARGUMENT AND AUTHORITY

A. The law regarding dismissal motions under Rule 12(b)(1) and (6).

Dismissal of a complaint is appropriate under Federal Rule of Civil Procedure 12(b)(1) when the court lacks statutory or constitutional power to adjudicate the claims at issue. *Geraci v. City of Austin*, 1:19-CV-340-SH, 2020 WL 1644004, at *2 (W.D. Tex. April 2, 2020) (*citing Home Builders Ass’n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998)). That is because a plaintiff who fails to plead a cognizable claim against a governmental entity under §1983 thereby fails to overcome the entity’s governmental immunity. *See id.*, at *4. When, as here, a 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the jurisdiction issues presented under Rule 12(b)(1) before addressing any attack on the merits. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

Relatedly, Rule 12(b)(6) permits a court to dismiss a complaint for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). To overcome a motion to dismiss under Rule 12(b)(6), the plaintiff must plead sufficient facts to state a claim for relief that is facially plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “[D]ismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief.” *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 624 (5th Cir. 2001) (quoting *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995)). “[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.” *Taylor v. Books A Million*, 296 F.3d 376, 378 (5th Cir. 2002) (quoting *S. Christian Leadership Conference v. Supreme Court of State of La.*, 252 F.3d 781, 786 (5th Cir. 2001)). Thus, a court considering a motion to dismiss may begin by identifying pleadings that “because they are no more than conclusions, are not entitled to the assumption of truth.” *Ashcroft*, 556 U.S. at 679.

B. The law regarding municipal liability for alleged constitutional under 42 U.S.C. §1983.

A municipality such as the City of Austin may be liable for constitutional violations under 42 U.S.C § 1983, but there is no *respondeat superior* liability. See *Monell v. Dep’t of Social Services of City of New York*, 436 U.S. 658, 691 (1978). A municipality is only liable for “acts directly attributed to it ‘through some official action or imprimatur.’” *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009) (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)). To proceed with a §1983 claim against a city, a plaintiff must “show the deprivation of a federally protected right caused by action taken ‘pursuant to an official municipal

policy.’” *Valle v. City of Houston*, 613 F.3d 536, 541 (5th Cir. 2010) (quoting *Monell*, 436 U.S. at 691). In order to impose §1983 liability on a city, “[a] plaintiff must identify, ‘(1) an official policy (or custom), of which (2) policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose ‘moving force’ is that policy or custom.” *Valle*, 613 F.3d at 541-42 (quoting *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002)).

As to the first requirement, a policy or custom is official only “when it results from the decision or acquiescence of the municipal officer or body with final policymaking authority over the subject of the offending policy.” *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); *Peterson*, 588 F.3d at 847. To establish the “moving force” requirement, a plaintiff must show a direct causal link between the policy and the constitutional violation. That is, “the plaintiff must demonstrate that a municipal decision reflects a deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision.” *Bd. of the County Comm’rs v. Brown*, 520 U.S. 397, 404 (1997); *Valle*, 613 F.3d at 543. Deliberate indifference is a high standard – a showing of simple or even heightened negligence will not suffice. *Piotrowski v. City of Houston*, 237 F.3d 567, 580 (5th Cir. 2001). Deliberate indifference requires proof that a city disregarded a known or obvious consequence of its action. *Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005). These requirements guard against improvident litigation that seeks to impose common law *respondeat superior* liability on government entities such as cities under the guise of a constitutional rights violation.

C. Plaintiff has not alleged an actionable *Monell* claim under a theory of failure to train.

Plaintiff claims the City is liable for “failure to train, supervise, and protect” Austin citizens. *Dkt. 1*, §IV(C). As for the training claim, a municipality’s culpability for deprivation of constitutional rights is at its most tenuous where a claim turns on a failure to train. *Connick v.*

Thompson, 563 U.S. 51, 61 (2011). Claims of inadequate training generally require that plaintiff demonstrate a pattern of violations. *Sanders-Burns v. City of Plano*, 594 F.3d 366, 381 (5th Cir. 2010), (*Snyder v. Trepagnier*, 142 F.3d 791, 799 (5th Cir. 1998) (“proof of a single...incident ordinarily is insufficient to hold a municipality liable for inadequate training.”). As with the insufficient policy claim, a municipality can be liable for failing to train its employees when the city’s failure shows “a deliberate indifference to the rights of the inhabitants.” *Farmer v. Brennan*, 511 U.S. 825, 840 (1994). “In this regard, a plaintiff must show that “in light of the duties assigned to specific officers or employees, the need for more or different training is obvious, and the inadequacy so likely to result in violations of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need.” *Sanders-Burns v. City of Plano*, 594 F.3d at 382 (5th Cir. 2010) citing *City of Canton, Ohio v. Harris*, 489 U.S. at 390 (1989). Proving that an injury could have been avoided had a government employee been better or more trained to avoid the particular injury-causing conduct will not suffice to meet a §1983 plaintiff’s burden. *Canton, supra*, at 391.

Here, Plaintiff alleges no facts whatsoever regarding how APD trained any officers during the relevant period on handling reports of sexual assaults, how to prevent of sexual harassment, or any other aspect of the job. As for Dodds, Plaintiff make no factual allegations whatsoever regarding his APD training. To prevail on a failure to train claim, plaintiff must allege with specificity how a city’s training program is inadequate. *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005). Plaintiff’s bald, conclusory legal assertion that Dodds’ training was somehow inadequate will not support a claim. *Dkt. 1, ¶109. Ratliff v. Aransas Cty.*, 948 F.3d. 281, 285 (5th Cir. 2020) (holding conclusory statements in complaint alleging deficiency in training caused a violation of constitutional rights does not state a claim for relief under Rule 12(b)(6)).

The notion that Austin police officers, unlike other citizens, must receive special training on how to avoid sexually assaulting people (a criminal act in any jurisdiction) is extraordinary.

Furthermore, there is no alleged “pattern” of violations that would demonstrate a training deficiency caused Dodds to sexually assault the Plaintiff. Claims of inadequate supervision and claims of inadequate training both generally require that the plaintiff demonstrate a pattern of similar violations. *Burge v. St. Tammany Parish*, 336 F.3d 363, 370 (5th Cir. 2003) *citing* *Thompson v. Upshur Cty*, 245 F.3d 447, 459 (5th Cir. 2001)(“Just as proof of a custom or practice requires more than a showing of isolated acts, proof of deliberate indifference, generally requires a showing of more than a single instance of the lack of training or supervision causing a violation of constitutional rights”). For example, in *Posos*, a woman sued a city after a police officer sexually assaulted her. *Posos v. City of San Antonio*, 463 F.App’x 303, 304 (5th Cir. 2012). The woman did not allege that other police officers had engaged in similar conduct, and she did not establish that the city had actual or constructive notice of similar acts by the police officer at issue. *Id.* at 305. Thus, she was unable to establish that the City acted with deliberate indifference. *Id.* Furthermore, the Fifth Circuit recently held that evidence of decade old past systemic issues with a police department does not necessarily support a showing of “a pattern of similar violations at the time [the plaintiff’s] own rights were violated. *Gomez v. Galman*, 18 F.4th 769, 779-80 (5th Cir. 2021) (holding that reliance on a Department of Justice (“DOJ”) investigation and independent report into problematic hiring policies does not create a pattern to support deliberate indifference, when the facts alleged related to the report include no discussion of similar, contemporaneous violations to the claims alleged by plaintiff).

Here, there are no facts alleged regarding Dodds' history at APD – good or bad. To establish a pattern for §1983 purposes, there must be “similar violations” meaning the prior acts must be “fairly similar to what ultimately transpired.” *Estate of Davis*, 406 F.3d at 383. There are no allegations of any prior violations, similar or otherwise, by Dodds and no facts that would show his assault of Plaintiff was the continuation of an established pattern. The Complaint's reference to misdeeds by other APD officers in the past fails to establish an actual pattern. Of the three allegations made related to other officers, none of the incidents involved an officer sexually assaulting a citizen while on the job. The first allegation, from 2008 twelve years before Plaintiff's assault, involved an APD sergeant sexually *harassing* a co-worker. *Dkt. 1*, ¶42. The second, from 2014, involved *inappropriate comments* made by two officers to a female passerby which were recorded on the officers' body-worn cameras. *Dkt. 1*, ¶43-44. This is hardly comparable to Dodds' alleged sexual assault.³ The third allegation involved officer Jason Dusterhoff's domestic violence and sexual assault of his established intimate partner (his girlfriend).⁴ *Dkt. 1*, ¶49. While alleged conduct of this kind is very serious, it is not the same kind of conduct alleged here by Dodds. In any event, for Plaintiff to suggest Dusterhoff and Dodds both assaulted females because APD neglected to train them not to is not support by the facts, the law or common sense.

Furthermore, references to alleged systemic issues related to the Department's investigations of sexual assaults and a report finding “sexism” within the Department does not establish a pattern, just as the DOJ investigation and report in *Gomez* failed to establish a pattern of conduct that can support a *Monell* claim. *See Gomez*, 18 F.4th at 779-80. Most of the incidents alleged by plaintiff occurred years before the facts underlying her claim. *Dkt. 1*, ¶79-87.

³ The Complaint notes “upon information and belief” both officers were disciplined by APD, but “not seriously” enough. *Dkt. 1*, ¶44. Regardless of Plaintiff's view on the appropriateness of the discipline given, the allegation does not support the conclusion that APD somehow promoted sexual assaults by its officers.

⁴ As alleged in the petition, this employee, Commander Jason Dusterhoff, was terminated as discipline for this conduct.

Additionally, these types of alleged failures are wholly dissimilar to the conduct alleged in this case—they involve investigating reported criminal conduct, not APD officers committing criminal acts. Notably, in this case Dodds was criminally investigated and is under criminal prosecution for these acts, contrasting this case starkly from the other allegations made relating to sexual assault investigations and prosecutions. *Dkt. 1, ¶40.*

D. Plaintiff has also failed to plead a cognizable *Monell* claim under the theory of failure to supervise.

An inadequate supervision claim requires much of the same proof as a failure to train claim, including showing a failure to supervise, a causal connection between the lack of supervision and the violation of rights, and deliberate indifference to constitutional rights. *Doe v. Taylor Indep. School Dist.*, 15 F.3d 443, 452-53 (5th Cir. 1994). Additionally, for an inadequate supervision claim, “to support a supervisory liability claim, the misconduct of a subordinate must be conclusively linked to the action or inaction of the supervisor.” *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 169 (5th Cir. 2010). Here, it is significant the pleading alleges only one prior incident of an APD officer committing a sex crime: Dusterhoft. But in that instance, the pleading makes clear APD Chief Brian Manley *-fired* Dusterhoft in 2018 for beating up his girlfriend, strangling her during sex. *Dkt. 1, ¶29-51.* The fact that Dusterhoft was fired for assaulting his girlfriend in no way supports the conclusion that APD, then or in 2020, had a pattern tolerating sexual assaults by officers. In fact, it shows the opposite.

As mentioned already above, Plaintiff alleges that in 2008, Chief Manley’s predecessor at APD, Chief Acevedo fired an officer for sexually harassing a coworker, then rescinded the termination. *Dkt. 1, ¶42.* This incident, which happened under a different chief and a dozen years before Dodds assaulted Plaintiff, does not evidence a pattern of APD management turning a blind eye to sex crimes by its officers. Dodds’ did not sexually harass Plaintiff, he sexually *assaulted*

her. The two are incomparable, even if APD *had not* fired the harassing officer in 2008. Likewise, Plaintiff's allegation that in 2014 Chief Acevedo "did not seriously discipline" two APD officers who whistled at and made comments to a female passerby is in no way similar to the criminal conduct Plaintiff alleges against Dodds. *Dkt. 1, ¶43*. Comparing these alleged and dissimilar instances, which took place in different decades, by different individuals, under different commands and under different circumstances, does not establish a pattern of poor training or supervision at APD that would support municipal liability under §1983. *See Gomez*, 18 F.4th at 778) (upholding dismissal of City under Rule 12(b) where plaintiff attempted to establish deliberate indifference in the hiring of an officer through dissimilar misconduct by officer and through decade old issues with recruitment and retention).

Finally, the pleading includes no allegations or facts that would have indicated to APD that Dodds needed additional supervision before he assaulted Plaintiff. Notably, there are no allegations that APD was aware of prior sexually inappropriate behavior by Dodds, or any other troubling conduct. This cuts against any assertion that the City acted with deliberate indifference by failing to supervise Dodds. *See Limon v. City of Balcones Heights*, 485 F.Supp.2d 751, 754 (W.D. Tex. 2007) (holding a City did not act with deliberate indifference by failing to act before officer committed a second sexual assault, when City did not have notice of the first sexual assault); *see Posos*, 463 F.App'x at 305 ("[Plaintiff] cannot demonstrate that the City acted with deliberate indifference to her rights...[S]he failed to present any evidence that the City had actual or constructive knowledge that [the officer] committed similar acts before his assault on her.")).

E. Plaintiff is unable to establish *Monell* liability by alleging a pattern that is tantamount to an official policy.

Finally, plaintiff appears to attempt to hold the City liable under a theory that a “culture” of sexism at APD and inadequate investigations into reported criminal sexual assaults somehow created a custom that amounts to a defacto municipal policy. Plaintiff’s amorphous characterization of a perceived “culture” at the police department is not a substitute for the pleading requirements to establish municipal liability under §1983. Official policy can be established by “a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.” *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984). To establish a policy by alleging a pattern, the prior incidents must have occurred over a length and frequency to attribute knowledge of the conduct to the governing body such as to establish the conduct is accepted and expected. *Peterson v. City of Fort Worth*, 588 F.3d 838, 850 (5th Cir. 2009). Additionally, “[a] pattern requires similarity and specificity; ‘[p]rior indications cannot simply be for any and all ‘bad’ or unwise acts, but rather must point to the specific violation in question.’” *Id.* at 851 (quoting *Estate of Davis*, 406 F.3d at 383).

Here, as already detailed in this motion, Plaintiff attempts to establish a policy through a pattern by relying on dissimilar acts, most of which happened years ago. First, Plaintiff attempts to establish a pattern by pointing to the three alleged incidents involving misconduct by APD officers: the 2008 sexual harassment by an APD sergeant, the 2014 inappropriate verbal comments caught on body camera footage, and the 2018 sexual assault by Dusterhoft of his girlfriend. *Dkt. 1*, ¶42-51. As stated above, only the Dusterhoft incident involved sexual assault by an AFD employee and, as the Plaintiff alleges, APD terminated him. This does not support a theory that APD somehow had a custom of allowing officers to commit sexual assault.

Second, Plaintiff suggests APD's "culture" of sexism was established by the Department's failure to adequately investigate reports of sex crimes committed by third parties. This allegation does not demonstrate a "custom" at APD of ignoring, or condoning, criminal acts by officers. As her strained theory goes, this "culture" created a custom where police officers believed they would be allowed to commit sexual assaults with impunity. This theory fails because the law requires "similarity and specificity" to establish a custom through a pattern. *Peterson*, 588 F.3d at 851. Charges of "sexism" in the workplace and purported failings in conducting sufficient criminal investigations are in no way similar to officers sexually assaulting citizens. Plaintiff has attempted to show a pattern by listing out various unrelated, "unwise" actions that have occurred at APD rather than pointing to specific, similar instances of conduct. *Estate of Davis*, 406 F.3d at 383. This approach fails. *See id.* at 383-84 (no pattern where prior acts, while demonstrating a lack of judgment and perhaps illegalities, did not involve behavior related to use of force on a third party).

Furthermore, as in *Gomez*, references to a report looking at past systemic issues within the department does not establish a policy of deliberate indifference when the references to the report do not "discuss specific conduct of officers like what is alleged [in the present case]." *Gomez*, 18 F.4th at 779. Thus, the allegations regarding a report by Lisa Tatum about a "culture of sexism" at APD, the audit by DPS, and other allegations about issues relating to sexual assault investigations does not establish municipal liability under *Monell*. *See Dkt. 1*, ¶¶52-54, 72-73.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant City of Austin respectfully requests that Plaintiff's claims against the City be dismissed, and that the City be awarded any other relief to which it may be entitled.

RESPECTFULLY SUBMITTED,

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

/s/ Paul Matula

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ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

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 2nd day of May, 2022.

Via CM/ECF:

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ATTORNEYS FOR PLAINTIFF

/s/ Paul Matula

PAUL MATULA

3. Admitted in part; denied in part. Defendant admits only that Defendant was at the time of this incident an Austin Police Department officer, and that he is sued in his individual capacity for compensatory and punitive damages. Defendant denies that he can be served at 715 E. 8th Street, Austin, TX 78701 and denies that attorneys Douglas K. O'Connell or Ken Ervin represent him in this matter such that they may receive service of process for him. Defendant admits that he may be served at his home in Lexington, TX, or wherever he may be found. Defendant admits that he was acting under color of law as an Austin Police Department officer at all relevant times.

II. JURISDICTION AND VENUE

4. Defendant states that the allegations in paragraph 4 of the Complaint call for a legal conclusion and therefore no answer is required.

5. Defendant states that the allegations in paragraph 5 of the Complaint call for a legal conclusion and therefore no answer is required.

6. Defendant states that the allegations in paragraph 6 of the Complaint call for a legal conclusion and therefore no answer is required.

7. Defendant states that the allegations in paragraph 7 of the Complaint call for a legal conclusion and therefore no answer is required.

III. FACTS

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the Complaint.

9. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 of the Complaint.

10. Defendant is without knowledge or information sufficient to form a belief as to

the truth of the allegations in paragraph 10 of the Complaint.

11. As to the allegations contained in paragraph 11 of the Complaint, Defendant admits to responding and arriving on scene while on duty. As to the remainder of the allegations in paragraph 11 of the Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations.

12. Defendant admits to the allegations in paragraph 12 of the Complaint.

13. Defendant admits to the allegations in paragraph 13 of the Complaint.

14. Defendant admits to the allegations in paragraph 14 of the Complaint.

15. Defendant denies the allegations in paragraph 15 of the Complaint.

16. Defendant denies the allegations in paragraph 16 of the Complaint.

17. Defendant denies the allegations in paragraph 17 of the Complaint.

18. As to the allegations in paragraph 18 of the complaint, Defendant admits to accompanying A.G. to the hospital and the completion of documentation for A.G.'s emergency detention.

19. Defendant denies the allegations in paragraph 19 of the Complaint.

20. Defendant denies the allegations in paragraph 20 of the Complaint.

21. Defendant denies the allegations in paragraph 21 of the Complaint.

22. Defendant denies the allegations in paragraph 22 of the Complaint.

23. Defendant denies the allegations in paragraph 23 of the Complaint.

24. Defendant denies the allegations in paragraph 24 of the Complaint.

25. Defendant denies the allegations in paragraph 25 of the Complaint.

26. Defendant denies the allegations in paragraph 26 of the Complaint.

27. Defendant denies the allegations in paragraph 27 of the Complaint.

28. Defendant denies the allegations in paragraph 28 of the Complaint.

29. Defendant denies the allegations in paragraph 29 of the Complaint.

30. Defendant denies the allegations in paragraph 30 of the Complaint.

31. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31 of the Complaint.

32. Defendant denies the allegations in paragraph 32 of the Complaint.

33. Defendant denies the allegations in paragraph 33 of the Complaint.

34. Defendant denies the allegations in paragraph 34 of the Complaint.

35. Defendant denies the allegations in paragraph 35 of the Complaint.

36. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36 of the Complaint.

37. Defendant denies the allegations in paragraph 37 of the Complaint.

38. Defendant denies the allegations in paragraph 38 of the Complaint.

39. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 39 of the Complaint.

40. Defendant admits to the allegations in paragraph 40 of the Complaint.

41. The allegations contained in paragraph 41 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 41 of the Complaint.

42. The allegations contained in paragraph 42 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge

or information sufficient to form a belief as to the truth of the allegations contained in paragraph 42 of the Complaint.

43. The allegations contained in paragraph 43 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 43 of the Complaint.

44. The allegations contained in paragraph 44 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 44 of the Complaint.

45. The allegations contained in paragraph 45 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 45 of the Complaint.

46. The allegations contained in paragraph 46 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 46 of the Complaint.

47. The allegations contained in paragraph 47 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 47 of the Complaint.

48. The allegations contained in paragraph 48 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 48 of the Complaint.

49. The allegations contained in paragraph 49 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 49 of the Complaint.

50. The allegations contained in paragraph 50 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 50 of the Complaint.

51. The allegations contained in paragraph 51 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 51 of the Complaint.

52. The allegations contained in paragraph 52 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 52 of the Complaint.

53. The allegations contained in paragraph 53 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge

or information sufficient to form a belief as to the truth of the allegations contained in paragraph 53 of the Complaint.

54. The allegations contained in paragraph 54 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 54 of the Complaint.

55. The allegations contained in paragraph 55 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 55 of the Complaint.

56. The allegations contained in paragraph 56 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 56 of the Complaint.

57. The allegations contained in paragraph 57 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 57 of the Complaint.

58. The allegations contained in paragraph 58 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 58 of the Complaint.

59. The allegations contained in paragraph 59 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 59 of the Complaint.

60. The allegations contained in paragraph 60 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 60 of the Complaint.

61. The allegations contained in paragraph 61 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 61 of the Complaint.

62. The allegations contained in paragraph 62 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 62 of the Complaint.

63. The allegations contained in paragraph 63 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 63 of the Complaint.

64. The allegations contained in paragraph 64 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge

or information sufficient to form a belief as to the truth of the allegations contained in paragraph 64 of the Complaint.

65. The allegations contained in paragraph 65 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 65 of the Complaint.

66. The allegations contained in paragraph 66 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 66 of the Complaint.

67. The allegations contained in paragraph 67 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 67 of the Complaint.

68. The allegations contained in paragraph 68 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 68 of the Complaint.

69. The allegations contained in paragraph 69 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 69 of the Complaint.

70. The allegations contained in paragraph 70 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 70 of the Complaint.

71. The allegations contained in paragraph 71 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 71 of the Complaint.

72. The allegations contained in paragraph 72 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 72 of the Complaint.

73. The allegations contained in paragraph 73 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 73 of the Complaint.

74. The allegations contained in paragraph 74 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 74 of the Complaint.

75. The allegations contained in paragraph 75 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge

or information sufficient to form a belief as to the truth of the allegations contained in paragraph 75 of the Complaint.

76. The allegations contained in paragraph 76 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 76 of the Complaint.

77. The allegations contained in paragraph 77 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 77 of the Complaint.

78. The allegations contained in paragraph 78 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 78 of the Complaint.

79. The allegations contained in paragraph 79 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 79 of the Complaint.

80. The allegations contained in paragraph 80 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 80 of the Complaint.

81. The allegations contained in paragraph 81 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 81 of the Complaint.

82. The allegations contained in paragraph 82 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 82 of the Complaint.

83. The allegations contained in paragraph 83 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 83 of the Complaint.

84. The allegations contained in paragraph 84 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 84 of the Complaint.

85. The allegations contained in paragraph 85 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 85 of the Complaint.

86. The allegations contained in paragraph 86 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge

or information sufficient to form a belief as to the truth of the allegations contained in paragraph 86 of the Complaint.

87. The allegations contained in paragraph 87 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 87 of the Complaint.

88. The allegations contained in paragraph 88 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 88 of the Complaint.

89. The allegations contained in paragraph 89 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 89 of the Complaint.

90. The allegations contained in paragraph 90 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 90 of the Complaint.

91. The allegations contained in paragraph 91 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 91 of the Complaint.

92. The allegations contained in paragraph 92 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 92 of the Complaint.

93. Defendant denies the allegations in paragraph 93 of the Complaint.

IV. CAUSES OF ACTION

94. Defendant responds to the allegations contained in paragraph 94 of the Complaint in the same manner as Defendant's answers in paragraphs 1 through 93, inclusive, hereinabove, the contents of which are incorporated by reference as though fully recited herein.

95. Defendant denies the allegations in paragraph 95 of the Complaint.

96. Defendant denies the allegations in paragraph 96 of the Complaint.

97. Defendant denies the allegations in paragraph 97 of the Complaint.

98. Defendant denies the allegations in paragraph 98 of the Complaint.

99. Defendant denies the allegations in paragraph 99 of the Complaint.

100. Defendant denies the allegations in paragraph 100 of the Complaint.

101. Defendant denies the allegations in paragraph 101 of the Complaint.

102. Defendant denies the allegations in paragraph 102 of the Complaint.

103. Defendant denies the allegations in paragraph 103 of the Complaint.

104. Defendant denies the allegations in paragraph 104 of the Complaint.

105. The allegations in paragraph 105 of the Complaint recite and purport to recite specific provisions of law and call for a legal conclusion that do not require a response.

However, to the extent that a response may be required, Defendant denies the allegations of this paragraph 105 to the extent that it asserts or is deemed as asserting any unlawful or improper

actions on the part of Defendant and Defendant refers all questions of fact and law to this Court for determination.

106. Defendant responds to the allegations contained in paragraph 106 of the Complaint in the same manner as Defendant's answers in paragraphs 1 through 105, inclusive, hereinabove, the contents of which are incorporated by reference as though fully recited herein.

107. Defendant denies the allegations in paragraph 107 of the Complaint.

108. Defendant responds to the allegations contained in paragraph 108 of the Complaint in the same manner as Defendant's answers in paragraphs 1 through 107, inclusive, hereinabove, the contents of which are incorporated by reference as though fully recited herein.

109. Defendant denies the allegations of this paragraph 109 of the Complaint to the extent that it asserts or is deemed as asserting any unlawful or improper actions on the part of Defendant. As to the remaining allegations in paragraph 109, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations.

110. Defendant denies the allegations of this paragraph 110 of the Complaint to the extent that it asserts or is deemed as asserting any unlawful or improper actions on the part of Defendant. As to the remaining allegations in paragraph 110, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations.

111. Defendant denies the allegations of this paragraph 111 of the Complaint to the extent that it asserts or is deemed as asserting any unlawful or improper actions on the part of Defendant. As to the remaining allegations in paragraph 111, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations.

112. The allegations in paragraph 112 of the Complaint recite and purport to recite specific provisions of law and call for a legal conclusion that do not require a response.

However, to the extent that a response may be required, Defendant denies the allegations of this paragraph 112 to the extent that it asserts or is deemed as asserting any unlawful or improper actions on the part of Defendant and Defendant refers all questions of fact and law to this Court for determination.

113. The allegations contained in paragraph 113 of the Complaint are not directed at Defendant. However, to the extent that a response is required, Defendant denies the allegations of this paragraph 113 to the extent that it asserts or is deemed as asserting any unlawful or improper actions on the part of Defendant. Defendant otherwise admits that Plaintiff seeks damages.

114. Defendant denies that Plaintiff is entitled to a jury trial for any cause of action.

115. Defendant denies that Plaintiff is entitled to any such relief as Plaintiff requests of the Court in paragraph 115 of the Complaint.

V. AFFIRMATIVE DEFENSES & IMMUNITIES

116. Defendant states the following defenses and immunities to the Complaint, without assuming the burden of proof on any such defense that would otherwise rest on Plaintiffs. Defendant reserves the right to amend and/or supplement its response to Plaintiff's allegations, as well as these defenses and immunities, as additional information is obtained through the discovery process or otherwise.

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

118. Defendant hereby invokes the doctrine of Qualified Immunity and Official Immunity. Defendant discharged his obligations and public duties in good faith and would show

that his actions that any actions he took at any relevant time were objectively reasonable in light of the law and with the information possessed at that time, and that he violated no clearly established law.

119. The incident in question and the resulting harm to the decedent were caused or contributed to by the decedent's own illegal and/or reckless conduct.

120. Pleading further, alternatively, and by way of affirmative defense, Defendant 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 the producing cause or the sole proximate cause of the incident in question and the alleged damages that arise therefrom. Defendants invoke the comparative responsibility provisions of the Texas Civil Practice & Remedies Code.¹

121. Defendant further pleads that, in the unlikely event they are found to be liable, that such liability be reduced by the percentage of the causation found to have resulted from the acts or omissions of the decedent.

122. Defendant pleads that he had legal justification for each and every action taken by them relating to this incident.

123. Defendant asserts the limitations and protections of Chapter 41 of the Texas Civil Practice & Remedies Code, and the due process clause of the United States Constitution.

124. Defendant asserts the limitations and protections of Chapter 101 of the Texas Civil Practice & Remedies Code.

125. To the extent Defendant did not address a specific averment made by Plaintiff in the Complaint, Defendant expressly denies all such averments.

VI. PRAYER

¹ See TEX. CIV. PRAC. & REM. CODE ANN. § 33.001.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:
1:22-cv-00299

PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS

The Court should deny Defendant City of Austin’s Rule 12 motion to dismiss. Doc. 8.

I. SUMMARY OF ARGUMENT

The City’s motion should be denied for four reasons.

First, the City’s cursory footnote argument that Dodds did not violate the constitution is incorrect. Dodds used his authority and equipment as an Austin Police Department officer to gather information about when Plaintiff would be vulnerable, illegally enter Plaintiff’s home, trap her in her bedroom, sexually assault her, and then harass and intimidate her. Doc. 1, pp. 2–5, ¶¶ 8–40. This conduct clearly violated both the Fourth and Fourteenth Amendments to the Constitution.

Second, the City of Austin’s longstanding policy failures foreseeably caused Dodds to sexually assault Plaintiff. For years, APD police chiefs ignored complaints about sexual harassment, sexist comments, and outright sexual assaults by officers, whilst simultaneously covering up the deficiencies of APD’s sex crimes division—including its bias against victims of sexual assault. Doc. 1, pp. 5–12, ¶¶ 41–93. Thus, contrary to the City’s motion, the City’s culture of sexual violence and sexist customs were a moving force of Dodds’ misconduct.

Third, the City incorrectly argues based on summary judgment and post-verdict decisions which do not apply the correct standard of review for the City's motion. *See, e.g., Converse v. City of Kemah*, 961 F.3d 771, 776 n.3 (5th Cir. June 12, 2020). Moreover, at the Rule 12 stage, Plaintiff is not required to know information that is solely held by APD, such as the details of supervision over Dodds during this incident, the applicable APD policies, other instances of sexual assault by APD officers, and the decision to hire and retain Officer Dodds.

Fourth, the motion to dismiss is premature. At the very least, Plaintiff needs the opportunity for discovery so that she can have a genuine opportunity to amend.

Accordingly, the Court should deny the City's motion.

II. FACTUAL BACKGROUND

This is a 42 U.S.C. § 1983 case arising from a sexual assault by a police officer filed on March 30, 2022. Doc. 1.

On April 18, 2020, Officer Dodds was called to Plaintiff Jane Doe's home after Plaintiff's boyfriend threatened to kill himself. Doc. 1, p. 1, ¶¶ 8–11. Defendant Dodds used the call to determine where Plaintiff lived and obtain her phone number. *Id.* at 1–2, ¶¶ 11–15. While at the scene, Defendant Dodds learned Plaintiff would be the only adult in the home after Dodds took her boyfriend away, and asked Plaintiff about locking her front door, saying “What if someone sneaks in there? You don't want to be sleeping with some dude in there with you.” *Id.* at 3, ¶¶ 15–17. Dodds later called Plaintiff from his APD phone and began to ask if he could come over and if Plaintiff would “take off his uniform.” *Id.* at 3, ¶¶ 18–21. Plaintiff never consented and hung up. *Id.* at 3, ¶¶ 20, 21. Dodds then called Plaintiff four more times from his APD-issued cell phone, but Plaintiff did not pick up. *Id.* at 3, ¶ 22.

Later that night, Dodds returned to Plaintiff's home and knocked on the door wearing his uniform and duty belt. Doc. 3, p. 4, ¶¶ 24–25. When Plaintiff's minor nephew opened the door, he saw a police officer, so did not call for help when Dodds walked directly into the home and Plaintiff's bedroom, where he shut the door behind him. *Id.* at 4, ¶¶ 25–26. Dodds then grabbed Plaintiff and repeatedly penetrated her with his penis without her consent. *Id.* at 4, ¶¶ 27–31.

In the days following the assault, Dodds used his APD cell phone and APD cruiser to terrify Plaintiff by calling her repeatedly and driving by her home. Doc. 1, pp. 4–5, ¶¶ 32–38. Dodds was eventually indicted for sexual assault and official oppression. *Id.* at 5, ¶¶ 38–40.

For more than a decade, APD has had a publicly deficient sex crimes unit. Doc. 1, pp. 7–12, ¶¶ 55–91. Among thousands of reported rapes, APD only made arrests in less than 10% of cases since 2011—in fact, from 2011 through 2018, despite receiving reports of more than 4,063 rapes, APD only made 112 arrests. *Id.* at 7, ¶¶ 55–64. These terrible results were known to City leadership, as the Mayor himself admitted Austin has “far too many sexual assaults that are resulting in too few perpetrators being taken off our streets.” *Id.* at 8, ¶ 69. The City Council specifically heard that APD had far worse performance in making sexual violence-related arrests compared to other crimes. *Id.* at 8, ¶ 68.

APD's highly public failures in sex crime policing resulted from three obviously problematic policies: First, APD had fewer than 20 sex crimes detectives, a disproportionately small number in light of the number of allegations that needed to be investigated. Doc. 1, p. 8, ¶¶ 66–67. Second, APD leadership pressured the sex crimes unit to cover up their abysmal performance by wrongly “exceptionally clearing” most cases—a decision that came directly from the police chief over the objections of the sex crimes unit. *Id.* at 8–9, ¶¶ 70–77. Finally, the sex crimes unit and APD in general suffered from misogynistic tendencies that prevented them from

pursuing those crimes: victims were routinely ignored or even disparaged by APD officers, with officers routinely refusing to investigate cases, particularly where, like here, the victim was impaired or where the female victim knew her male attacker. *Id.* at 6, 9–12, ¶¶ 46, 77–91.

APD’s failure to investigate emboldened predators within the force like Dodds during the same time frame. When similar allegations leaked, the former police chief dismissed claims that his male officers had sexually assaulted women, calling them complaints about “bad sex.” Doc. 1, pp. 5–6, ¶ 45. In 2014, the police chief did nothing to discipline officers who catcalled a woman from their patrol car and “joked” that if she called the police, then the police would not be able to “unrape you.” *Id.* at 5, ¶ 43. In 2008, APD found that a lieutenant had engaged in sexual harassment, but rescinded his discipline—until 2019 when that same official was arrested for sexual assault of a child. *Id.* at 5, ¶ 42. Despite these controversies, APD did nothing to root out the problems within its ranks and maintained a culture of sexism dangerous to women as late as 2020, based on a report ordered by the City itself. *Id.* at 6, ¶ 52.

Accordingly, Plaintiff alleges APD failed to supervise officers that have a history of sexual violence and harassment, wrongfully cleared complaints of sexual assault by officers, wrongfully failed to investigate complaints of sexual assault, maintained a culture of tolerance for sexual violence, and failed to protect the public from officers that it knew to be dangerous. Doc. 1, pp. 14–15, ¶ 109. Together, these policies and practices allowed Dodds to remain an officer and emboldened him to sexually assault and intimidate Plaintiff Doe using the equipment, training, and privileges of a police officer. *Id.* at 15, ¶¶ 110–111.

III. STANDARD OF REVIEW

Motions to dismiss for failure to state a claim are viewed with disfavor and rarely granted. *Calhoun v. Villa*, 761 Fed. App’x 297, 299 (5th Cir. 2019). When reviewing a motion to dismiss,

Courts are required to accept “all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.” *Lindquist v. City of Pasadena*, 525 F.3d 383, 386 (5th Cir. 2008) (internal citations omitted); *see also Richardson v. Axion Logistics, LLC*, 780 F.3d 304, 306 (5th Cir. 2015).

A claim is correctly pleaded when the facts go beyond “threadbare recital of the elements of a cause of action, supported by mere conclusory statements.” *Patrick v. Wal-Mart, Inc.-Store No. 155*, 681 F.3d 614, 622 (5th Cir. 2012) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “[T]he pleading standard Rule 8 announces does not require detailed factual allegations,” it only “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. “This standard simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of the necessary claims or elements.” *Morgan v. Hubert*, 335 Fed. App’x 466, 470 (5th Cir. 2009).

Moreover, when the government or its agents are the defendants, as is the case here, plaintiffs will often not have access to critical information before discovery. Thus, “only minimal factual allegations should be required at the motion to dismiss stage.” *Thomas v. City of Galveston*, 800 F. Supp. 2d 826, 842-43 (S.D. Tex. 2011) (Ellison, J.); *see Edmiston v. Culberson Cty., Texas*, No. EP-21-CV-132-KC, 2022 WL 452483, at *14 (W.D. Tex. Jan. 13, 2022) (Cardone, J.); *Bright v. City of Killeen, Texas*, No. 6:20-CV-431, 2021 WL 1226560, at *5 (W.D. Tex. Mar. 31, 2021) (Albright, J.); *Sanchez v. Gomez*, 283 F. Supp. 3d 524, 532 (W.D. Tex. Oct. 6, 2017) (Martinez, J.); *King v. City of Austin, Texas*, No. A-16-CA-1020-SS, 2017 WL 1097110, at *6 (W.D. Tex. Mar. 21, 2017) (Sparks, J.); *Crisp v. Dutton*, No. A-15-CV-0431-LY-ML, 2015 WL 7076483, *8 (W.D. Tex. Nov. 12, 2015) (Lane, Mag. J.); *see also Reyes v. City of Austin, Inc.*, No. 1:21-CV-00992-LY-SH, 2022 WL 789333, at *4 (W.D. Tex. Mar. 15, 2022) (Hightower, Mag. J.)

(allegation that “about 10 [or] so” similar wrongful arrests had occurred was sufficient for municipal liability pleading).

IV. ARGUMENT

The Court should deny the City’s motion to dismiss Plaintiff’s claims for four reasons.

A. Dodds violated Plaintiff’s constitutional rights.

Dodds plainly violated Plaintiff Doe’s Fourteenth Amendment right to bodily integrity as well as Plaintiff’s Fourth Amendment rights to be free from unreasonable seizure and unlawful entry. The City’s argument to the contrary, which it relegates to a single footnote, should be denied.

1. *Dodds violated Plaintiff’s Fourteenth Amendment right to bodily integrity.*

As the City’s own cited authority holds, sexual assault by a government employee, like Dodds, violates the victim’s right to bodily integrity under the substantive due process clause of the Fourteenth Amendment. *Doe v. Taylor Indep. School Dist.*, 15 F.3d 443, 451 (5th Cir. 1994) (“It is incontrovertible that bodily integrity is necessarily violated when a state actor sexually abuses a schoolchild and that such misconduct deprives the child of rights vouchsafed by the Fourteenth Amendment”). This principle has been repeatedly affirmed by the Fifth Circuit, including in cases where police officers sexually assaulted adult women.¹ And that is exactly what Plaintiff has pleaded—“Dodds, while acting under color of law, violated Plaintiff Doe’s substantive due process right to bodily integrity by penetrating her with his penis without her consent”—so the City’s contention that Plaintiff did not “clearly allege a constitutional violation” should be rejected. *Compare* Doc. 1, p. 12, ¶ 95 *with* Doc. 8, p. 1, n.1.

¹ See *Whitley v. Hanna*, 726 F.3d 631, 651 (5th Cir. 2013); *United States v. Sullivan*, 546 F. App’x 349, 351 (5th Cir. 2013); *United States v. Dillon*, 532 F.3d 379, 386 (5th Cir. 2008); *United States v. Guidry*, 456 F.3d 493, 507 (5th Cir. 2006).

2. *Dodds violated Plaintiff's Fourth Amendment right to be free from unreasonable seizure and unlawful entry.*

The Court should also reject the City's factually and legally erroneous criticism of Plaintiff's Fourth Amendment claims: The Fourth Amendment protects people from government intrusion in their persons and homes whether or not police formally detain their victims.

As to the unreasonable seizure, Dodds illegally entered Plaintiff's home, trapped her in her own bedroom, held her in place with his hands, and forcibly penetrated her vagina with his penis without her consent. Doc. 1, pp. 4, 13, ¶¶ 26, 28–29, 99–100. Obviously, there was no justification that permitted any force, much less a sexual assault. *See Graham v. Connor*, 490 U.S. 386, 396 (1989). One court in this district has specifically rejected the City's argument that the Fourth Amendment only protects people from sexual assault "in the course of an attempted arrest or apprehension of one suspected of criminal conduct." *Cerda v. Billingsley*, No. SA-09-CA-816-FB, 2012 WL 13034113, at *3 (W.D. Tex. Jan. 3, 2012). Similar to *Cerda*—where the officer allegedly followed his victim into her home without consent, claimed she had active warrants, grabbed her, and sexually assaulted her—here, when Dodds entered Plaintiff's home without permission, closed the door behind him, grabbed her, and forcibly penetrated her, he was "seizing" Plaintiff within the meaning of the Fourth Amendment. *Id.*

Moreover, Dodds' entry into Plaintiff's home and then her bedroom without consent from anyone was a separate Fourth Amendment violation. *See, e.g., Trent v. Wade*, 776 F.3d 368, 379 (5th Cir. 2015).

Accordingly, the Court should deny the City's footnote argument, as Plaintiff has alleged Dodds violated her Fourth and Fourteenth Amendment rights.

B. The City's deficient policies, customs, and supervision were a moving force of Dodds' sexual assault.

Plaintiff's complaint articulates three different policy failures that reflect deliberate indifference to the risk that officers like Dodds would engage in sexual violence.

A city is liable to civil rights plaintiffs "when the execution of a [city]'s policies or its customs deprives an individual of constitutional or federal rights." *Colle v. Brazos County*, 981 F.2d 237, 244 (5th Cir. 1993). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent as to practically have the force of law." *Hicks-Fields v. Harris Cty., Tex.*, 860 F.3d 803, 808 (5th Cir. 2017). A municipality is liable for its employees' episodic acts and omissions where there is deliberate indifference by the policymaker to "(1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy (or custom)." *Jauch v. Choctaw Cnty, Miss.*, 874 F.3d 425, 435 (5th Cir. 2017). Policies, conditions, and customs with a "mutually enforcing effect" should be considered together. *See Wilson v. Seiter*, 501 U.S. 294, 304 (1991); *Sanchez v. Young Cty., Texas*, 956 F.3d 785, 796 (5th Cir. 2020). Here, Plaintiff alleges three policy deficiencies that, both separately and in combination, trigger municipal liability.

First, Plaintiff alleges APD officers themselves engaged in a pattern of sexual violence going back years, but APD has failed to train, supervise, prosecute, or disciplined them. Doc. 1, pp. 6–7, 12, 14–15, ¶¶ 45, 92, 109(a–e, g, i), 110. "[T]he existence of a persistent pattern of illegal conduct, tolerated by municipal policymakers, tends to show that the subject conduct does not represent an unauthorized departure from lawful policy but instead represents the realization of an *unlawful policy*." *Milam v. City of San Antonio, Tex.*, 113 Fed. Appx. 622, 625 (5th Cir. 2004) (emphasis in original); *see also Barkley v. Dillard Dep't Stores, Inc.*, 277 Fed.Appx. 406, 413 (5th

Cir. 2008) (noting that where “officers received no reprimands or discharges from the city” for “flagrant” violations, the court may infer “there must have been a preexisting disposition and policy of reckless disregard”). While “[a] pattern [alone] could evidence not only the existence of a policy but also official deliberate indifference,” Plaintiff also specifically alleges deliberate indifference and knowledge by the policymaker—as the Chief responded by discounting past allegations as merely being about “bad sex.” Doc. 1, pp. 6–7, ¶ 45; *Piotrowski v. City of Houston*, 237 F.3d 567, 582 (5th Cir. 2001). Such an ongoing pattern, and tolerance by the policymakers, is naturally a moving force for officers like Dodds to continue preying on women. Doc. 1, pp. 12, 15, ¶¶ 93, 111. Moreover, the Fifth Circuit has held that a complaint states a claim by alleging a city’s failure to train and supervise jail officers had the obvious result of one of those officers engaging in sexual assault. *See Drake v. City of Haltom City*, 106 F. App’x 897, 899 (5th Cir. 2004) (reversing dismissal of *Monell* claims). Thus, Plaintiff’s allegations easily exceed the threshold required by Rule 8 based on those allegations alone. Doc. 1, pp. 14–15, ¶¶ 109–110.

Second, compounding the problem of untrained and unsupervised predatory officers, APD investigation of sex crimes had been plagued by a host of policy problems for over a decade at the time Dodds sexually assaulted Plaintiff. Doc. 1, pp. 7–12, 14–15, ¶¶ 55–91, 109(d–f, i), 110. In raw numbers, APD’s arrest statistics for crimes of sexual violence were alarmingly anemic for years—with less than 10% of rape complaints leading to an arrest. Doc. 1, pp. 7–8, ¶¶ 55–68. Moreover, APD undermined sexual assault investigations with misogynistic bias and anti-victim misconceptions—as the complaint describes both generally and with specific, high-profile examples. *Id.* at 9–12, ¶¶ 79–91. Instead of fixing these problems, APD covered them up with tactics like “exceptionally clearing” sexual assault cases that did not merit that disposition. *Id.* at 8–9, ¶¶ 70–76. Each of these three issues—poor arrest performance, biased investigations, and

wrongful exceptional clearance—was specifically known to policymakers well before Dodds sexually assaulted Plaintiff. *Id.* at 6, 8, 9, ¶¶ 48, 51, 69, 74–77. In any event, “dishonesty and an apparent cover-up is ‘typical of extended or pervasive misconduct,’” so the exceptional clearance practice alone, which violated applicable regulations according to DPS and APD’s police chief, is sufficient to infer the policy and the policymakers’ knowledge. *Id.* at 8–9, ¶¶ 72–74; *Sanchez v. Young Cty., Texas*, 956 F.3d 785, 793 (5th Cir. 2020) (internal citations omitted); *see also Williams v. Treen*, 671 F.2d 892, 899 (5th Cir. 1982) (“If an official’s conduct contravenes his own state’s explicit and clearly established regulations, a subjective belief in the lawfulness of his action is per se unreasonable.”). This chronic deficiency in sex crime investigations emboldened predators within APD like Dodds, causing his sexual assault on Plaintiff. Doc. 1, pp. 12, 15, ¶¶ 93, 111.

Third, underlying both of the foregoing deficiencies was chronic sexism within APD’s ranks. Doc. 1, pp. 5–7, 9–12 ¶¶ 42–46, 48–49, 52–54, 80–82, 85, 87, 89–91. This culture is demonstrated both by a formal report, commissioned by the City itself, as well as a pattern of disturbing conduct—ranging from the tolerance for sexual harassment and leaked jokes by on-duty officers about raping a bystander to criticizing rape victims for how they dressed and that their reports of sexual assault “sounded consensual.” *Id.* Again, this pattern of specific incidents alone is sufficient to show the policymaker’s knowledge—particularly for the egregious incidents—but Plaintiff has also shown actual knowledge through the policymakers’ remarks on the problem and the official, City-commissioned report on it. *Id.* at 5–6, ¶¶ 42–44, 49, 52–53; *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984) (en banc) (“Where the violations are flagrant or severe, the fact finder will likely require a shorter pattern of the conduct to be satisfied that diligent governing body members would necessarily have learned of the objectionable practice and acceded to its continuation.”); *Sanchez v. Young Cty., Texas*, 956 F.3d 785, 793 (5th Cir. 2020)

(failure to correct longstanding deficiencies “arguably shows acquiescence to the misconduct such that a jury could conclude that it represent[ed] official policy”).

Together, these allegations paint a picture of a police force that, for years, ignored officers who routinely engage in sexual assault; deployed only a token, self-defeating sex crimes unit to investigate; and allowed these practices to continue due to widespread sexism. As APD “demonstrated deliberate indifference to the offensive acts by failing to take action that was obviously necessary to prevent or stop the abuse,” the City of Austin is liable for enabling and causing the sexual assault by Defendant Dodds when these allegations are read with all inferences drawn in Plaintiff’s favor. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 456-57 (5th Cir. 1994) (en banc); see also *Lopez v. City of Houston, Tex.*, No. Civ. A. 03-2297, 2005 WL 1770938, *24-26 (S.D. Tex. July 25, 2005).

The City incorrectly complains that these allegations are not specific enough, but Plaintiff’s allegations easily satisfy Rule 8. Unlike *Gomez v. Galman*, where that plaintiff provided no allegations of any similar incidents or indifference by the policymaker, in this case Plaintiff plausibly alleges three distinct policy deficiencies, including both patterns of specific misconduct arising under each deficiency and the policymaker’s direct knowledge for each deficiency. 18 F.4th 769, 779 (5th Cir. 2021); see *supra* pp. 9–11. Also unlike *Gomez*, Plaintiff’s allegations include ongoing problems that APD had not fixed even at the time of her sexual assault—such as the sex crimes unit yielding inadequate numbers through 2018 and the City-commissioned report finding APD was still rife with sexism in 2020. Doc. 1, pp. 6–7, ¶¶ 52–55, 64. Unlike *Ratliff v. Aransas County*, where that plaintiff never explained how the alleged policy caused the constitutional violation, in this case, Plaintiff has explained that APD caused Dodds’ sexual misconduct by tolerating a pattern of officers engaging in sexual harassment and assault, years-long failure to

investigate sex crimes such that Dodds expected to get away with invading the private home of Plaintiff and assaulting her, as well as a culture of sexism that invited sexual predators into the force and tolerated their conduct. 948 F.3d 281, 285 (5th Cir. 2020); Doc. 1, pp. 12, 15, ¶¶ 93, 111.

The rest of the City’s argument relies on summary judgment and post-verdict cases which are not applicable here, as discussed below. Accordingly, Plaintiff has plausibly alleged an official policy or custom of the City of Austin, known to its policymakers, which was the moving force of her constitutional violation, and the City’s motion should be denied.

C. The motion to dismiss should be denied because it asks the Court to apply Rule 56 and post-verdict decisions.

The Court should also deny the City’s motion because it asks the Court to rely almost exclusively upon inapplicable decisions which say nothing about the requirements of notice pleading. The City’s authority is inapplicable for three reasons.

First, the City’s argument erroneously relies on Rule 56 and post-judgment decisions, not Rule 12 decisions, with just two exceptions (discussed and refuted above).² Indeed, the City lets the veil slip when it accuses Plaintiff of lacking “proof” and quoting decisions about “evidence.” Doc. 8, pp. 6–8, 10–11. This invites the Court into error, as the Fifth Circuit “ha[s] criticized defendants for arguing that cases dismissed on summary judgment supported dismissal of their cases at the pleadings stage.” *Converse v. City of Kemah*, 961 F.3d 771, 776 n.3 (5th Cir. June 12,

² See Doc. 8, pp. 7–13 (citing inapplicable Rule 56 decisions: *Posos v. City of San Antonio*, 463 F.App’x 303, 304 (5th Cir. 2012); *Peterson v. City of Fort Worth*, 588 F.3d 838, 850 (5th Cir. 2009); *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005); *Est. of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 379 (5th Cir. 2005); *Thompson v. Upshur Cty*, 245 F.3d 447, 459 (5th Cir. 2001); *Limon v. City of Balcones Heights*, 485 F.Supp.2d 751, 754 (W.D. Tex. 2007); and post-verdict decisions: *Burge v. St. Tammany Parish*, 336 F.3d 363, 370 (5th Cir. 2003); *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984)).

2020); *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 629 n.8 (5th Cir. 2018); *Drake v. City of Haltom City*, 106 F. App'x 897, 900 (5th Cir. 2004).

Second, the crux of the City's motion is its attempt to weaponize obscurantism. Plaintiff obviously does not know the specifics of APD's internal training or the incidents where different APD officers engaged in sexual assault and other sexist conduct alleged in the complaint. But Plaintiff's lack of knowledge does not make her allegations implausible where that information is excepted from public disclosure requirements under Texas law and therefore not available to Plaintiff before discovery. *See* TEX. GOV'T CODE §§ 552.102, 552.108. Despite knowing Plaintiff was his sexual assault victim, the City did not provide Officer Dodds' internal affairs history or a history of complaints against him in response to Plaintiff's request for that information before this litigation began. *See* Ex. 1, Letter from P. Samuel (Jan. 24, 2022). During discovery, Plaintiff may learn that APD ignored warning signs not only for officers generally, but for Dodds specifically, which would obviously help develop her allegation that the City failed to supervise officers known to have engaged in sexual misconduct in the past. Doc. 1, p. 14, ¶ 109(b). But, again, those facts cannot be discovered at the Rule 12 stage, so the City's motion is should be denied. What Plaintiff has alleged—such as the Chief of Police dismissing allegations of sexual assault by officers as “bad sex,” Doc. 1, pp. 5–6, ¶ 45, and the City's own commissioned investigation finding pervasive sexism remains rampant in APD, *id.* at 6–7, ¶¶ 52–54—is sufficiently specific under these circumstances.

Finally, numerous Rule 12 decisions in this district have rejected arguments similar to the City's because plaintiffs will not have access to this information before discovery. *See Edmiston*, No. EP-21-CV-132-KC, 2022 WL 452483, at *14 (W.D. Tex. Jan. 13, 2022) (Cardone, J.); *Bright*, No. 6:20-CV-431, 2021 WL 1226560, at *5 (W.D. Tex. Mar. 31, 2021) (Albright, J.); *Sanchez*,

283 F. Supp. 3d at 532 (W.D. Tex. Oct. 7, 2017) (Martinez, J.); *King*, No. A-16-CA-1020-SS, 2017 WL 1097110, at *6 (W.D. Tex. May 1, 2018) (Sparks, J.); *Crisp*, No. A-15-CV-0431-LY-ML, 2015 WL 7076483, *8 (W.D. Tex. Nov. 12, 2015) (Lane, J.); *Reyes*, No. 1:21-CV-00992-LY-SH, 2022 WL 789333, at *4 (W.D. Tex. Mar. 15, 2022) (Yeakel, J). Further, the Fifth Circuit has recognized that a civil rights plaintiff cannot plead facts “peculiarly within the knowledge of defendants.” *Schultea v. Wood*, 47 F.3d 1427, 1434 (5th Cir. 1995). For the same reason, this Court should reject the City’s premature complaints about evidence and deny the motion to dismiss in its entirety.

D. In the alternative, the Court should permit discovery and an opportunity to amend the Complaint before granting a Rule 12 motion.

Although Plaintiff believes the motion should be denied on its merits, if the Court would grant any part of the City’s motion, then Plaintiff requests in the alternative that the Court grant Plaintiff leave to amend after the benefit of limited discovery.

“The court should freely give leave [to amend pleadings] when justice so requires.” FED. R. CIV. P. 15(a)(2).

This case involves internal policies and procedures of the City of Austin, as well as detailed history regarding both Officer Dodds specifically and APD broadly which are not available to Plaintiffs before bringing suit. *See* TEX. GOV’T CODE § 552.108 (excepting many law-enforcement records from public disclosure). If the Court needs additional information on the subjects the City attacks—such as more specificity regarding APD training or prior alleged similar misconduct—Plaintiff should not be expected to plead even more details prior to discovery. All of those subjects are only known to Defendants and other law enforcement agencies, at least until Plaintiff has had the opportunity to investigate through discovery. *Thomas*, 800 F. Supp. 2d at, 842-43; *Edmiston*, No. EP-21-CV-132-KC, 2022 WL 452483, at *14; *Bright s*, No. 6:20-CV-431, 2021 WL 1226560,

CERTIFICATE OF SERVICE

By my signature above, I certify that a true and correct copy of the foregoing has been served on all counsel of record through the Electronic Case Files System of the Western District of Texas.

By /s/ Jeff Edwards
Jeff Edwards

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:
1:22-cv-00299

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Exhibit 1

Letter from Plaintiff's Counsel to the City of Austin



EDWARDS LAW

JEFF EDWARDS
BOARD CERTIFIED - PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
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PAUL SAMUEL
ATTORNEY AT LAW
paul@edwards-law.com

January 24, 2022

**SENT VIA ELECTRONIC MAIL AND UNITED STATES MAIL RETURN
RECEIPT REQUESTED**

City of Austin
301 W. 2nd Street
Austin, TX 78701
Public.information@austintexas.gov

RE: *Request for Copies of Public Documents*

To Whom it May Concern:

Pursuant to section 552.221 of the Texas Government Code, I respectfully request a certified copy of the following documents:

1. All records (including any investigations, videotapes, audio recordings, reports, evaluations, e-mails, faxes, or other documents recorded in any media) relating to any allegation of a crime committed by Officer Walter Dodd.
2. The personnel files of Officer Dodd including any reprimands, negative employment actions, citations, internal affairs investigations, or complaints filed against Officer Dodd.
3. The arrest affidavit for Cause No. D1DC20301555 and any and all information related, including, but not limited to investigations, videotapes, dash cam footage, body worn camera, audio recordings or any other document recorded in any media relating to that cause number.

If electronic versions of the documents exist, I request the responsive documents in that format. If possible, please send the responsive information via email to paul@edwards-law.com.

If the cost of producing the documents exceeds \$25, please notify me and provide an itemization of the costs.

Thank you for your time and assistance in this matter.

Sincerely,

Paul Samuel

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:
1:22-cv-00299

ORDER DENYING DEFENDANT CITY OF AUSTIN’S MOTION TO DISMISS

After considering Defendant City of Austin’s Motion to Dismiss, Plaintiff’s response, any reply, any arguments of counsel, all applicable filings, and all applicable law, the Court hereby DENIES the motion in its entirety.

IT IS SO ORDERED.

Signed: _____, 2022.

ROBERT PITMAN
UNITED STATES DISTRICT COURT JUDGE

FILED

May 18, 2022

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

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

BY: CC
DEPUTY

JANE DOE,
Plaintiff,

v.

THE CITY OF AUSTIN and WALTER
DODDS,
Defendants.

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No. 1:22-cv-00299

**DEFENDANT WALTER DODDS MOTION TO STAY DISCOVERY PENDING
CRIMINAL PROCEEDINGS**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES Defendant Walter Dodds (hereinafter “Defendant”) and files this motion to stay discovery for this civil matter pending the resolution of his criminal proceedings. Defendant requests that the Court rule on this motion to stay discovery. Accordingly, Defendant would respectfully show the Court as follows:

I. BACKGROUND

A. The alleged incident.

1. This lawsuit arises out of an alleged injury suffered by Plaintiff Jane Doe (hereinafter “Plaintiff”) stemming from Defendant’s response to a call regarding a domestic disturbance at Plaintiff’s residence in April 2020. During Defendant’s response to the call, Defendant determined that Defendant’s boyfriend posed a harm to himself and arranged for his examination and eventual transportation to a hospital by Austin Emergency Medical Services (EMS). Despite Plaintiff’s wholly unsupported statements in her Original Complaint, Defendant never engaged in conduct that constituted a violation of Plaintiff’s rights under the Fourth and Fourteenth Amendments. Nevertheless, Travis County District Attorney Jose Garza plans to pursue felony Sexual Assault and misdemeanor Official Oppression charges against Defendant related to the conduct alleged by Plaintiff herein. *See* Exhibit 1, pg. 6. Although the indictment is still forthcoming as of the filing of this motion, Defendant expects to be presented to a grand jury in the immediate future. Any discovery requests from Plaintiff will involve a parallel civil lawsuit related to the felony and misdemeanor charges against Defendant.

II. ARGUMENTS

A. Standard for a Motion to Stay Discovery

2. The factors for a court to consider in a motion to stay discovery are:
- (1) The extent to which the issues in the criminal case overlap with those presented in the civil case;
 - (2) The status of the criminal case, including whether the criminal defendant has been indicted;
 - (3) The private interests of the plaintiff in proceeding expeditiously weighed against the prejudice to plaintiff caused by the delay;
 - (4) The private interests of and burden on the defendant;
 - (5) The interests of the courts; and
 - (6) The public interest.

Walker v. Wilburn, No. 3:13-CV-4896-D, 2015 WL 5873392, at *5 (N.D. Tex. Oct. 5, 2015).

B. Applying these six factors, this Court should stay discovery in this case.

a. The first factor favors of a stay of discovery.

3. The first factor is the degree to which civil issues overlap with criminal issues. The underlying legal subject matter of Defendant's criminal cases and this civil lawsuit is very similar. Defendant is charged with felony Sexual Assault and misdemeanor Official Oppression. The offense of Sexual Assault requires proof that Defendant caused the penetration of Plaintiff's anus, sexual organ, or mouth without Plaintiff's consent. Texas Penal Code Section 22.011(a)(1). The offense of Official Oppression requires proof that, while acting as a public servant under color of office or employment, Defendant intentionally denied Plaintiff the exercise or enjoyment of a right or privilege. Texas Penal Code Section 39.03(a). Plaintiff seeks to prove these very things in her lawsuit, as seen in Plaintiff's Original Complaint. Thus, the issues in the civil and criminal cases greatly overlap and support a stay of discovery.

b. The second factor weighs in favor of a stay of discovery.

4. The second factor is the status of the criminal case. Defendant has not yet been indicted for the conduct alleged by Plaintiff in Plaintiff's Original Complaint (even though the complaint says he has—that's how certain it is), wherein she alleges that Defendant came to her home and assaulted her. Defendant's potential felony and misdemeanor indictments that the District Attorney plans to present and obtain in the very near future weigh in favor of a stay of discovery.

c. The third factor favors a stay of discovery.

5. Here, any argument that discovery should move forward due to a lack of indictment should fail. The District Attorney has clearly indicated that Defendant will be presented to a grand jury in the near future following the filing of this motion. If Defendant is no-billed at that

time, the parties here can continue with discovery at that point. After Defendant's criminal trial, the parties can advise this Court that the discovery stay is no longer needed. Furthermore, the events and surrounding circumstances at issue were documented in multiple investigations conducted by elements of the APD. Such information is not at risk of decay or destruction. Thus, Plaintiff will not be prejudiced if this Court allows the criminal matter to resolve first by granting the requested stay.

d. The fourth factor favors a stay.

6. The fourth factor concerns the defendant's interest in a stay. If the requested stay of discovery is not granted, Defendant's exercise of his Fifth Amendment right could be offered as evidence against him in this suit, and the jury could be permitted to draw an adverse inference when rendering its verdict. If he instead testifies in a deposition during this case without a stay of discovery being granted, his upcoming grand jury presentation and potential criminal trial defense could be harmed. Without a stay, Defendant will be forced to provide testimony for his actions leading up to and during the alleged sexual assault and official oppression. Defendant would be compelled to choose between pursuing a meritorious civil defense or handicapping his criminal defense. The fourth factor weighs heavily in favor of a stay.

e. The fifth factor weighs in favor of the requested stay.

7. The fifth factor considers the Court's own interests, including judicial efficiency. Here, a conviction or lack thereof in the criminal case would hit at liability or lack thereof in the civil action. In fact, the results of the criminal case may result in an outright settlement of the civil claim. So, the fifth factor weighs in favor of granting the requested stay.

f. Finally, the sixth factor weighs in favor of a stay.

8. The public's interests weigh in favor of granting Defendant's requested stay. Staying civil discovery will protect the integrity of Defendant's criminal process, assuring his Fifth Amendment rights are not jeopardized and preventing the State's prosecution from obtaining discovery that is not allowed in the criminal matter under the Texas Rules of Criminal Procedure. The public has an interest in maintaining the integrity of criminal proceedings, protecting citizens' Constitutional rights, and ensuring defendants are not forced to choose between a good defense in relation to civil or criminal liability.

III. PRAYER

9. WHEREFORE, Defendant Walter Dodds respectfully requests that this Court grant his motion to stay civil discovery pending the resolution of his criminal proceedings and to provide to Defendant Dodds all other relief to which he may justly be entitled in law or equity.

Respectfully submitted,

/s/ Walter Dodds

Walter Dodds
Defendant

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

JANE DOE,
Plaintiff,

v.

CITY OF AUSTIN and WALTER
DODDS,
Defendants.

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CIVIL ACTION NO. 1:22-cv-00299

**DEFENDANT CITY OF AUSTIN’S REPLY TO PLAINTIFF’S
RESPONSE TO DEFENDANT’S MOTION TO DISMISS**

Defendant City of Austin (the “City”), files this Reply to Plaintiff’s Response to Defendant’s Motion to Dismiss (*Dkt. 10*). Defendant would show the following:

A. Rule 12b motions are neither disfavored nor rarely granted and for good reason.

Plaintiff’s Response accurately cites *dicta* in *Calhoun v. Villa*, 761 F. App’x 297, 299 (5th Cir. 2019)(“Motions for failure to state a claim are ‘disfavored in the law and rarely granted.’”). But the authority Plaintiff relies on establishes just the opposite. In *Calhoun*, the court *affirmed* the Rule 12(b)(6) dismissal of a plaintiff’s § 1983 claims against a police department and its officers, noting that the “well-pleaded facts” did not support the claims plaintiff made. *Id.* at 301. Likewise, the *Calhoun* opinion quotes as authority *Thompson v. Goetzmann*, where the Fifth Circuit affirmed the dismissal of plaintiff’s claims under Rule 12(b). *See Thompson*, 337 F.3d 489, 501 (5th Cir. 2003)(Complaint that “cherry pick[ed]” phrases from a statutory scheme which were selected in order “to justify an exceptionally broad . . . interpretation” of the law did not support conclusional allegations of wrongdoing by defendant).

As the other opinions cited on page 5 of the Response show, dismissal of §1983 claims under Rule 12(b) is not rare. Constitutional rights claims against government entities and their

employees are frequently dismissed for failure to assert actionable claims, as was the case in most of the other opinions Plaintiff cites.

- *Lindquist v. City of Pasadena*, 525 F.3d 383, 388 (5th Cir. 2008)(Trial court’s dismissal of plaintiff’s due process and “unbridled discretion” claims against city were proper.)
- *Patrick v. Wal-Mart, Inc.*, 681 F.3d 614, 622 (5th Cir. 2012)(Dismissal of state law claim affirmed where plaintiff’s complaint offered no factual content that would allow the “court to draw the *reasonable* inference” of defendant’s liability.)
- *Ashcroft v. Iqbal*, 556 U.S. 662, 680-81, 687 (2009)(Reversing trial court’s denial of Rule 12(b)(6) motion where plaintiff’s complaint failed to nudge his claims of invidious discrimination “across the line from conceivable to *plausible*.”)
- *Morgan v. Hubert*, 335 F. App’x 466, 473 (5th Cir. 2009)(Trial court’s denial of prison warden’s 12(b)(6) motion based on qualified immunity defense vacated and case remanded to trial court for discovery on that limited issue.)
- *Thomas v. City of Galveston*, 800 F. Supp. 2d 826, 839 (S.D. Tex. 2011)(Rule 12(b)(6) motions in § 1983 case granted in part.)
- *Bright v. City of Killeen*, No. 6:20-CV-431, 2021 WL 1226560, at *5 (W.D. Tex. Mar. 31, 2021)(Plaintiff’s § 1983 claim against municipality based on “*de-facto* custom” of “shoot first and ask questions later” dismissed where complaint did not demonstrate “a pattern . . . that transcends the error made in a single case.”)

These opinions demonstrate Rule 12(b)(6) serves the salutary purpose of permitting the court to determine at the pleading stage whether the costly and time-consuming effort of defending a claim is warranted by determining the viability of a claim. A federal pleading must contain “something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). For purposes of Rule 12(b), conclusory assertions *are not* facts and are not entitled to be assumed true. *Iqbal*, 556 U.S. at 681. When the defendant is a government entity sued on a *Monell* claim, Rule 12(b)(6) calls for the court to determine whether plaintiff’s complaint sufficiently alleged facts to show (1) an official government policy (2) promulgated by the municipal policy maker (3) was the moving force behind the violation of a constitutional right. *See Gomez v. Galman*, 18 F.4th 769, 777 (5th Cir. 2021); *see also Ayon v. Austin Indep. Sch. Dist.*, 1:19-CV-586-RP, 2020 WL 1536383, at *3 (W.D. Tex. Mar. 31, 2020)(Noting in connection with a Rule 12(b)(6) motion on a *Monell* claim, that

“isolated unconstitutional actions by [school district] employees will almost never trigger liability” against government.”). These requirements are not meaningless. Nor is it more judicially efficient to defer the determination until after discovery.

Here, the unconstitutional misconduct Plaintiff alleges is the sexual assault by Dodds, an isolated incident by any fair reading of the complaint.¹ It is no small task to plead *facts* that would support a *reasonable* conclusion that the City (1) had an actual policy or custom, (2) that was approved at APD’s top levels, (3) which was the “moving force” of Dodds’ alleged sexual assault. Nor should it be easy to plead such an extraordinary *Monell* claim, since *respondeat superior* theories are not permitted under §1983. A municipality may be perceived as a “deep pocket” to sue. But the City’s resources to defend litigation like this—where the City’s liability is footed on the unauthorized and unforeseen actions of former employees—is not unlimited. Consideration must be given at the pleading stage as to whether the liability theory against the City is even plausible under *Monell*, given the alleged facts, or lack thereof. That is what Rule 12(b) is for.

B. Factual allegations regarding APD’s shortcomings were not the “moving force” of Dodds’ actions.

For a *Monell* claim, plaintiff must plead facts that plausibly establish: “a policymaker; an official policy; and a violation of constitutional rights whose ‘moving force’ is the policy or custom.” *Ratliff v. Aransas Cnty.*, 948 F.3d 281, 285 (5th Cir. 2020) (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)). For the policy to be the “moving force” for the

¹ Although not dispositive, the Response misconstrues footnote 1 of the Motion. *See Dkt. 10, p. 1, 6-7*. The Motion focuses on Plaintiff’s failure to allege *Monell* liability. However, it is not clear Plaintiff actually alleges a Constitutional violation for which the City is liable. The City is not claiming Dodds did not violate the Fourteenth Amendment, but if he did, that does not mean Plaintiff sufficiently alleged a 14th Amendment claim against the City. *See Dkt. 8, n.1*. As to the 4th Amendment claim, it is an open question whether sexual assault by a police officer violates the Fourth Amendment when the plaintiff is not detained or under investigation of any kind. In the case Plaintiff cites, the officer had informed plaintiff she had outstanding warrants. *See Dkt. 10, P. 7*, citing *Cerda v. Billingsley*. These facts are different from this case. Dodds’s actions were not related to any arrest, detainment, or investigation of Plaintiff. Nor does the caselaw necessarily support a separate 4th Amendment violation. *Trent v. Wade*, cited by Plaintiff, involved forcible entry by police officers in the context of “no knock” entries. 776 F.3d 368, 378-79 (5th Cir. 2015). Plaintiff does not allege Dodds used force to enter her home.

violation, a plaintiff must show direct causation. *Peterson v. City of Fort Worth*, 588 F.3d 838, 848 (5th Cir. 2009). This means there must be a direct causal link between the City policy and the Constitutional rights violation. *Id.*

Plaintiff's complaint is not threadbare, but the threads there do not make a rug for purposes of pleading *Monell* liability. The complaint alleges the City is liable for Dodds' actions because of three purported policy failures: (a) sexual assault by officers who went unpunished by APD management; (b) APD's sex crimes unit made relatively few arrests compared to the number allegations; and (c) a culture of sexism at APD. As to the first purported policy, Plaintiff's Response promotes rhetoric rather than the facts alleged. The Response mischaracterizes the factual allegations in the Complaint to bolster a pleading that lacks a plausible causation theory. For example, the Response states "[f]or years, APD police chiefs ignored ... outright sexual assaults by officers" Resp. P. 1 (*citing Dkt. 1, pp. 5-12, ¶¶41-93*), and "for year, ignored officers who routinely engage in sexual assault." Resp. at P. 11. Plaintiff's characterizations are not a substitute for the facts actually alleged in the Complaint. The Court may not consider these characterizations of the facts as allegations. *See Thomas*, 800 F. Supp. 2d at 838 (Court refused to draw the broad inferences proposed in plaintiff's response to motion to dismiss where complaint lacked those specific allegations) (*citing Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984)) ("it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss").

The alleged facts do not plausibly support the conclusion that City policies caused Dodds to sexually assault Plaintiff. For example, the Complaint alleges only one APD officer was arrested for sexual assault of a child. *Dkt. 1 ¶42*. There are no allegations that then-APD Chief Acevedo ignored this arrest or failed to take appropriate action against the officer. Further, the Complaint

alleges Acevedo dismissed some allegations of assault made by female subordinates against other officers as “bad sex.” *Dkt. 1* ¶45. Acevedo was APD chief years before the incident involving Plaintiff. *Id.* ¶41. Acevedo’s alleged comment does not logically support the conclusion that APD “ignored” any sexual assault complaints against any officers. These allegations, if true, are not connected to the Plaintiff’s claims of an unwritten policy or custom at APD that drove Dodds to sexually assault Plaintiff in 2020. Unrelated events that happened at least four years earlier and under a different police chief do not corroborate a so-called custom of unpunished sex crimes by APD officers. *See id.* ¶110 (identifying current chief Manley as policymaker at fault). The Complaint goes on to allege “during the years leading up to the attack on Doe, APD officers have been accused of sexual assault but not prosecuted.” *Dkt. 1* ¶92. Whether the county’s district attorney brought criminal charges against these unnamed but “accused” APD officers hardly supports the conclusion that APD’s chiefs “ignored” any sexual assaults. As explained in the Motion, the Complaint alleges only one actual instance of an APD officer sexually assaulting a female, and in that case Chief Manley fired the officer, Jason Dusterhoft. *Id.* ¶49. This directly contradicts Plaintiff’s conclusory statement that APD “ignored” sexual assaults by officers. The other allegations of officer misconduct in the Complaint relate to sexual *harassment*. Allegations that APD had internal complaints of sexual harassment cannot plausibly be linked to a propensity for police officers to engage in felonious sexual assaults. Apples are not oranges for purposes of establishing a pattern under *Monell*.

As for alleged failures of the APD’s sex crime unit to prosecute criminal claims (which itself is the purview of the district attorney, not the police) and purported “sexism” at the

Department, the City's Motion explains why those factual allegations do not sufficiently establish a pattern of similar violations to support *Monell* liability. *See Dkt. 8, Pp. 6-13.*²

Even if it is *conceivable* that the City's alleged, unwritten policies directly caused Dodds to violate Plaintiff's constitutional rights, the theory is not *plausible* under the facts alleged, and thus does not satisfy the requirements under *Twombly* or *Iqbal*.

C. It is appropriate and at times necessary to consider governing cases, even those not decided under Rule 12.

The City does not deny that at the Rule 12 pleading stage, a plaintiff "is not required to know information that is solely held by APD," *Dkt. 10, p. 2*. But Plaintiff *is* required to plead specific facts, accepted as true, to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

Plaintiff takes issue with the City's Motion for "erroneously" relying on Rule 56 and post-verdict decisions. The fact some of the cases were not decided on a Rule 12 motion does not mean they may not be considered. Plaintiff's criticism ignores the context and purposes for citing these cases. The Motion does not argue that Plaintiff's *Monell* claims, at the pleading stage, should be dismissed for lack of evidence or proof. In fact, the Motion emphasizes the Complaint's factual allegations, even if true, would not support *Monell* liability. *See Dkt. 8, Pp. 6-13*. Contrary to Plaintiff's characterization, the City's Motion nowhere impugns Plaintiff's Complaint for lack of "proof." The term "proof" appears in the Motion, but not in a context that seeks to impose on Plaintiff a heightened standard than that required under notice pleading. And although in the summary judgment and post-verdict decisions, the court may have ultimately concluded that the

² Plaintiff's attempt to distinguish *Gomez v. Galman* is unavailing. *See Dkt. 10, P. 11*. In distinguishing *Gomez*, Plaintiff cites to the City-commissioned report finding sexism at APD. *Id.* But in *Gomez* the court found that a report on officer misconduct did not demonstrate the municipality had notice of a pattern of similar violations at the time the plaintiff's rights were violated. *Gomez*, 18 F.4th at 779. In this case, the "Tatum report" does not establish a pattern of officers committing sexual assaults.

plaintiff's claim failed due to lack of evidence necessary to establish an element of liability, here Plaintiff's *Monell* claims fail because Plaintiff has not plead facts necessary to establish liability.

Plaintiff's invitation for the Court to ignore sound, reasoned caselaw relies on a superficial categorization of the cases based on whether the ruling was made on a Rule 12 motion or a post-discovery motion. That distinction makes no difference here, as those cases explain the substantive law, not the standard of review or assessment of evidence. For example, *Peterson v. City of Fort Worth* outlines when a pattern of events equates to official policy for purposes of a *Monell* claim. 588 F.3d at 850-51; *see Dkt. 8, P. 12*. Although in *Peterson* the court went on to analyze whether the evidence showed a pattern, for purposes of a Rule 12 motion, this statement of the substantive law illustrates what a plaintiff must allege.

Likewise, the Rule 12 decisions cited by the City - *Gomez v. Galman* and *Ratliff v. Aransas County* - also cite to summary judgment cases.³ Rulings on summary judgment are frequently cited as authority on Rule 12 motions because they are governing. This Court should not ignore these cases and what they say. Finally, the cases in which the Fifth Circuit criticized defendants for relying on summary judgment decisions differ from the instant case. *See Dkt. 10, Pp. 12-13* (citing *Littel and Drake*). The City is not arguing that the cases decided on summary judgment support granting the Motion. Again, the City cites these cases for their statements of the relevant substantive law and the elements to establish *Monell* liability. In *Littel and Drake*, the Fifth Circuit took issue with the defendants' heavy reliance on a single out-of-circuit case where the evidentiary record was inconsistent with the plaintiff's factual allegations. *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 629 n.8 (5th Cir. 2018); *Drake v. City of Haltom City*, 106 F. App'x 897, 900 (5th

³ *See, e.g., Ratliff*, 948 F.3d 281 at 285, citing *Zarnow v. City of Wichita Falls*, 614 F.3d 161 (5th Cir. 2010), a summary judgment case, to set out the requirements of a failure to train theory; *Gomez*, 18 F.4th at 778-80, citing *Gros v. City of Grand Prairie*, a summary judgment case, and *Piotrowski v. City of Houston*, a post-verdict case, in describing requirements for municipal liability.

Cir. 2004). Wisely, the Fifth Circuit does not institute a blanket rule that only Rule 12 decisions can be used to decide Rule 12 motions. *See Littel*, 894 F.3d 616, 629 n.8 (citing to *Burge v. St. Tammany Parish* to explain methods of showing deliberate indifference); *see also Ayon*, 2020 WL 1536383 at *4-6 (citing summary judgment decisions such as *Zarnow* and *Peterson* to set out the governing law to establish municipal liability under *Monell*).

D. Deferring the Rule 12(b) motion until after discovery is unwarranted and inequitable.

Finally, Plaintiff requests leave to conduct “limited discovery” so information might be uncovered that might allow Plaintiff to amend and allege a viable *Monell* claim. The requested relief is not warranted. First, this is not a case where Plaintiff claims to be in the dark as to the events leading up to her April 2020 assault by Dodds. The complaint includes page after page of allegations detailing the contents of audits, studies, and reports, with specific incidents of purported wrong-doing by other APD officers going back 14 years. *See, e.g., Dkt. 1, ¶¶42-45, 49-50, 52-54, 55-64, 66-67, 72-73, 81-87*. Plaintiff must already have these audits, studies, and reports, as well as information regarding the other acts of alleged officer wrong-doing, or they would not have been cited. Obviously, these reports and audits and the incidents described are not “peculiarly within the knowledge of defendants.” In any event, that information simply does not support a viable *Monell* claim, as discussed in the Motion and this Reply.

Second, the scope of the “limited discovery” Plaintiff claims is needed is undefined. The preliminary discovery Plaintiff asks for leave to conduct at the pleading stage does not identify any particular factual *issue*. The complaint makes no claim whatsoever, not even “on information and belief”, that Dodds faced similar complaints at APD prior to the incident with Plaintiff. Plaintiff’s argument that it will not know whether there is an actual *Monell* claim against the City

until after discovery is done would convert federal pleading requirements into an impermissible, fishing expedition in search of a claim.

Rather than seek leave for limited discovery on narrowly tailored topics, Plaintiff leaves it to the Court to guess what the vital information needed at the pleading stage might be. The Response describes a variety of discovery methods, without any reference to limits or subjects. Plaintiff asks for leave to conduct the following preliminary discovery. *Dkt. 10, P. 15*:

- “*written discovery to the Defendants (and other agencies and municipalities with knowledge of Dodds’ background)*” without specifying any scope or limits for that discovery.
- “*the Deposition of Defendant Dodds*” even though Dodds indicated he will likely assert his Fifth Amendment rights in this civil case and not give testimony. Dodds has filed a motion to stay discovery in this case pending his state criminal proceedings. *See Dkt. 11, ¶6* (“If the requested stay of discovery is not granted, [Dodds’] exercise of his Fifth Amendment right could be offered as evidence against him in this suit . . .”)
- “*the deposition of the police chief*” even though the two APD police chiefs named in the Complaint as the so-called policy-makers, Art Acevedo (2007 - 2016) and Brian Manley (2016 – 2021), moved on and are no longer City employees.
- “*the deposition of a representative of the City under Rule 30(b)(6)*” the subjects of which deposition(s) are not specified.

In short, Plaintiff wants to complete *all* its discovery, determine whether an actual *Monell* claim can be pleaded against the City, then have the Court consider dismissing the claim. Plaintiff’s approach to discovery turns Rule 12(b)(6) upside down.

The only authority Plaintiff cites where the federal court allowed preliminary discovery in connection with a pending Rule 12(b)(6) motion is *Bright v. City of Killeen*, a § 1983 case involving a shooting death during the execution of a “no knock” arrest warrant by police. No. 6:20-CV-431, 2021 WL 1226560, at *5 (W.D. Tex. Mar. 31, 2021). In *Bright*, the court denied without prejudice the municipality’s Rule 12(b)(6) motion and permitted plaintiff to conduct “*limited* discovery concerning the policies and procedures *identified by the Plaintiff as being inadequate*, and as this Court *deems necessary*.” *Id.* at *5 (emphasis added). According to the court in *Bright*,

those four specific policies and procedures were: 1) police policies/training for officers executing no-knock warrants; 2) policies/training on use of deadly force; 3) policies/training on de-escalation techniques for no-knock arrest; and 4) the police department's implementation of these policies for the five-year period preceding the shooting. *Id.* This "tailored discovery" balanced plaintiff's needs with "the government's right to preclusion from frivolous claims." *Id.* at *4. As for plaintiff's "de facto custom" *Monell* claim against the city, the court granted the Rule 12(b)(6) motion outright and without discovery. *Id.* at *5.

Here, the complaint points to no actual APD policy or training that was insufficient, other than those regarding the Department's sexual harassment training and handling of sexual assault complaints by officers charged with investigating them. But Plaintiff was not the victim of inadequate sexual harassment training or a sexual assault complaint mishandled by APD. The notion that APD officers must be specifically trained not to sexually assault females, in order for the Department to avoid liability, is simply not a plausible *Monell* claim. It is an invitation to allow *Monell* claims under a *respondeat superior* theory. As for Plaintiff's assertion that her injury was caused by APD's "culture that tolerated sexual violence", this is merely a "de facto custom" claim, which fails. Plaintiff points to no other comparable instances where an APD officer sexually assaulted a female while the Department turned a blind eye. Like the alleged "shoot first ask questions later" claim dismissed in *Bright*, Plaintiff's "culture of sexism" claim against the City should be dismissed.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant City of Austin respectfully requests that its motion be granted and that Plaintiff's claims against the City be dismissed, and that the City be awarded any other relief to which it may be entitled.

RESPECTFULLY SUBMITTED,

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CITY OF AUSTIN**

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 23rd day of May, 2022.

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ATTORNEYS FOR PLAINTIFF

/s/ Paul Matula

PAUL MATULA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:

1:22-cv-00299

PLAINTIFF’S AMENDED COMPLAINT

Plaintiff Jane Doe brings this 42 U.S.C. § 1983 case against the City of Austin and then-Austin Police Department Officer Walter Dodds, as Dodds sexually assaulted her.

I. PARTIES

1. Plaintiff Jane Doe is a resident of Travis County, Texas. Plaintiff files under a pseudonym to protect her privacy and safety.

2. Defendant City of Austin is a municipality that operates the Austin Police Department. Defendant City of Austin may be served through its City Clerk at 301 W. 2nd Street, Austin, TX 78701. The City’s policymaker for policing matters was former Police Chief Brian Manley at the time of the incident and is currently Chief Joseph Chacon. *The City has appeared in this case.*

3. Defendant Officer Walter Tyson Dodds was at the time of this incident an Austin Police Department officer and he is sued in his individual capacity for compensatory and punitive damages. He can be served with process via his former employer at 715 E. 8th Street, Austin, Texas 78701; via his attorneys, Douglas K. O’Connell at 505 West 12th Street, Suite 200, Austin, Texas 78701 and Ken Ervin at 1301 Rio Grande St., Austin, Texas 78701; at his home in Lexington, Texas; or wherever he may be found. Officer Dodds was acting under color of law as

an Austin Police Department officer at all relevant times. *Dodds has answered.*

II. JURISDICTION AND VENUE

4. This Court has federal question jurisdiction over this 42 U.S.C. § 1983 action pursuant to 28 U.S.C. §§ 1331 and 1343.

5. This Court has general personal jurisdiction over Defendant City of Austin as it is located in Travis County, Texas and over Defendant Dodds as he resides in Lee County, Texas.

6. This Court has specific *in personam* jurisdiction over Defendants because this case arises out of conduct by Defendants that injured Plaintiff Jane Doe, and which occurred in Travis County, Texas, which is within the Western District of Texas.

7. Venue of this cause is proper in the Western District pursuant to 28 U.S.C. § 1391(b) because a substantial portion of the events or omissions giving rise to Plaintiff's claims occurred in Travis County, which is within the Western District of Texas.

III. FACTS

A. Dodds' attack on Doe

8. On April 18, 2020, Jane Doe and her boyfriend, A.G., had an argument during which A.G. had a breakdown, put a belt around his throat, and tightened it to threaten suicide.

9. Doe yelled to her nephew to go get help.

10. Doe's nephew went to his mother in a nearby apartment who called 911 to get help from APD.

11. At approximately 6:13pm, Defendant Officer Walter Dodds, while on duty as an Austin Police Officer, responded and arrived on scene.

12. Officer Dodds conducted interviews with Jane Doe and A.G.

13. Officer Dodds determined that A.G. was a danger to himself and needed to be placed under an emergency detention.

14. Austin Emergency Medical Services (EMS) arrived on scene and determined that A.G. would need to be transported to the hospital.

15. During Officer Dodds' interview with Doe, he asked for her phone number and told her that he would be calling her to tell her where A.G. was being taken.

16. At the end of the interview, Officer Dodds asked Doe about locking the door to her apartment.

17. Officer Dodds said, "What if someone sneaks in there? You don't want to be sleeping with some dude in there with you."

18. Officer Dodds then accompanied A.G. to the hospital and completed the required documentation for A.G.'s emergency detention.

19. Then at 6:54pm, Officer Dodds called Doe from his APD-issued cell phone.

20. Officer Dodds started the call by telling Doe which hospital A.G. had been taken to, but then began to ask if he could come over. Doe did not give consent for Officer Dodds to come to her home.

21. Officer Dodds then asked her if Doe would take off his uniform for him and again if he could come over. Again, Doe did not consent to allow the officer into her apartment or to take off his uniform. Doe ended the call.

22. Officer Dodds called Doe four more times from the same APD-issued cell phone between 6:54pm and 9:09pm, but Doe did not pick up any of these calls.

23. After 9:09pm, Doe fell asleep in her bedroom alone.

24. Sometime after Doe fell asleep, Officer Dodds again went to Doe's apartment and knocked on the door.

25. On information and belief, Dodds used his police vehicle to return to Doe's apartment.

26. Although Dodds' police vehicle is equipped with a tracking device that APD dispatchers and Dodds' supervisors could see, neither his supervisor nor the dispatchers challenged Dodds for returning to a residence where there was no reason for him to be.

27. Doe's minor nephew opened the door and saw Officer Dodds in his full uniform, including his gun and full duty belt.

28. Officer Dodds walked by Doe's nephew, directly into Doe's bedroom, and shut the door behind him.

29. Dodds did not have permission or authority to enter the home.

30. Because Officer Dodds was an armed police officer, Doe's minor nephew did not call for help or otherwise attempt to impede his entrance.

31. Doe awoke to Officer Dodds in her bedroom penetrating her vagina with his penis.

32. Doe was shocked, frightened, and confused about what was going on and never consented to any contact of any kind from Officer Dodds.

33. Officer Dodds then flipped her onto her stomach and forced his penis into her vagina two more times.

34. Officer Dodds was not wearing a condom and ejaculated onto the fitted sheet on her bed. Doe remained terrified.

35. That sheet was later tested for DNA evidence by APD. The DNA analysis confirmed that Officer Dodds' DNA was present on the sheet.

36. Over the next several days, Officer Dodds continued to call Doe and terrorize her.

37. On April 25, 2020, Officer Dodds called Doe, disguising his number.

38. Doe picked up the phone, recognized Dodds' voice immediately, and heard him ask who she was with and what she was doing.

39. Terrified, Doe answered that she was with her husband and hung up the phone.

40. On April 26, 2020, at approximately 5:30pm, Doe saw Officer Dodds drive by her apartment complex in his police vehicle, slowly drove down the dead end of her parking lot, turned around and drove away. Doe's nephew took a photo of the vehicle, which APD later confirmed was Dodds' assigned police car for that day.

41. Again, neither Dodds' supervisor nor APD dispatchers challenged Dodds for taking his police vehicle to a residence where he had no reason to be.

42. On April 27, 2020, at 4:40pm, Dodds called Doe again, using *67 to hide his phone number.

43. Officer Dodds again asked her what she was doing and if he could come over. Doe, recording the call, repeatedly asked him to say his name, but Dodds only responded, "It's me."

44. On April 29, 2020, Doe called 911 to report the sexual assault by Officer Dodds.

45. Officer Walter Dodds was accused of Sexual Assault and Official Oppression and was arrested on September 10, 2020.

46. Dodds' criminal defense attorneys claimed that he had been indicted for those accusations, although Dodds filed a motion in this action claiming he has not yet been indicted.

B. The City was deliberately indifferent in hiring Dodds as an APD officer.

47. Attempting to find work as a police officer is appealing to sexual predators because the authority, training, and equipment associated with the position enables them to engage in sexual violence with less chance of detection.

48. Conditions of the policing profession create opportunities for sexual misconduct, as officers have power and authority over others, often work alone, often work without direct supervision, often work late into the night, and often engage with vulnerable populations who lack power, are perceived as less credible, or both.

49. Despite their expertise in evading law enforcement, over one hundred police officers are caught engaging in sexual violence every year in the United States.

50. Sexual misconduct by law enforcement officers is the most common single source of citizen complaints behind only excessive force.

51. Any competent police chief would know that there is a substantial risk that a prospective officer seeking employment would be a sexual predator.

52. On information and belief, the City's police chief knew at all relevant times that there was a substantial risk that prospective officers seeking work at APD would be sexual predators.

53. APD's decisions to reject or hire prospective officers that it believes are substantially likely to be sexual predators is kept secret and not known to Plaintiff.

54. On information and belief, the City's police chief knew at all relevant times that a pattern of sexual predators had sought to work as police officers for APD.

55. Dodds' *modus operandi* in his attack upon Doe and his subsequent harassment in this case reflects planning and a habitual pattern strongly indicative of a serial sexual predator.

56. Dodds' background is also consistent with the profile of a serial sexual predator.

57. Most people who sexually assault a stranger will do so again, and have done so before.

58. Most people who are caught engaging in sexual assault have done so many times before people before.

59. On information and belief, Doe was not Dodds' first victim.

60. On information and belief, Dodds had abused his authority, training, and equipment as a police officer to sexually assault other people while working at law enforcement agencies prior to being hired by APD.

61. The full scope of APD's hiring policies, procedures, and practices are secret and not accessible to Plaintiff without the benefit of discovery or other court intervention.

62. APD routinely conducts pre-employment background investigations and conducts other pre-employment procedures for prospective new hires and cadets at the APD academy.

63. The complete nature of APD's pre-employment process is secret and not accessible to Plaintiff without the benefit of discovery or other court intervention.

64. Based on the public version of APD policy, APD's pre-employment process is limited to a drug test, a review of public social media information, proof of citizenship, proof of age, proof of education, proof of criminal history checks, and proof of any military discharge.

65. Minimum police standards require the following additional pre-employment procedures pertinent to the risk of hiring a sexual predator:

- Authorization to search the prospective officer's full social media presence and a thorough review of those records for indicators of sexism and sexually abusive conduct;
- Pre-employment interviews with current and former romantic or sexual partners to inquire about any history of sexism or sexually abusive conduct;

- Personal interviews with polygraph examination calculated to detect biases such as sexism that are predictive of sexual violence, as well as to ask about behaviors that are predictive of sexual violence such as characteristic power and control tactics;
- Psychological screening for indicators of abusive tendencies; and
- Authorization to collect prior employment records, including with all prior law enforcement agencies; collection of those records; and review for incidents of prior sexual misconduct.

66. Enacting a hiring process that omits some or all of these rudimentary additional pre-employment procedures is substantially likely to permit sexual predators to become police officers.

67. The importance of the foregoing additional pre-employment procedures has been promulgated by nationally respected sources since long before this incident, such as the International Association of Chiefs of Police, Chief Thomas Tremblay, and End Violence Against Women International.

68. On information and belief, APD's police chief, and all competent police chiefs, are aware of the importance of the foregoing additional pre-employment procedures and the risk that failing to implement some or all of them is substantially likely to permit sexual predators to become police officers.

69. On information and belief, APD failed to implement each of the foregoing additional pre-employment procedures at all relevant times.

70. On information and belief, APD's police chief knew that APD's failure to implement some or all of the foregoing additional pre-employment procedures had caused APD to fail to detect and prevent the retention of sexual predators in the past, and that this would continue because APD failed to rectify the deficiencies.

71. On information and belief, if APD had implemented a process that included some or all of the foregoing additional pre-employment procedures, then APD would have detected Dodds as a likely sexual predator, would not have hired him, and he would not have attacked Doe.

72. On information and belief, any of the foregoing additional pre-employment procedures would have detected that Dodds was likely a serial sexual predator when he was hired.

73. In the alternative, on information and belief, APD actually did know or was deliberately indifferent to the fact that Dodds was likely a serial sexual predator, but chose to hire him anyway.

C. APD was deliberately indifferent in failing to supervise Dodds.

74. APD has no policies, practices, or procedures to alert supervisors, dispatchers, or anyone else of obviously suspicious movements by officers and their patrol vehicles like Dodds' use of his patrol vehicle in this case.

75. Minimum police standards require police supervisors to watch for obvious signs of sexually predatory officers, such as:

- Unwarranted call backs to victims, witnesses, or suspects;
- Unwarranted visits to victims, witnesses, or suspects;
- Possessing sexually inappropriate material while on-duty;
- Using government equipment such as cell phones for inappropriate contact with community members, detainees, or co-workers; and
- Attempting to initiate sexual contact with anyone contacted within the context of law enforcement duties and activities.

76. Officer Dodds' patrol vehicle tracking system could easily be used to alert supervisors, dispatchers, and others within APD's command structure of obviously suspicious

behavior like parking or driving by the same a private residence without an active call multiple times, thereby implementing the above supervisory methods.

77. Likewise, the APD-issued cell phone for officers could easily be monitored remotely for inappropriate contacts and communications of a sexual nature.

78. Accordingly, the above-described supervisory methods were easily feasible at all relevant times.

79. Failing to enact the above-described supervisory methods is substantially likely to permit sexual predators to act with impunity within a police force.

80. The importance of the above-described supervisory methods has been promulgated by nationally respected sources since long before this incident, such as the International Association of Chiefs of Police, Chief Thomas Tremblay, and End Violence Against Women International.

81. On information and belief, APD's police chief, and all competent police chiefs, are aware of the importance of the above-described supervisory methods and the risk that failing to implement some or all of them is substantially likely to permit sexual predators to act with impunity within a police force.

82. On information and belief, APD failed to implement each of the foregoing above-described supervisory methods at all relevant times.

83. On information and belief, APD's police chief knew that APD's failure to implement some or all of the above-described supervisory methods had caused APD to permit sexual predators to act with impunity within a police force in the past, and that this would continue because APD failed to rectify the deficiencies.

84. On information and belief, Dodds had previously used his APD-issued cell phone and his patrol vehicle to sexually assault, harass, and intimidate others that he had contacted in the course of his duties, similar to this incident.

85. Because, on information and belief, APD has none of the above-described supervisory methods implemented, Dodds' previous misconduct and his misconduct in this case was not detected until Doe had already been assaulted and reported the crime herself.

86. If APD had used the above-described supervisory methods, then Dodds would have been interrupted by a minimally competent supervisor before he could attack Doe.

87. In the alternative, on information and belief, APD actually did know or was deliberately indifferent to the fact that Dodds was a serial sexual predator, but chose to retain him anyway and permit his crimes to continue.

D. APD was deliberately indifferent in failing to implement any policies prohibiting sexual misconduct by officers, as distinct from sexual harassment policies.

88. Minimum police standards require specific policies to forbid sexual misconduct by police, such as:

- Forbidding officers from knowingly engage in social or romantic relationships with confidential informants, victims, or witnesses involved with active investigations.
- Requiring officers to report misconduct by fellow officers.
- Prohibiting the conduct described in the supervisory section above.

89. Failing to enact the above-described policies is substantially likely to permit sexual predators to act with impunity within a police force, as the lack of unequivocal minimum standards creates a substantial risk that officers will adopt to a custom of not reporting on their colleagues.

90. The importance of the above-described policies has been promulgated by nationally respected sources since long before this incident, such as the International Association of Chiefs

of Police, Chief Thomas Tremblay, End Violence Against Women International, and the President's Task Force on 21st Century Policing.

91. On information and belief, APD's police chief, and all competent police chiefs, are aware of the importance of the above-described policies and the risk that failing to enact some or all of them is substantially likely to permit sexual predators to act with impunity within a police force.

92. APD failed to enact each of the foregoing above-described policies at all relevant times.

93. On information and belief, APD's police chief knew that APD's failure to enact some or all of the above-described policies had caused APD to permit sexual predators to act with impunity within a police force in the past, and that this would continue because APD failed to rectify the deficiencies.

94. On information and belief, Dodds had previously used his APD-issued cell phone and his patrol vehicle to sexually assault, harass, and intimidate others that he had contacted in the course of his duties, similar to this incident.

95. Because, on information and belief, APD has none of the above-described policies implemented, Dodds' previous misconduct and his misconduct in this case was not detected until Doe had already been assaulted and reported the crime herself.

96. If APD had enacted the above-described policies, then Dodds would have been interrupted by a minimally competent supervisor or colleague before he could attack Doe.

97. In fact, APD had, at all relevant times, no policies, training, procedures, or supervision whatsoever calculated to prevent police sexual misconduct, despite the fact that it is a widespread problem recognized by law enforcement agencies nationwide.

98. On information and belief, had APD enacted those obviously necessary policies, procedures, and supervision described above, then Dodds would have been detected and either never hired or expelled long before he encountered and attacked Doe.

99. In the alternative, on information and belief, APD actually did have such policies, but was deliberately indifferent, through its policymaker, to a custom of its officers routinely violating those policies.

E. APD fostered an ongoing culture of sexual misconduct by APD officers by undermining any and all efforts to investigate, discipline, and arrest the perpetrators.

100. Sexual misconduct by law enforcement generates more citizen complaints than any other factor aside from excessive force.

101. However, APD has not published any statistics on citizen complaints specifically about sexual misconduct.

102. For 2002, the City reported 77 complaints of “bias,” 59 complaints of “excessive force,” 59 complaints of “failure of duty, and 51 complaints of “oppressive behavior.” Among the subcategories of those complaints, APD reported 38 complaints of “harassment,” 9 complaints of “misconduct,” 7 complaints of “abuse of power,” 2 complaints of “assault,” 1 complaint of “family violence,” 5 complaints of “coercion,” and 32 complaints of “intimidation.” It is unclear from the City’s publication which of these categories, if any, includes sexual violence.

103. For 2003, the City used different categories which are also unclear. The City reported 65 “external” complaints about “use of force” and 75 “external” complaints about “Proper procedure.”

104. The City also received 80 “internal” complaints in 2003, but it is unknown to Plaintiff what categories of allegations were involved in those complaints.

105. From 2004 through 2015, the City published a total number of “code of conduct” violations alleged against officers, a number which is reported to include sexual misconduct—but also includes confounding information such as complaints about rude language. These numbers reflect the following:

- 2004 – 245 alleged “code of conduct” violations by APD officers.
- 2005 – 441 alleged “code of conduct” violations by APD officers.
- 2006 – 396 alleged “code of conduct” violations by APD officers.
- 2007 – 497 alleged “code of conduct” violations by APD officers.
- 2008 – 660 alleged “code of conduct” violations by APD officers.
- 2009 – 576 alleged “code of conduct” violations by APD officers.
- 2010 – 416 alleged “code of conduct” violations by APD officers.
- 2011 – 337 alleged “code of conduct” violations by APD officers.
- 2012 – 319 alleged “code of conduct” violations by APD officers.
- 2013 – 372 alleged “code of conduct” violations by APD officers.
- 2014 – 342 alleged “code of conduct” violations by APD officers.
- 2015 – 366 alleged “code of conduct” violations by APD officers.

106. Plaintiff has not been able to locate other records reflecting the total number of alleged incidents involving sexual misconduct by APD officers.

107. On information and belief, many of these generically reported allegations were allegations of sexual assault by APD officers that the City declined to discipline or investigate.

108. On information and belief, the relevant policymaker was aware of that pattern of sexual misconduct allegations and that APD was not investigating the accused perpetrating officers.

109. The City did not begin to routinely publish complaints against APD officers until approximately 2019 except where officers were disciplined and, on information and belief, only a single officer was disciplined for sexual misconduct during the period from 2002 until September 2020.

110. Beginning in approximately 2019, the City began to publish, in part, some complaints made to the Office of Police Oversight, but the City continues to maintain supervisory complaints and complaints made to the APD Internal Affairs Division under a veil of secrecy.

111. Thus, APD maintains the vast majority of records of complaints about its officers' sexual misconduct behind a veil of secrecy.

112. Art Acevedo was the APD chief from 2007 until the end of 2016.

113. In May 2008, Acevedo found that APD Sergeant Dustin Lee, a 12-year veteran, had sexually harassed a coworker. However, Acevedo's initial discipline was rescinded so Lee remained on the force. In 2019, Lee, by then an APD Lieutenant who had been working in APD for 23 years, was arrested by Round Rock Police for sexual assault of a child.

114. In 2014, APD officers Michael Castillo and Mark Lytle were caught on their body worn cameras whistling at a woman walking by, mockingly suggesting she call the police, and then warning her that the police cannot "unrape you."

115. Despite the publicity, on information and belief, then-police chief Art Acevedo did not discipline Castillo or Lytle.

116. Also while chief, on information and belief, Acevedo dismissed allegations by his subordinate female officers that male APD officers had assaulted them. While he was the policymaker for law enforcement in Austin, Acevedo allegedly said some of these allegations of sexual violence by APD officers were just about "bad sex."

117. On information and belief, during Acevedo's tenure as chief, the sex crimes unit maintained a wall with photos of people the unit had unilaterally determined to have submitted a "false report" of sexual violence.

118. Acevedo was succeeded by Brian Manley, who served as chief from 2016 until 2021.

119. During Manley's tenure, APD's longstanding culture of sexual misconduct came to the forefront of the public consciousness.

120. On information and belief, during Manley's tenure through the time of Doe's assault, APD officers continued to be accused of credible claims of sexual misconduct, including—but not limited to—sexual violence against women.

121. On information and belief, from the beginning of Manley's tenure until Dodds' arrest, Manley was aware of the pattern of credible accusations that his officers had engaged in sexual violence.

122. On information and belief, internal reports were generated by APD, by the Office of the Police Monitor, by the Citizen Review Panel, and by other arms of the City about numerous accusations that its officers had engaged in sexual violence, but those reports were never published, APD never disciplined the officers, APD failed to seriously investigate the complaints, and APD never arrested the perpetrators.

123. Due to APD policy and Texas Public Information law, records of accusations against APD officers—including allegations of sexual assault—that APD itself deems unmeritorious are permanently hidden from public view and often destroyed after only a few years.

124. On information and belief, APD officers, including Manley, were widely aware that allegations of sexual violence against APD officers would not result in serious punishment.

125. On March 7, 2020, an unknown woman accused an APD officer of walking up to her, grabbing her arm, pushing her up against a car, and then groping her breast and vagina. The officer allegedly did not ask the victim for any information and had no reason to frisk the unknown woman. Based on available records, no officer was disciplined arising from the complaint.

126. A 2020 report by Lisa Tatum, ordered by the City of Austin's City Manager and released the day before Dodds attacked Doe, found that APD retained a culture of sexism.

127. The Tatum report found that APD's Senior Chaplain, Rick Randall, often makes sexist comments.

128. The Tatum investigation also received many reports from all across APD that sexist name calling, and use of derogatory terms associated with sex, persist.

129. A culture of sexism in a police department fosters sexual predators, and attracts them to attempt to work as officers in that department.

130. As discussed above, a key step in screening and rooting out sexual predators is to evaluate prospective officers and current officers' views for sexist bias, because such a bias is a strong predictor of sexually predatory behavior.

131. The importance of eliminating sexist bias in policing has been promulgated by nationally respected sources since long before this incident, such as the International Association of Chiefs of Police, Chief Thomas Tremblay, End Violence Against Women International, the Department of Justice, and the President's Task Force on 21st Century Policing.

132. On information and belief, APD's police chief, and all competent police chiefs, are aware of the importance of the eliminating sexism within their police department and the risk that failing to do so is substantially likely to foster sexually predatory behavior by officers.

133. On information and belief, APD failed to correct the sexist culture pervading APD at all relevant times.

134. On information and belief, APD's police chief knew that APD's failure to correct the sexist culture within the agency had caused APD officers to engage in sexual assault in the past, and that this would continue because APD failed to rectify the deficiencies.

135. On April 20, 2022, an unknown woman who worked for the City accused a male APD officer of sexually harassing almost every female he works with. The woman alleged that she and other victims were too afraid to come forward due to retaliation, that she had seen the officer pull on women's hair, slap their butts, and pressure them to send him nude photos.

F. APD's longstanding failure to investigate sexual violence

136. A 2018 study, sponsored by the U.S. Department of Justice, found that APD only made arrests in less than ten percent of sexual assault allegations during the year-long study period.

137. The percentage of arrests is even more abysmal for rape within the meaning of public reporting requirements,¹ and has been for at least the last ten years.

138. In 2011, out of 211 rapes reported to APD, APD made no arrests.

139. In 2012, out of 209 rapes reported to APD, APD made just 1 arrest.

140. In 2013, out of 217 rapes reported to APD, APD made no arrests.

141. In 2014, out of 571² rapes reported to APD, APD only made 4 arrests.

142. In 2015, out of 487 rapes reported to APD, APD only made 2 arrests.

¹ The Texas Penal Code does not use the term "rape," but the State of Texas and City of Austin often report the crime of "rape" when publishing statistics on crimes and arrests, as they rely upon the FBI's definition of the crime to organize their reporting.

² Prior to 2014, the FBI's definition of "rape" was narrower, causing the number of reports and arrests so classified to be lower. APD also underreported the number of reported rapes in 2014, 2015, and 2016.

143. In 2016, out of 747 rapes reported to APD, APD only made 3 arrests.

144. In 2017, out of 834 rapes reported to APD, APD only made 9 arrests.

145. In 2018, out of 787 rapes reported to APD, APD made 89 arrests.

146. This is partly because the agency intentionally underfunded investigating sexual assault.

147. In 2020, APD assigned only 19 detectives to handle about 1,000 sexual violence cases per year.

148. APD only had 17 sex crimes detectives in 2018, investigating 787 rapes. By comparison, APD had 12 detectives assigned to investigate 32 murders in 2018.

149. Sexual violence rarely leads to an arrest arising from a complaint to APD when compared to other crimes such as murder, assault, and theft of an automobile. This fact was reported to the Austin City Council in 2019.

150. Mayor Steve Adler remarked that the City of Austin has “far too many sexual assaults that are resulting in too few perpetrators being taken off our streets.”

151. But APD is not just unskilled in investigating sexual violence; it instead chooses not to press charges for the supermajority of those cases despite sufficient evidence to do so.

152. For years, APD affirmatively chose to close investigations without adequate investigation. APD covered up its lack of investigations by “exceptionally clearing” about 2 of every 3 rape cases that it closed during the years leading up to the attack on Doe. A case is only supposed to be “exceptionally cleared” if there is an identified suspect, the suspect’s location is known, and there is enough information to support an arrest, charge, or turning over the case to the court for prosecution, but for some reason the case does not lead to an arrest, charge, or other

prosecution. That means that APD nonetheless did not arrest, charge, or turn over the case to the court system a supermajority of rape cases even when they had enough evidence to do so.

153. Even worse, in an audit of late 2017 rape cases handled by APD, the Texas Department of Public Safety determined that the Austin Police Department had wrongfully “exceptionally cleared” nearly one-third of its exceptionally cleared rape cases during the audited period.

154. The Texas Department of Public Safety audit further confirmed that nearly half of those wrongfully “exceptionally cleared” cases had “enough information to support an arrest, charge, and turning over to the court for prosecution.”

155. APD Chief Manley agreed with nearly all of DPS’s findings, admitting the majority of cases identified by DPS were closed improperly or should not have been closed at all.

156. But this intentional misclassification was not new information to APD’s policymaker. On information and belief, APD’s former head of sex crimes, Elizabeth Donegan, had internally complained about and resisted the practice for years.

157. Moreover, Donegan’s superiors within APD had pressured her to deliberately cover up the department’s poor investigating success by improperly “exceptionally clearing” cases. After she was pushed out of the department, the rate of “exceptional clearance” rose. Manley admitted he had a “difference of opinion” with Donegan about this issue when he had her transferred.

158. Aside from Donegan’s prophetic complaints about “exceptional clearance,” she also publicly warned that APD’s sexual assault investigations were not adequately thorough.

159. These mirror problems with APD’s investigation in specific incidents that have been publicized.

160. For example, on information and belief, in the investigation of the sexual assault of Hanna Senko from 2006, APD never visited the scene of the crime, never interviewed witnesses, and decided to “exceptionally clear” the case before Senko’s blood test results even came back—even though she reported her assailant had suspiciously had pills in his pocket before the attack.

161. In investigating an October 2008 sexual assault, on information and belief, APD questioned the victim’s truthfulness, asked her about other men she had had sex with, and asked her whether she had a boyfriend.

162. To investigate the 2010 sexual assault of Julie Ann Nitsch, on information and belief, APD failed to collect physical evidence including the cords the assailant used as a weapon, broken locks, the glass door the assailant used to enter, or anything else that could be used to identify the assailant. Instead, APD asked Nitsch how much she had to drink, what she had been wearing, and why she lived in a bad neighborhood.

163. On December 24, 2014, on information and belief, Heather Sin was drugged at a bar and sexually assaulted by several men. The next morning, Sin awoke at railroad tracks and called the police. A physical exam confirmed many injuries including genital injuries consistent with sexual assault. An APD detective later spoke to her and made clear that he did not believe anything had happened to her and would wait on DNA results before investigating at all. After Sin pressed for an explanation, APD suggested they were not pursuing the case because Sin had been drinking. Sin’s case remained pending for at least 3 years.

164. On August 9, 2015, on information and belief, Marina Conner was sexually assaulted. During the assault, Conner made a phone call that recorded her cries for help. Conner spoke to an APD detective on the phone who promised to come meet her, but he never did. Conner

obtained a written confession from the assailant. Despite this evidence, APD decided not to pursue the case.

165. On January 7, 2016, on information and belief, Anisha Ituah was sexually assaulted by a patient at a state hospital. Her family called APD, but APD refused to dispatch anyone, so APD never collected forensic evidence from Ituah. APD's detective also complained to Ituah that he had a huge case load of over 300 rape victims and he cannot get every case done. The detective also blamed Ituah for her own assault and suggested he would not investigate. Travis County later told her family that APD was not pursuing the case.

166. Even more alarming is APD's response to a series of sexual violence that Amanda Day reported to APD. In 2018, on information and belief, APD told her that it would not investigate because she had previously consented to "kissing and stuff" with her violent assailant who repeatedly sexually assaulted her. The APD officer also asked her what panties she was wearing and inaccurately told the victim that the sexual assaults were "family violence," before refusing to investigate further.

167. Also in 2018, on information and belief, APD closed a case investigating sexual assault allegations by Jessica Ragsdill. In that case, APD obtained video footage confirming the suspect had entered a hotel room with the victim while she was so intoxicated that she could not stand. APD also had photographic evidence reflecting that the sexual assault was so violent that Ragsdill was bleeding and bruised. But APD decided not to pursue the case regardless, and "exceptionally cleared" the report of sexual assault.

168. In January 2018, on information and belief, Emily Borchardt was repeatedly and violently sexually assaulted by a ring of sex traffickers who abducted her, locked her in a motel room, and repeatedly threatened to kill her. After at least 10 hours, Borchardt finally escaped and

called APD. The first officer to respond rolled his eyes and was impatient. APD failed to collect surveillance video or other physical evidence from the motel. The detective assigned to the case told Borchardt's mother that some of the events "sounded consensual." The detective later characterized the bruising on Borchardt's neck where her assailants had strangled her as a "hickey." Eventually APD declined to pursue the investigation further.

169. On information and belief, during the years leading up to the attack on Doe, APD officers routinely told sexual assault victims that their assaults "sounded consensual."

170. On information and belief, during the years leading up to the attack on Doe, APD officers routinely characterized victims of sexual violence as "bad victims" if they knew their attacker.

171. On information and belief, during the years leading up to the attack on Doe, APD detectives assigned to investigate sexual violence often rolled their eyes at the victim's allegations, then dismissed them because the assailant claimed the encounter was consensual.

172. On information and belief, during the years leading up to the attack on Doe, APD officers assigned to investigate sexual violence routinely criticized victims for their clothing, for where they live, and for drinking alcohol.

173. As a proximate and obviously foreseeable result of APD's deplorable sex crimes investigation practices, APD officers believed they could engage in sexual violence with impunity, and many of them did so in a pattern of misconduct for years.

174. On information and belief, APD's police chief was aware that the deficiencies in the sex crimes investigation practices and the fact that these deficiencies had caused, and would continue to cause, APD officers to sexually assault citizens with impunity.

175. On information and belief, during the years leading up to the attack on Doe, APD officers have been accused of sexual assault but not arrested or disciplined.

176. A single, high profile counter-example proves the rule. In December 2018, Manley terminated an APD commander, Jason Dusterhoft, for allegedly beating his then-girlfriend, including by strangling her during sex, despite, on information and belief, knowing that this allegation was not credible and that this allegation had instead been manufactured by APD's sex crimes unit on Manley's own orders.

177. Dusterhoft countered that Manley had intentionally used the sex crimes division to pressure his ex-girlfriend into fabricating the allegations, pointing out that Manley himself admitted the allegations were not credible.

178. Dusterhoft alleges, in an ongoing lawsuit, that he had personally alerted Manley to a then-dire backlog in sexual assault kit testing—a backlog which was a source of enormous public embarrassment for Manley and reinforced the belief that APD did not take allegations of sexual assault seriously.

179. Therefore, Manley's actions and statements with respect to Dusterhoft further aggravated the widespread belief amongst APD officers that allegations of sexual violence were never taken seriously, as the sex crimes unit was already widely viewed to lack integrity and Manley's alleged actions further severely undermined its credibility.

180. Because APD systemically engaged in sexual violence, continued to hire officers without any protections in place against hiring sexual predators, refused to supervise its officers to prevent such violence, refused to enact any policies prohibiting that violence, refused to properly investigate sexual violence, systemically covered up their failures, and maintained a culture that

tolerated sexual violence even by police officers, predators like Officer Dodds were emboldened and believed they could engage in sexual violence with impunity.

IV. CAUSES OF ACTION

A. FOURTH AND FOURTEENTH AMENDMENT VIOLATIONS – AS TO DEFENDANT OFFICER DODDS

181. Plaintiff incorporates the preceding paragraphs as if alleged herein.

182. Austin Police Department Officer Dodds, while acting under color of law, violated Plaintiff Doe's substantive due process right to bodily integrity by penetrating her with his penis without her consent.

183. Doe has suffered significant injuries as a result of Officer Dodds' sexual assault.

184. Austin Police Department Officer Dodds' assault shocks the conscience. Without any legitimate reason, Officer Dodds entered Plaintiff's home at night, penetrated her without her consent, and proceeded to intentionally terrify her by driving by her home in his APD cruiser and calling her cell phone from blocked numbers.

185. Therefore, Austin Police Department Officer Dodds violated Doe's clearly established Fourteenth Amendment right to bodily integrity in such a way that clearly shocks the conscience and directly and proximately caused Doe to suffer significant injuries.

186. In addition, Austin Police Department Officer Dodds, while acting under color of law, entered Plaintiff Doe's home without permission and used excessive force on Plaintiff Doe by penetrating her with his penis without her consent in her own home.

187. Officer Dodds unlawfully entered Doe's home and then seized Doe by using force on her, trapping her in her bedroom, restraining her freedom to leave, and restraining her freedom to decline his unwanted sexual conduct and penetration.

188. Austin Police Department Officer Dodds' use of force was wholly excessive to any conceivable need, objectively unreasonable in light of clearly established law, conscience shocking and directly caused Plaintiff Doe to suffer serious injuries.

189. Therefore, Austin Police Department Officer Dodds violated Doe's clearly established Fourth Amendment rights.

190. Officer Dodds acted under color of law in the course of his violations of Plaintiff Doe's rights when he used his police investigation of her 911 call as pretext to find out where she lived, her phone number, and whether she would be vulnerable to his assault; used his police investigation as a pretext to contact her again and press unwanted sexual advances; used his police-issued phone to call her repeatedly before the sexual assault; used his APD badge and uniform to gain access to her home; kept his uniform on—including his APD badge and APD issued gun—while sexually assaulting Doe; intimidated her nephew with his authority as a police officer as well as his uniform, badge, and service weapon; and terrified her with his service weapon and police authority. Officer Dodds also drove by her home in his APD cruiser in order to further terrify and intimidate her in an effort to prevent her from reporting the misconduct and prepare to attack her again.

191. As a direct and proximate result of Austin Police Department Officers Dodds' actions, Doe suffered and continues to suffer significant injuries.

192. Doe brings these claims pursuant to 42 U.S.C. § 1983.

B. PUNITIVE/EXEMPLARY DAMAGES – AS TO DEFENDANT DODDS

193. Plaintiff incorporates the preceding paragraphs as if alleged herein.

194. Defendant's conduct was egregious, reckless, and endangered countless community members. Plaintiff seeks punitive damages as well to deter future similar violations of constitutional rights.

C. FOURTH AND FOURTEENTH AMENDMENT – FAILURE TO TRAIN, SUPERVISE, AND PROTECT AS TO DEFENDANT CITY OF AUSTIN

195. Plaintiff incorporates the preceding paragraphs as if alleged herein.

196. The City of Austin, had the following policies, practices, or customs in place when APD Officer Dodds sexually assaulted Doe:

- a. Failure to train officers about preventing sexual harassment and sexual assault;
- b. On information and belief, hiring officers known or that should have been known to have sexually harassed or sexually assaulted in the past;
- c. Failing to adopt simple pre-employment procedures to screen out officers who were or would likely become sexual predators;
- d. Failure to supervise officers known or that should have been known to have sexually harassed or sexually assaulted in the past;
- e. Failure to implement simple procedures to detect highly suspicious behavior by officers, such as Dodds' driving back to the same private residence multiple times for no legitimate reason;
- f. Failure to implement straightforward policies to prohibit and help detect highly suspicious behavior typical of officers who engage in sexual violence;
- g. Failure to discipline officers for domestic violence or sexual assault in the past;
- h. Wrongfully clearing complaints that officers and members of the public engaged in sexual assault;
- i. Wrongfully failing to investigate complaints that officers and members of the public engaged in sexual assault;
- j. Adopting a culture of tolerance for sexual violence and unjustified skepticism of reports of sexual violence;
- k. Failure to adequately investigate officers' history of sexual harassment or sexual assault in the past;

- l. Failure to protect the public from known dangerous servants while giving them the tools and authority to perpetrate attacks on innocent civilians with impunity; and
- m. Failure to investigate APD officers accused of sexual assault.

197. Each of the policies, practices, or customs delineated above was actually known, constructively known, approved, and/or ratified by City of Austin and its policymaker for law enforcement purposes, Chief of Police, Brian Manley, and was promulgated with deliberate indifference to Doe's Fourth and Fourteenth Amendment rights under the United States Constitution. Moreover, the known and obvious consequence of these policies, practices, or customs was that Austin Police Department officers would be placed in recurring situations where constitutional violations similar to those inflicted on Doe would result. Accordingly, these policies also made it highly predictable that the particular violations alleged here, all of which were under color of law, would result.

198. Consequently, the policies and conduct delineated above were a moving force of Plaintiff's constitutional deprivations and injuries, and proximately caused severe damages to Plaintiff.

199. Plaintiff Doe brings this claim pursuant to 42 U.S.C. § 1983.

V. DAMAGES

200. Plaintiff Doe seeks the following damages:

- a. Past and future medical expenses;
- b. Past and future economic damages, including (but not limited to) loss of earning capacity;
- c. Past and future physical pain and mental anguish;
- d. Past and future impairment;
- e. Past and future disfigurement;
- f. Punitive damages at to Defendant Dodds only;

- g. Loss of consortium; and,
- h. Attorneys' fees pursuant to 42 U.S.C. § 1988.

VI. JURY DEMAND

201. Pursuant to Federal Rule of Civil Procedure 48, Plaintiff hereby requests a jury trial.

VII. PRAYER FOR RELIEF

202. To right this injustice, Plaintiff requests the Court:
- a. Award compensatory damages against Defendants;
 - b. Award exemplary damages against Defendant Dodds only;
 - c. Award Plaintiff costs and fees, including but not limited to expert fees and attorneys' fees, pursuant to 42 U.S.C. § 1988;
 - d. Award pre-judgment and post-judgment interest at the highest rate allowable under the law; and,
 - e. Award and grant such other just relief as the Court deems proper.

Dated: May 24, 2022.

Respectfully submitted,

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By /s/ Jeff Edwards
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

By my signature below I certify that a true and correct copy of this document has been filed with the Court's electronic case filing system and served on all parties who have thereby appeared.

/s/ Jeff Edwards

Jeff Edwards

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:

1:22-cv-00299

**PLAINTIFF’S PARTIALLY UNOPPOSED MOTION FOR LEAVE TO AMEND HER
COMPLAINT**

Plaintiff Jane Doe respectfully requests leave to amend her complaint with the attached Exhibit 1 to revise her allegations. Defendant City of Austin does not oppose the motion. Defendant Dodds has appeared *pro se* in this case, but he has not provided any contact information which would allow Plaintiff to meaningfully confer with him about this motion.

A. FACTS AND PROCEDURAL BACKGROUND

Plaintiff Jane Doe filed this 42 U.S.C. § 1983 case on March 30, 2022, alleging that Defendant Walter Dodds used his authority, training, and equipment as an APD officer to invade Plaintiff’s home, sexually assault her, then harass and intimidate Plaintiff, and that this attack was caused by longstanding deficient policies, supervision, and training by the City of Austin. Doc. 1.

B. ARGUMENT

The Court should grant Plaintiff leave to amend her complaint.

“Rule 15(a) declares that leave to amend shall be freely given when justice so requires; this mandate is to be heeded. . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.”

Foman v. Davis, 371 U.S. 178, 182 (1962) (internal quotation marks and citations omitted); *see also* FED. R. CIV. P. 15(a)(2). Ordinarily the Court should not deny leave to amend merely due to delay. *See Dueling v. Devon Energy Corp.*, 623 F. App'x 127, 131 (5th Cir. 2015) (reversing denial of leave to amend where there was significant unexplained delay).

In this case, there is good cause to grant leave to amend as Plaintiff seeks the amendment early in the case, less than thirty days after the Defendants appeared and before any discovery, so there will be no unfair prejudice from the delay. *See* Doc. 8; Doc. 9. The amendment will add factual detail to clarify the scope of Plaintiff's allegations and correct issues with the previous complaint. No parties are added or changed by the amendment.

C. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's leave to amend her Complaint with the proposed Second Amended Complaint, which is attached as Exhibit 1.

Dated: May 25, 2022.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

By my signature below, I certify that a true and correct copy of the foregoing has been served on all counsel of record via the Court's electronic case filing system.

/s/ Jeff Edwards
Jeff Edwards

CERTIFICATE OF CONFERENCE

By my signature below, I certify that I conferred with counsel for Defendant City of Austin via electronic mail and they indicated the City is not opposed to the relief requested in this motion. Defendant Dodds has not provided contact information so it is not feasible to confer with him about the relief requested in this motion.

/s/ David James
David James

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:

1:22-cv-00299

PLAINTIFF’S SECOND AMENDED COMPLAINT

Plaintiff Jane Doe brings this 42 U.S.C. § 1983 case against the City of Austin and then-Austin Police Department Officer Walter Dodds, as Dodds sexually assaulted her.

I. PARTIES

1. Plaintiff Jane Doe is a resident of Travis County, Texas. Plaintiff files under a pseudonym to protect her privacy and safety.

2. Defendant City of Austin is a municipality that operates the Austin Police Department. The City’s policymaker for policing matters was former Police Chief Brian Manley at the time of the incident and is currently Chief Joseph Chacon. *The City has appeared in this case.*

3. Defendant Officer Walter Tyson Dodds was at the time of this incident an Austin Police Department officer and he is sued in his individual capacity for compensatory and punitive damages. Officer Dodds was acting under color of law as an Austin Police Department officer at all relevant times. *Dodds has answered.*

II. JURISDICTION AND VENUE

4. This Court has federal question jurisdiction over this 42 U.S.C. § 1983 action pursuant to 28 U.S.C. §§ 1331 and 1343.

5. This Court has general personal jurisdiction over Defendant City of Austin as it is located in Travis County, Texas and over Defendant Dodds as he resides in Lee County, Texas.

6. This Court has specific *in personam* jurisdiction over Defendants because this case arises out of conduct by Defendants that injured Plaintiff Jane Doe, and which occurred in Travis County, Texas, which is within the Western District of Texas.

7. Venue of this cause is proper in the Western District pursuant to 28 U.S.C. § 1391(b) because a substantial portion of the events or omissions giving rise to Plaintiff's claims occurred in Travis County, which is within the Western District of Texas.

III. FACTS

A. Dodds' attack on Doe

8. On April 18, 2020, Jane Doe and her boyfriend, A.G., had an argument during which A.G. had a breakdown, put a belt around his throat, and tightened it to threaten suicide.

9. Doe yelled to her nephew to go get help.

10. Doe's nephew went to his mother in a nearby apartment who called 911 to get help from APD.

11. At approximately 6:13pm, Defendant Officer Walter Dodds, while on duty as an Austin Police Officer, responded and arrived on scene.

12. Officer Dodds conducted interviews with Jane Doe and A.G.

13. Officer Dodds determined that A.G. was a danger to himself and needed to be placed under an emergency detention.

14. Austin Emergency Medical Services (EMS) arrived on scene and determined that A.G. would need to be transported to the hospital.

15. During Officer Dodds' interview with Doe, he asked for her phone number and told her that he would be calling her to tell her where A.G. was being taken.

16. At the end of the interview, Officer Dodds asked Doe about locking the door to her apartment.

17. Officer Dodds said, "What if someone sneaks in there? You don't want to be sleeping with some dude in there with you."

18. Officer Dodds then accompanied A.G. to the hospital and completed the required documentation for A.G.'s emergency detention.

19. Then at 6:54pm, Officer Dodds called Doe from his APD-issued cell phone.

20. Officer Dodds started the call by telling Doe which hospital A.G. had been taken to, but then began to ask if he could come over. Doe did not give consent for Officer Dodds to come to her home.

21. Officer Dodds then asked her if Doe would take off his uniform for him and again if he could come over. Again, Doe did not consent to allow the officer into her apartment or to take off his uniform. Doe ended the call.

22. Officer Dodds called Doe four more times from the same APD-issued cell phone between 6:54pm and 9:09pm, but Doe did not pick up any of these calls.

23. After 9:09pm, Doe fell asleep in her bedroom alone.

24. Sometime after Doe fell asleep, Officer Dodds again went to Doe's apartment and knocked on the door.

25. On information and belief, Dodds used his police vehicle to return to Doe's apartment.

26. Although Dodds' police vehicle is equipped with a tracking device that APD dispatchers and Dodds' supervisors could see, neither his supervisor nor the dispatchers challenged Dodds for returning to a residence where there was no reason for him to be.

27. Doe's minor nephew opened the door and saw Officer Dodds in his full uniform, including his gun and full duty belt.

28. Officer Dodds walked by Doe's nephew, directly into Doe's bedroom, and shut the door behind him.

29. Dodds did not have permission or authority to enter the home.

30. Because Officer Dodds was an armed police officer, Doe's minor nephew did not call for help or otherwise attempt to impede his entrance.

31. Doe awoke to Officer Dodds in her bedroom penetrating her vagina with his penis.

32. Doe was shocked, frightened, and confused about what was going on and never consented to any contact of any kind from Officer Dodds.

33. Officer Dodds then flipped her onto her stomach and forced his penis into her vagina two more times.

34. Officer Dodds was not wearing a condom and ejaculated onto the fitted sheet on her bed. Doe remained terrified.

35. That sheet was later tested for DNA evidence by APD. The DNA analysis confirmed that Officer Dodds' DNA was present on the sheet.

36. Over the next several days, Officer Dodds continued to call Doe from his APD-issued cell phone and terrorize her.

37. On April 25, 2020, Officer Dodds called Doe, disguising his number.

38. Doe picked up the phone, recognized Dodds' voice immediately, and heard him ask who she was with and what she was doing.

39. Terrified, Doe answered that she was with her husband and hung up the phone.

40. On April 26, 2020, at approximately 5:30pm, Doe saw Officer Dodds drive by her apartment complex in his police vehicle, slowly drove down the dead end of her parking lot, turned around and drove away. Doe's nephew took a photo of the vehicle, which APD later confirmed was Dodds' assigned police car for that day.

41. Again, neither Dodds' supervisor nor APD dispatchers challenged Dodds for taking his police vehicle to a residence where he had no reason to be.

42. On April 27, 2020, at 4:40pm, Dodds called Doe again, using *67 to hide his phone number.

43. Officer Dodds again asked her what she was doing and if he could come over. Doe, recording the call, repeatedly asked him to say his name, but Dodds only responded, "It's me."

44. On April 29, 2020, Doe called 911 to report the sexual assault by Officer Dodds.

45. Officer Walter Dodds was accused of Sexual Assault and Official Oppression and was arrested on September 10, 2020.

46. Dodds' criminal defense attorneys claimed that he had been indicted for those accusations, although Dodds filed a motion in this action claiming he has not yet been indicted.

B. The City was deliberately indifferent in hiring Dodds as an APD officer.

47. Attempting to find work as a police officer is appealing to sexual predators because the authority, training, and equipment associated with the position enables them to engage in sexual violence with less chance of detection.

48. Conditions of the policing profession create opportunities for sexual misconduct, as officers have power and authority over others, often work alone, often work without direct supervision, often work late into the night, and often engage with vulnerable populations who lack power, are perceived as less credible, or both.

49. Despite their expertise in evading law enforcement, over one hundred police officers are caught engaging in sexual violence every year in the United States.

50. Sexual misconduct by law enforcement officers is the most common single source of citizen complaints behind only excessive force.

51. Any competent police chief would know that there is a substantial risk that a prospective officer seeking employment would be a sexual predator.

52. On information and belief, the City's police chief knew at all relevant times that there was a substantial risk that prospective officers seeking work at APD would be sexual predators.

53. APD's decision-making to reject or hire prospective officers that it believes are substantially likely to be sexual predators is kept secret and not known to Plaintiff.

54. On information and belief, the City's police chief knew at all relevant times that a pattern of sexual predators had sought to work as police officers for APD.

55. Dodds' *modus operandi* in his attack upon Doe and his subsequent harassment in this case reflects planning and a habitual pattern strongly indicative of a serial sexual predator.

56. Dodds' background is also consistent with the profile of a serial sexual predator.

57. Most people who sexually assault a stranger will do so again, and have done so before.

58. Most people who are caught engaging in sexual assault have done so many times before people before.

59. On information and belief, Doe was not Dodds' first victim.

60. On information and belief, Dodds had abused his authority, training, and equipment as a police officer to sexually assault other people while working at law enforcement agencies prior to being hired by APD.

61. The full scope of APD's hiring policies, procedures, and practices are secret and not accessible to Plaintiff without the benefit of discovery or other court intervention.

62. APD routinely conducts pre-employment background investigations and conducts other pre-employment procedures for prospective new hires and cadets at the APD academy.

63. The full scope of APD's pre-employment process is secret and not accessible to Plaintiff without the benefit of discovery or other court intervention.

64. Based on the public version of APD policy, APD's pre-employment process is limited to a drug test, a review of public social media information, proof of citizenship, proof of age, proof of education, proof of criminal history checks, and proof of any military discharge.

65. Minimum police standards require the following additional pre-employment procedures pertinent to the risk of hiring a sexual predator:

- Authorization to search the prospective officer's full social media presence and a thorough review of those records for indicators of sexism and sexually abusive conduct;
- Pre-employment interviews with current and former romantic or sexual partners to inquire about any history of sexism or sexually abusive conduct;
- Personal interviews with polygraph examination calculated to detect biases such as sexism that are predictive of sexual violence, as well as to ask about behaviors that are predictive of sexual violence such as characteristic power and control tactics;
- Psychological screening for indicators of abusive tendencies; and

- Authorization to collect prior employment records, including with all prior law enforcement agencies; collection of those records; and review for incidents of prior sexual misconduct.

66. Enacting a hiring process that omits some or all of these rudimentary additional pre-employment procedures is substantially likely to permit sexual predators to become police officers.

67. The importance of the foregoing additional pre-employment procedures in preventing police departments from hiring sexual predators has been promulgated by nationally respected sources since long before this incident, such as the International Association of Chiefs of Police, Chief Thomas Tremblay, and End Violence Against Women International.

68. On information and belief, APD's police chief, and all competent police chiefs, are aware of the importance of the foregoing additional pre-employment procedures and the risk that failing to implement some or all of them is substantially likely to permit sexual predators to become police officers.

69. On information and belief, APD failed to implement each of the foregoing additional pre-employment procedures at all relevant times.

70. On information and belief, APD's police chief knew that APD's failure to implement some or all of the foregoing additional pre-employment procedures had caused APD to fail to detect and prevent the retention of sexual predators in the past, and that this would continue because APD failed to rectify the deficiencies.

71. On information and belief, if APD had implemented a process that included some or all of the foregoing additional pre-employment procedures at the time Dodds was hired, then APD would have detected Dodds as a likely sexual predator at that time, would not have hired him, and he would not have attacked Doe.

72. In the alternative, on information and belief, APD actually did know or was deliberately indifferent to the fact that Dodds was likely a serial sexual predator, but chose to hire him anyway.

C. APD was deliberately indifferent in failing to supervise Dodds.

73. APD has no policies, practices, or procedures to alert supervisors, dispatchers, or anyone else of obviously suspicious movements by officers and their patrol vehicles like Dodds' use of his patrol vehicle in this case.

74. Minimum police standards require police supervisors to watch for obvious signs of sexually predatory officers, such as:

- Unwarranted call backs to victims, witnesses, or suspects;
- Unwarranted visits to victims, witnesses, or suspects;
- Possessing sexually inappropriate material while on-duty;
- Using government equipment such as cell phones for inappropriate contact with community members, detainees, or co-workers; and
- Attempting to initiate sexual contact with anyone contacted within the context of law enforcement duties and activities.

75. Officer Dodds' patrol vehicle tracking system could easily be used to alert supervisors, dispatchers, and others within APD's command structure of obviously suspicious behavior like parking or driving by the same a private residence without an active call multiple times, thereby implementing the above supervisory methods.

76. Likewise, the APD-issued cell phone for officers could easily be monitored remotely for inappropriate contacts and communications of a sexual nature.

77. Accordingly, the above-described supervisory methods were easily feasible at all relevant times.

78. Failing to enact the above-described supervisory methods is substantially likely to permit sexual predators to act with impunity within a police force.

79. The importance of the above-described supervisory methods to deter, detect, and otherwise prevent sexual violence by police officers has been promulgated by nationally respected sources since long before this incident, such as the International Association of Chiefs of Police, Chief Thomas Tremblay, and End Violence Against Women International.

80. On information and belief, APD's police chief, and all competent police chiefs, are aware of the importance of the above-described supervisory methods and the risk that failing to implement some or all of them is substantially likely to permit sexual predators to act with impunity within a police force.

81. On information and belief, APD failed to implement each of the foregoing above-described supervisory methods at all relevant times.

82. On information and belief, APD's police chief knew that APD's failure to implement some or all of the above-described supervisory methods had caused APD to permit sexual predators to act with impunity within a police force in the past, and that this would continue because APD failed to rectify the deficiencies.

83. On information and belief, Dodds had previously used his APD-issued cell phone and his APD patrol vehicle to sexually assault, harass, and intimidate others that he had contacted in the course of his work as an APD officer, similar to this incident.

84. Because, on information and belief, APD has none of the above-described supervisory methods implemented, Dodds' previous misconduct and his misconduct in this case was not detected until Doe had already been assaulted and reported the crime herself.

85. If APD had used the above-described supervisory methods, then Dodds would have been interrupted by a minimally competent supervisor before he could attack Doe.

86. In the alternative, on information and belief, APD actually did know or was deliberately indifferent to the fact that Dodds was a serial sexual predator, but chose to retain him anyway and permit his crimes to continue.

D. APD was deliberately indifferent in failing to implement any policies prohibiting sexual misconduct by officers, as distinct from sexual harassment policies.

87. Minimum police standards require specific policies to forbid and deter sexual misconduct by police, such as:

- Forbidding officers from knowingly engaging in social or romantic relationships with confidential informants, victims, or witnesses involved with active investigations.
- Requiring officers to report misconduct by fellow officers.
- Prohibiting the following conduct and other conduct indicative of sexual predation:
 - Unwarranted call backs to victims, witnesses, or suspects;
 - Unwarranted visits to victims, witnesses, or suspects;
 - Possessing sexually inappropriate material while on-duty;
 - Using government equipment such as cell phones for inappropriate contact with community members, detainees, or co-workers; and
 - Attempting to initiate sexual contact with anyone contacted within the context of law enforcement duties and activities.

88. Failing to enact the above-described policies is substantially likely to permit sexual predators to act with impunity within a police force, as the lack of unequivocal minimum standards creates a substantial risk that officers will adopt a custom of not reporting on their colleagues and removes consistency in the application of important supervisory steps to detect sexual predators.

89. The importance of the above-described policies in the deterrence, detection, and prevention of sexual violence by police officers has been promulgated by nationally respected sources since long before this incident, such as the International Association of Chiefs of Police, Chief Thomas Tremblay, End Violence Against Women International, and the President's Task Force on 21st Century Policing.

90. On information and belief, APD's police chief, and all competent police chiefs, are aware of the importance of the above-described policies and the risk that failing to enact some or all of them is substantially likely to permit sexual predators to act with impunity within a police force.

91. APD failed to enact each of the foregoing above-described policies at all relevant times.

92. On information and belief, APD's police chief knew that APD's failure to enact some or all of the above-described policies had caused APD to permit sexual predators to act with impunity within a police force in the past, and that this would continue because APD failed to rectify the deficiencies.

93. On information and belief, Dodds had previously used his APD-issued cell phone and his patrol vehicle to sexually assault, harass, and intimidate others that he had contacted in the course of his duties, similar to this incident.

94. Because, on information and belief, APD has none of the above-described policies implemented, Dodds' previous misconduct and his misconduct in this case was not detected until Doe had already been assaulted and reported the crime herself.

95. If APD had enacted the above-described policies, then Dodds would have been interrupted by a minimally competent supervisor or colleague before he could attack Doe.

96. In fact, APD had, at all relevant times, no policies, training, procedures, or supervision whatsoever calculated to prevent police sexual misconduct, despite the fact that it is a widespread problem recognized by law enforcement agencies nationwide.

97. On information and belief, had APD enacted those obviously necessary policies, procedures, and supervision described above, then Dodds would have been detected and either never hired or expelled long before he encountered and attacked Doe.

98. In the alternative, on information and belief, APD actually did have such policies, but was deliberately indifferent, through its policymaker, to a custom of its officers routinely violating those policies and to Dodds' conduct in this case.

E. APD fostered an ongoing culture of sexual misconduct by APD officers by undermining any and all efforts to investigate, discipline, and arrest the perpetrators.

99. Sexual misconduct by law enforcement generates more citizen complaints than any other factor aside from excessive force.

100. However, APD has not published any statistics on citizen complaints specifically about sexual misconduct.

101. For 2002, the City reported 77 complaints of "bias," 59 complaints of "excessive force," 59 complaints of "failure of duty, and 51 complaints of "oppressive behavior." Among the subcategories of those complaints, APD reported 38 complaints of "harassment," 9 complaints of "misconduct," 7 complaints of "abuse of power," 2 complaints of "assault," 1 complaint of "family violence," 5 complaints of "coercion," and 32 complaints of "intimidation." It is unclear from the City's publication which of these categories, if any, includes sexual violence.

102. For 2003, the City used different categories which are also unclear. The City reported 65 "external" complaints about "use of force" and 75 "external" complaints about "Proper procedure."

103. The City also received 80 “internal” complaints in 2003, but it is unknown to Plaintiff what categories of allegations were involved in those complaints.

104. From 2004 through 2015, the City published a total number of “code of conduct” violations alleged against officers, a number which is reported to include sexual misconduct—but also includes confounding information such as complaints about rude language. These numbers reflect the following:

- 2004 – 245 alleged “code of conduct” violations by APD officers.
- 2005 – 441 alleged “code of conduct” violations by APD officers.
- 2006 – 396 alleged “code of conduct” violations by APD officers.
- 2007 – 497 alleged “code of conduct” violations by APD officers.
- 2008 – 660 alleged “code of conduct” violations by APD officers.
- 2009 – 576 alleged “code of conduct” violations by APD officers.
- 2010 – 416 alleged “code of conduct” violations by APD officers.
- 2011 – 337 alleged “code of conduct” violations by APD officers.
- 2012 – 319 alleged “code of conduct” violations by APD officers.
- 2013 – 372 alleged “code of conduct” violations by APD officers.
- 2014 – 342 alleged “code of conduct” violations by APD officers.
- 2015 – 366 alleged “code of conduct” violations by APD officers.

105. Plaintiff has not been able to locate other records reflecting the total number of alleged incidents involving sexual misconduct by APD officers.

106. On information and belief, many of these generically reported allegations were allegations of sexual assault by APD officers that the City declined to discipline or investigate.

107. On information and belief, the relevant policymaker was aware of that pattern of sexual misconduct allegations and that APD was not investigating the accused perpetrating officers.

108. The City did not begin to routinely publish complaints against APD officers until approximately 2019 except where officers were disciplined and, on information and belief, only a single officer was disciplined for sexual misconduct during the period from 2002 until September 2020.

109. Beginning in approximately 2019, the City began to publish, in part, some complaints made to the Office of Police Oversight, but the City continues to maintain supervisory complaints and complaints made to the APD Internal Affairs Division under a veil of secrecy.

110. Thus, APD maintains the vast majority of records of complaints about its officers' sexual misconduct behind a veil of secrecy.

111. Art Acevedo was the APD chief from 2007 until the end of 2016.

112. In May 2008, Acevedo found that APD Sergeant Dustin Lee, a 12-year veteran, had sexually harassed a coworker. However, Acevedo's initial discipline was rescinded so Lee remained on the force. In 2019, Lee, by then an APD Lieutenant who had been working in APD for 23 years, was arrested by Round Rock Police for sexual assault of a child.

113. In 2014, APD officers Michael Castillo and Mark Lytle were caught on their body worn cameras whistling at a woman walking by, mockingly suggesting she call the police, and then warning her that the police cannot "unrape you."

114. Despite the publicity, on information and belief, then-police chief Art Acevedo did not discipline Castillo or Lytle.

115. Also while chief, on information and belief, Acevedo dismissed allegations by his subordinate female officers that male APD officers had assaulted them. While he was the policymaker for law enforcement in Austin, Acevedo allegedly said some of these allegations of sexual violence by APD officers were just about “bad sex.”

116. On information and belief, during Acevedo’s tenure as chief, the sex crimes unit maintained a wall with photos of people the unit had unilaterally determined to have submitted a “false report” of sexual violence.

117. Acevedo was succeeded by Brian Manley, who served as chief from 2016 until 2021.

118. During Manley’s tenure, APD’s longstanding culture of sexual misconduct came to the forefront of the public consciousness.

119. On information and belief, during Manley’s tenure through the time of Doe’s assault, APD officers continued to be accused of credible claims of sexual misconduct, including—but not limited to—sexual violence against women.

120. On information and belief, from the beginning of Manley’s tenure until Dodds’ arrest, Manley was aware of the pattern of credible accusations that his officers had engaged in sexual violence.

121. On information and belief, internal reports were generated by APD, by the Office of the Police Monitor, by the Citizen Review Panel, and by other arms of the City about numerous accusations that its officers had engaged in sexual violence, but those reports were never published, APD never disciplined the officers, APD failed to seriously investigate the complaints, and APD never arrested the perpetrators.

122. Due to APD policy and Texas Public Information law, records of accusations against APD officers—including allegations of sexual assault—that APD itself deems unmeritorious are permanently hidden from public view and often destroyed after only a few years.

123. On information and belief, APD officers, including Manley, were widely aware that allegations of sexual violence against APD officers would not result in serious punishment.

124. On March 7, 2020, an unknown woman accused an APD officer of walking up to her, grabbing her arm, pushing her up against a car, and then groping her breast and vagina. The officer allegedly did not ask the victim for any information and had no reason to frisk the unknown woman. Based on available records, no officer was disciplined arising from the complaint.

125. A 2020 report by Lisa Tatum, ordered by the City of Austin's City Manager and released the day before Dodds attacked Doe, found that APD retained a culture of sexism.

126. The Tatum report found that APD's Senior Chaplain, Rick Randall, often makes sexist comments.

127. The Tatum investigation also received many reports from all across APD that sexist name calling, and use of derogatory terms associated with sex, persist.

128. A culture of sexism in a police department fosters sexual predators, and attracts them to attempt to work as officers in that department.

129. As discussed above, a key step in screening and rooting out sexual predators is to evaluate prospective officers and current officers' views for sexist bias, because such a bias is a strong predictor of sexually predatory behavior.

130. The importance of eliminating sexist bias in policing has been promulgated by nationally respected sources since long before this incident, such as the International Association

of Chiefs of Police, Chief Thomas Tremblay, End Violence Against Women International, the Department of Justice, and the President's Task Force on 21st Century Policing.

131. On information and belief, APD's police chief, and all competent police chiefs, are aware of the importance of eliminating sexism within their police department and the risk that failing to do so is substantially likely to foster sexually predatory behavior by officers.

132. APD failed to correct the sexist culture pervading APD at all relevant times.

133. On information and belief, APD's police chief knew that APD's failure to correct the sexist culture within the agency had caused APD officers to engage in sexual assault in the past, and that this would continue because APD failed to rectify the deficiencies.

134. On April 20, 2022, an unknown woman who worked for the City accused a male APD officer of sexually harassing almost every female he works with. The woman alleged that she and other victims were too afraid to come forward due to retaliation, that she had seen the officer pull on women's hair, slap their butts, and pressure them to send him nude photos.

F. APD's longstanding failure to investigate sexual violence

135. A 2018 study, sponsored by the U.S. Department of Justice, found that APD only made arrests in less than ten percent of sexual assault allegations during the year-long study period.

136. The percentage of arrests is even more abysmal for rape within the meaning of public reporting requirements,¹ and has been for at least the last ten years.

137. In 2011, out of 211 rapes reported to APD, APD made no arrests.

138. In 2012, out of 209 rapes reported to APD, APD made just 1 arrest.

139. In 2013, out of 217 rapes reported to APD, APD made no arrests.

¹ The Texas Penal Code does not use the term "rape," but the State of Texas and City of Austin often report the crime of "rape" when publishing statistics on crimes and arrests, as they rely upon the FBI's definition of the crime to organize their reporting.

140. In 2014, out of 571² rapes reported to APD, APD only made 4 arrests.

141. In 2015, out of 487 rapes reported to APD, APD only made 2 arrests.

142. In 2016, out of 747 rapes reported to APD, APD only made 3 arrests.

143. In 2017, out of 834 rapes reported to APD, APD only made 9 arrests.

144. In 2018, out of 787 rapes reported to APD, APD made 89 arrests.

145. This is partly because the agency intentionally underfunded investigating sexual assault.

146. In 2020, APD assigned only 19 detectives to handle about 1,000 sexual violence cases per year.

147. APD only had 17 sex crimes detectives in 2018, investigating 787 rapes. By comparison, APD had 12 detectives assigned to investigate 32 murders in 2018.

148. Sexual violence rarely leads to an arrest arising from a complaint to APD when compared to other crimes such as murder, assault, and theft of an automobile. This fact was reported to the Austin City Council in 2019.

149. Mayor Steve Adler remarked that the City of Austin has “far too many sexual assaults that are resulting in too few perpetrators being taken off our streets.”

150. APD’s policymaker was therefore aware at all relevant times that APD’s sex crimes unit had been woefully ineffective.

151. But APD is not just unskilled in investigating sexual violence; it instead chooses not to press charges for the supermajority of those cases despite sufficient evidence to do so.

² Prior to 2014, the FBI’s definition of “rape” was narrower, causing the number of reports and arrests so classified to be lower. APD also underreported the number of reported rapes in 2014, 2015, and 2016.

152. For years, APD affirmatively chose to close investigations without adequate investigation. APD covered up its lack of investigations by “exceptionally clearing” about 2 of every 3 rape cases that it closed during the years leading up to the attack on Doe. A case is only supposed to be “exceptionally cleared” if there is an identified suspect, the suspect’s location is known, and there is enough information to support an arrest, charge, or turning over the case to the court for prosecution, but for some reason the case does not lead to an arrest, charge, or other prosecution. That means that APD nonetheless did not arrest, charge, or turn over the case to the court system a supermajority of rape cases even when they had enough evidence to do so.

153. Even worse, in an audit of late 2017 rape cases handled by APD, the Texas Department of Public Safety determined that the Austin Police Department had wrongfully “exceptionally cleared” nearly one-third of its exceptionally cleared rape cases during the audited period.

154. The Texas Department of Public Safety audit further confirmed that nearly half of those wrongfully “exceptionally cleared” cases had “enough information to support an arrest, charge, and turning over to the court for prosecution.”

155. APD Chief Manley agreed with nearly all of DPS’s findings, admitting the majority of cases identified by DPS were closed improperly or should not have been closed at all.

156. But this intentional misclassification was not new information to APD’s policymaker. On information and belief, APD’s former head of sex crimes, Elizabeth Donegan, had internally complained about and resisted the practice for years.

157. Moreover, Donegan’s superiors within APD had pressured her to deliberately cover up the department’s poor investigating success by improperly “exceptionally clearing” cases. After

she was pushed out of the department, the rate of “exceptional clearance” rose. Manley admitted he had a “difference of opinion” with Donegan about this issue when he had her transferred.

158. Aside from Donegan’s prophetic complaints about “exceptional clearance,” she also publicly warned that APD’s sexual assault investigations were not adequately thorough.

159. These mirror problems with APD’s investigation in specific incidents that have been publicized.

160. For example, on information and belief, in the investigation of the sexual assault of Hanna Senko from 2006, APD never visited the scene of the crime, never interviewed witnesses, and decided to “exceptionally clear” the case before Senko’s blood test results even came back—even though she reported her assailant had suspiciously had pills in his pocket before the attack.

161. In investigating an October 2008 sexual assault, on information and belief, APD questioned the victim’s truthfulness, asked her about other men she had had sex with, and asked her whether she had a boyfriend.

162. To investigate the 2010 sexual assault of Julie Ann Nitsch, on information and belief, APD failed to collect physical evidence including the cords the assailant used as a weapon, broken locks, the glass door the assailant used to enter, or anything else that could be used to identify the assailant. Instead, APD asked Nitsch how much she had to drink, what she had been wearing, and why she lived in a bad neighborhood.

163. On December 24, 2014, on information and belief, Heather Sin was drugged at a bar and sexually assaulted by several men. The next morning, Sin awoke at railroad tracks and called the police. A physical exam confirmed many injuries including genital injuries consistent with sexual assault. An APD detective later spoke to her and made clear that he did not believe anything had happened to her and would wait on DNA results before investigating at all. After Sin

pressed for an explanation, APD suggested they were not pursuing the case because Sin had been drinking. Sin's case remained pending for at least 3 years.

164. On August 9, 2015, on information and belief, Marina Conner was sexually assaulted. During the assault, Conner made a phone call that recorded her cries for help. Conner spoke to an APD detective on the phone who promised to come meet her, but he never did. Conner obtained a written confession from the assailant. Despite this evidence, APD decided not to pursue the case.

165. On January 7, 2016, on information and belief, Anisha Ituah was sexually assaulted by a patient at a state hospital. Her family called APD, but APD refused to dispatch anyone, so APD never collected forensic evidence from Ituah. APD's detective also complained to Ituah that he had a huge case load of over 300 rape victims and he cannot get every case done. The detective also blamed Ituah for her own assault and suggested he would not investigate. Travis County later told her family that APD was not pursuing the case.

166. Even more alarming is APD's response to a series of sexual violence that Amanda Day reported to APD. In 2018, on information and belief, APD told her that it would not investigate because she had previously consented to "kissing and stuff" with her violent assailant who repeatedly sexually assaulted her. The APD officer also asked her what panties she was wearing and inaccurately told the victim that the sexual assaults were "family violence," before refusing to investigate further.

167. Also in 2018, on information and belief, APD closed a case investigating sexual assault allegations by Jessica Ragsdill. In that case, APD obtained video footage confirming the suspect had entered a hotel room with the victim while she was so intoxicated that she could not stand. APD also had photographic evidence reflecting that the sexual assault was so violent that

Ragsdill was bleeding and bruised. But APD decided not to pursue the case regardless, and “exceptionally cleared” the report of sexual assault.

168. In January 2018, on information and belief, Emily Borchardt was repeatedly and violently sexually assaulted by a ring of sex traffickers who abducted her, locked her in a motel room, and repeatedly threatened to kill her. After at least 10 hours, Borchardt finally escaped and called APD. The first officer to respond rolled his eyes and was impatient. APD failed to collect surveillance video or other physical evidence from the motel. The detective assigned to the case told Borchardt’s mother that some of the events “sounded consensual.” The detective later characterized the bruising on Borchardt’s neck where her assailants had strangled her as a “hickey.” Eventually APD declined to pursue the investigation further.

169. On information and belief, during the years leading up to the attack on Doe, APD officers routinely told sexual assault victims that their assaults “sounded consensual.”

170. On information and belief, during the years leading up to the attack on Doe, APD officers routinely characterized victims of sexual violence as “bad victims” if they knew their attacker.

171. On information and belief, during the years leading up to the attack on Doe, APD detectives assigned to investigate sexual violence often rolled their eyes at the victim’s allegations, then dismissed them because the assailant claimed the encounter was consensual.

172. On information and belief, during the years leading up to the attack on Doe, APD officers assigned to investigate sexual violence routinely criticized victims for their clothing, for where they live, and for drinking alcohol.

173. As a proximate and obviously foreseeable result of APD's deplorable sex crimes investigation practices, APD officers believed they could engage in sexual violence with impunity, and many of them did so in a pattern of misconduct for years.

174. On information and belief, APD's police chief was aware that the deficiencies in the sex crimes investigation practices and the fact that these deficiencies had caused, and would continue to cause, APD officers to sexually assault citizens with impunity.

175. On information and belief, during the years leading up to the attack on Doe, many APD officers have been accused of sexual assault but not arrested or disciplined.

176. A single, high profile counter-example proves the rule. In December 2018, Manley terminated an APD commander, Jason Dusterhoft, for allegedly beating his then-girlfriend, including by strangling her during sex, despite, on information and belief, knowing that this allegation was not credible and that this allegation had instead been manufactured by APD's sex crimes unit on Manley's own orders.

177. Dusterhoft countered that Manley had intentionally used the sex crimes division to pressure his ex-girlfriend into fabricating the allegations, pointing out that Manley himself admitted the allegations were not credible.

178. Dusterhoft alleges, in an ongoing lawsuit, that he had personally alerted Manley to a then-dire backlog in sexual assault kit testing—a backlog which was a source of enormous public embarrassment for Manley. The entire controversy reinforced the belief, which was widespread amongst APD officers and known to APD's policymaker, that APD did not take allegations of sexual assault seriously.

179. Therefore, Manley's actions and statements with respect to Dusterhoft further aggravated the widespread belief amongst APD officers that allegations of sexual violence were

never taken seriously, as the sex crimes unit was already widely viewed to lack integrity and Manley's alleged actions further severely undermined its credibility.

180. The ineffectiveness of the sex crimes unit, coupled with its inherent sexual bias and lack of credibility, for years contributed to a culture of tolerance for sexual violence within APD, thereby undermining its deterrence effect and its effectiveness at detecting and preventing future sexual assaults by APD officers. These facts were well known to Manley and his predecessors at all relevant times.

181. Because APD systemically engaged in sexual violence, continued to hire officers without any protections in place against hiring sexual predators, refused to supervise its officers to prevent such violence, refused to enact any policies prohibiting that violence, refused to properly investigate sexual violence, systemically covered up their failures, and maintained a culture that tolerated sexual violence even by police officers, predators like Officer Dodds were hired, given the tools that enabled them to prey on the most vulnerable civilians, emboldened in their efforts, and believed they could engage in that sexual violence with impunity, causing even more sexual violence by APD officers—including Dodds' attack on Doe in this case.

IV. CAUSES OF ACTION

A. FOURTH AND FOURTEENTH AMENDMENT VIOLATIONS – AS TO DEFENDANT OFFICER DODDS

182. Plaintiff incorporates the preceding paragraphs as if alleged herein.

183. Austin Police Department Officer Dodds, while acting under color of law, violated Plaintiff Doe's substantive due process right to bodily integrity by penetrating her with his penis without her consent.

184. Doe has suffered significant injuries as a result of Officer Dodds' sexual assault.

185. Austin Police Department Officer Dodds' assault shocks the conscience. Without any legitimate reason, Officer Dodds entered Plaintiff's home at night, penetrated her without her consent, and proceeded to intentionally terrify her by driving by her home in his APD cruiser and calling her cell phone with his APD-issued phone from blocked numbers.

186. Therefore, Austin Police Department Officer Dodds violated Doe's clearly established Fourteenth Amendment right to bodily integrity in such a way that clearly shocks the conscience and directly and proximately caused Doe to suffer significant injuries.

187. In addition, Austin Police Department Officer Dodds, while acting under color of law, entered Plaintiff Doe's home without permission and used excessive force on Plaintiff Doe by penetrating her with his penis without her consent in her own home.

188. Officer Dodds unlawfully entered Doe's home and then seized Doe by using force on her, trapping her in her bedroom, restraining her freedom to leave, and restraining her freedom to decline his unwanted sexual conduct and penetration.

189. Austin Police Department Officer Dodds' use of force was wholly excessive to any conceivable need, objectively unreasonable in light of clearly established law, conscience shocking and directly caused Plaintiff Doe to suffer serious injuries.

190. Therefore, Austin Police Department Officer Dodds violated Doe's clearly established Fourth Amendment rights.

191. Officer Dodds acted under color of law in the course of his violations of Plaintiff Doe's rights when he used his police investigation of her 911 call as pretext to find out where she lived, her phone number, and whether she would be vulnerable to his assault; used his police investigation as a pretext to contact her again and press unwanted sexual advances; used his police-issued phone to call her repeatedly before the sexual assault; used his APD badge and uniform to

gain access to her home; kept his uniform on—including his APD badge and APD issued gun—while sexually assaulting Doe; intimidated her nephew with his authority as a police officer as well as his uniform, badge, and service weapon; and terrified her with his service weapon and police authority. Officer Dodds also subsequently drove by her home in his APD cruiser in order to further terrify and intimidate her, and called and texted her from his APD-issued cell phone, in an effort to prevent her from reporting the misconduct and prepare to attack her again.

192. As a direct and proximate result of Austin Police Department Officers Dodds' actions, Doe suffered and continues to suffer significant injuries.

193. Doe brings these claims pursuant to 42 U.S.C. § 1983.

B. PUNITIVE/EXEMPLARY DAMAGES – AS TO DEFENDANT DODDS

194. Plaintiff incorporates the preceding paragraphs as if alleged herein.

195. Defendant's conduct was egregious, reckless, and endangered countless community members. Plaintiff seeks punitive damages as well to deter future similar violations of constitutional rights.

C. FOURTH AND FOURTEENTH AMENDMENT – FAILURE TO TRAIN, SUPERVISE, AND PROTECT AS TO DEFENDANT CITY OF AUSTIN

196. Plaintiff incorporates the preceding paragraphs as if alleged herein.

197. The City of Austin, had the following policies, practices, or customs in place when APD Officer Dodds sexually assaulted Doe:

- a. Failure to train officers about detecting, preventing, and prohibiting sexual harassment and sexual assault;
- b. On information and belief, hiring officers known or that should have been known to have sexually harassed or sexually assaulted in the past;
- c. Failing to adopt simple pre-employment procedures to screen out officers who were or would likely become sexual predators;

- d. Failure to supervise officers known or that should have been known to have sexually harassed or sexually assaulted in the past;
- e. Failure to implement simple procedures to detect highly suspicious behavior by officers, such as Dodds' driving back to the same private residence multiple times for no legitimate reason and using his APD-issued cell phone to send sexual transmissions and harass Doe;
- f. Failure to implement straightforward policies to prohibit and help detect highly suspicious behavior typical of officers who engage in sexual violence;
- g. Failure to discipline officers for domestic violence or sexual assault in the past;
- h. Wrongfully clearing complaints that officers and members of the public engaged in sexual assault;
- i. Wrongfully failing to investigate complaints that officers and members of the public engaged in sexual assault;
- j. Adopting a culture of tolerance for sexual violence, unjustified skepticism of reports of sexual violence, and sexist views which contributed to further sexual violence by officers;
- k. Failure to adequately investigate officers' history of sexism, sexual harassment, or sexual assault in the past;
- l. Failure to protect the public from known dangerous servants while giving them the tools and authority to perpetrate attacks on innocent civilians with impunity; and
- m. Failure to investigate, discipline, and arrest APD officers accused of sexual assault.

198. Each of the policies, practices, or customs delineated above was actually known, constructively known, approved, and/or ratified by City of Austin and its policymaker for law enforcement purposes, Chief of Police, Brian Manley, and was promulgated with deliberate indifference to Doe's Fourth and Fourteenth Amendment rights under the United States Constitution. Moreover, the known and obvious consequence of these policies, practices, or customs was that Austin Police Department officers would be placed in recurring situations where constitutional violations similar to those inflicted on Doe would result. Accordingly, these policies also made it highly predictable that the particular violations alleged here, all of which were under color of law, would result.

199. Consequently, the policies and conduct delineated above were a moving force of Plaintiff's constitutional deprivations and injuries, and proximately caused severe damages to Plaintiff.

200. Plaintiff Doe brings this claim pursuant to 42 U.S.C. § 1983.

V. DAMAGES

201. Plaintiff Doe seeks the following damages:

- a. Past and future medical expenses;
- b. Past and future economic damages, including (but not limited to) loss of earning capacity;
- c. Past and future physical pain and mental anguish;
- d. Past and future impairment;
- e. Past and future disfigurement;
- f. Punitive damages as to Defendant Dodds only;
- g. Loss of consortium; and,
- h. Attorneys' fees pursuant to 42 U.S.C. § 1988.

VI. JURY DEMAND

202. Pursuant to Federal Rule of Civil Procedure 48, Plaintiff hereby requests a jury trial.

VII. PRAYER FOR RELIEF

203. To right this injustice, Plaintiff requests the Court:

- a. Award compensatory damages against Defendants;
- b. Award exemplary damages against Defendant Dodds only;
- c. Award Plaintiff costs and fees, including but not limited to expert fees and attorneys' fees, pursuant to 42 U.S.C. § 1988;

- d. Award pre-judgment and post-judgment interest at the highest rate allowable under the law; and,
- e. Award and grant such other just relief as the Court deems proper.

Dated: May 25, 2022.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

By my signature below I certify that a true and correct copy of this document has been filed with the Court's electronic case filing system and served on all parties who have thereby appeared.

/s/ Jeff Edwards
Jeff Edwards

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:

1:22-cv-00299

**ORDER ON PLAINTIFF’S PARTIALLY UNOPPOSED MOTION FOR LEAVE TO
AMEND HER COMPLAINT**

After considering Plaintiff’s Partially Unopposed Motion for Leave to Amend Her Complaint, Defendant City of Austin’s lack of opposition, any response, all argument and evidence presented, and all applicable law, the Court hereby GRANTS the motion in its entirety.

The Clerk is ORDERED to file Plaintiff’s Second Amended Complaint, which is attached to the Motion for Leave as Exhibit 1.

SIGNED this _____ day of _____.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:

1:22-cv-00299

**PLAINTIFF’S RESPONSE TO DEFENDANT WALTER DODDS’ MOTION TO STAY
DISCOVERY PENDING CRIMINAL PROCEEDINGS**

The Court should deny Defendant Walter Dodds’ motion to stay discovery in this case. This case concerns not just Dodds’ sexual assault of Plaintiff Jane Doe, but also the Defendant City of Austin’s policies and practices that encouraged and enabled his actions. Therefore, Dodds’ motion should be denied for three reasons.

First, Dodds cannot show any overlap between his anticipated charges and the City’s policy, training, and supervision at issue in this case, which are the primary reason discovery is needed.

Second, a stay of discovery, particularly as to the City, would unfairly prejudice Plaintiff due to the passage of time—including particularly the expiration of the City’s record retention periods—whereas proceeding with discovery as to the City would not unfairly harm Dodds .

Finally, the Court and the public have an interest in proceeding with this case, as the case involves the City’s failure to prevent Dodds’ egregious misconduct.

For these reasons, the Court should deny Dodds’ motion.

I. PROCEDURAL SUMMARY AND FACTUAL BACKGROUND

Plaintiff Jane Doe filed this 42 U.S.C. § 1983 case on March 30, 2022, alleging that Defendant Walter Dodds used his authority, training, and equipment as an APD officer to invade Plaintiff's home, sexually assault her, then harass and intimidate Plaintiff. Doc. 1.

Plaintiff also asserts municipal liability claims against the City for its longstanding policy failures that foreseeably caused Dodds to sexually assault Plaintiff. For years, APD police chiefs ignored complaints about sexual harassment, sexist comments, and outright sexual assaults by officers, whilst simultaneously intentionally covering up the deficiencies of APD's sex crimes division—including its bias against victims of sexual assault. Doc. 1, pp. 5–12, ¶¶ 41–93.

On May 19, 2022, Dodds filed the instant motion to stay discovery pending resolution of criminal proceedings against him. Doc. 11.

In his motion, Dodds contends that he has not been indicted. *See* Doc. 11, pp. 2–3.

II. LEGAL STANDARD

“There is no constitutional, statutory, or common law rule prohibiting simultaneous prosecution of parallel civil and criminal proceedings.” *Duncan v. Banks*, No. SA-15-CV-148-XR, 2015 WL 5511253, *4 (W.D. Tex. Oct. 24, 2017). Indeed, “[i]t is the rule, rather than the exception that civil and criminal cases proceed together.” *United States ex rel. Gonzalez v. Fresenius Med. Car N. Am.*, 571 F. Supp. 2d 758, 761 (W.D. Tex. 2008) (internal quotations omitted). A stay of a civil action until related criminal proceedings conclude is considered “an extraordinary remedy.” *Alcala v. Webb Cnty., Tex.*, 625 F. Supp. 2d 391, 391 (S.D. Tex. 2009). “Whether the issues in civil and criminal actions are related demands a common-sense, fact-bound analysis.” *Gonzalez*, 571 F. Supp. 2d at 762 (internal quotation omitted).

District courts in the Fifth Circuit typically weigh the following factors: “(1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the criminal case, including whether the defendant has been indicted; (3) the private interests of the plaintiff in proceeding expeditiously, weighed against the prejudice to the plaintiff caused by a delay; (4) the private interests of and burden on the defendant; (5) the interests of the courts; and (6) the public interest.” *Alcala*, 625 F. Supp. 2d at 398-99 (collecting cases).

III. ARGUMENT

The Court should deny Dodds’ motion, particularly as to the City, because Plaintiff needs to promptly proceed with discovery as to the City and the six factors weigh against staying discovery.

A. The potential charges do not significantly overlap with the claims against the City.

Plaintiff’s claims against the City in this case are distinct from any future criminal charges against Dodds, while the bulk of discovery will be directed at the City—not Dodds—so the overlap factor weighs against a stay.

Plaintiff’s claims against the City primarily depend upon Plaintiff’s ability to show the City is responsible for Dodds’ misconduct under *Monell*, rather than any dispute about what exactly Dodds did in this specific underlying incident (as there is expected to be overwhelming documentary and tangible evidence of Dodds’ sexual assault of Plaintiff).

A municipality is liable for its employees’ episodic acts and omissions where there is deliberate indifference by the policymaker to “(1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose ‘moving force’ is that policy (or custom).” *Jauch v. Choctaw Cnty, Miss.*, 874 F.3d 425, 435 (5th Cir. 2017). In proving such a municipal liability claim, it is often critically

important to demonstrate a pattern of similar misconduct. *Piotrowski v. City of Houston*, 237 F.3d 567, 582 (5th Cir. 2001). Developing evidence of such a pattern in this case will likely occupy the bulk of the discovery phase and will not implicate Dodds' conduct with respect to Doe—rather, it will implicate prior, similar misconduct, or the lack thereof, that was known or should have been known to the City's policymakers. Thus, by definition, it will be outside the scope of Dodds' criminal liability and have no overlap with his potential criminal charges.

The amount of overlap between the civil allegations and the criminal charges is “further reduced by the fact that the prosecutor in the criminal case, namely the State of Texas, is not a party to the civil action. In fact, the potential for prejudice to a criminal defense is diminished where private parties . . . are the plaintiffs in the civil action.” *Alcala*, 625 F. Supp. 2d at 402. Because the Plaintiff is a private party, “there is no reason to assume that [her] civil case is simply a stalking horse for the government's criminal inquiry, rather than a good faith effort to obtain compensation for their own private injuries.” *Id.* at 402-03 (cleaned up). Further, “it is not unconstitutional to force civil defendants to choose between the negative inferences drawn from their silence in a civil case and their Fifth Amendment privilege.” *United States ex rel. Gonzalez v. Fresenius Med. Car N. Am.*, 571 F. Supp. 2d 758, 764 (W.D. Tex. 2008). Dodds has failed to make the required strong showing that he needs a stay.

Dodds has not identified any area of overlap with the claims against the City in this case which will predominate in discovery, so the first factor weighs against a stay.

B. The nascent stage of Dodds' criminal case weighs in favor of denying a stay.

As Dodds insists that he has not been indicted, this weighs against a stay.

“[T]he pre-indictment nature of the pending criminal investigation weakens [defendant's] Fifth Amendment interest.” *Gonzalez*, 571 F. Supp. 2d at 764. While “the strongest case for a stay

exists where a party is indicted for a serious offense and must defend a civil action involving the same matter . . . even after an indictment has issued, courts are generally split as to the propriety of granting a stay.” *Alcala*, 625 F. Supp. at 401 (internal quotations and citations omitted).

While Dodds argues that this factor weighs in his favor, he cites no authority for the proposition that unindicted charges are ever a reason to delay a civil case, potentially indefinitely. Texas Supreme Court Chief Justice Hecht estimated that the COVID-19 pandemic caused an at-least three-year backlog of criminal cases.¹ Dodds’ motion to stay based solely on the fact that a grand jury will reportedly *consider*² indicting him for this incident is not sufficient to stay this entire civil case. This factor weighs heavily against a stay.

C. Plaintiff will be unfairly prejudiced by a stay.

A stay would unfairly prejudice Plaintiff because delay is likely to undermine her ability to gather evidence from the City.

The aphorism “justice delayed is justice denied” is grounded in reality. *See Stelly v. C.I.R.*, 761 F.2d 1113, 1116 (5th Cir. 1985). “Delay alone can infuse an adverse element into the proper flow of litigation: evidence deteriorates or disappears, memories fade, and witnesses die or move away.” *Veazey v. Young’s Yacht Sale and Service, Inc.*, 644 F.2d 475, 477 (5th Cir. 1981). In this case, granting Dodds’ motion will further delay necessary discovery into the facts of this case that

¹ Avery Travis, *‘This backlog is a problem’: Hundreds of criminal cases pending in-person trials in Travis County*, KXAN (Feb. 21, 2022), <https://www.kxan.com/news/local/austin/this-backlog-is-a-problem-hundreds-of-criminal-cases-pending-in-person-trials-in-travis-county/> (“Texas court officials estimate it could take three to five years to get the backlog of cases down to pre-pandemic levels, with as many as 140,000 jury trials pending across Texas”).

² Plaintiff originally pleaded that Dodds had been indicted, relying upon a motion Dodds filed in his criminal case where he claimed he had already been indicted. However, the criminal case’s public docket appears to confirm Dodds’ current claim that he has not been indicted, so Plaintiff yesterday sought leave to amend her complaint accordingly. *See* Doc. 14-1, p. 5, § 46.

largely occurred more than two years ago. Further delay will only mean key witnesses' memories will only be less reliable and available evidence will only diminish.

In parallel civil and criminal cases “there is a strong presumption in favor of discovery” in the civil case, “and it is the party who moves for a stay that bears the burden of overcoming this presumption.” *Id.* at 397-98. Similar to *Alcala*, where the civil case involved the culture of wrongdoing in a government office, “if information exists as to the alleged culture or environment” in the Austin Police Department which widely tolerated conduct exactly like Dodds’, then the evidence bearing this out “will most likely have to be elicited through written interrogatories and oral depositions of...others who took part in or witnessed any liability-creating transactions.” *Id.* at 405. Although Dodds argues that the City did a thorough investigation of the incident itself, Plaintiff’s *Monell* claims require discovery beyond just this incident. “Because such information is couched in memory, the integrity of this information is in danger of degrading over time.” *Id.*

This risk is not merely hypothetical, as the City’s evidence is subject to routine destruction under its record retention practices, or perhaps sooner as it has been known to violate its own policies. In a 2018 case, the City destroyed evidence during an ongoing (unmeritorious) criminal prosecution and a (meritorious) disciplinary proceeding.³ In that matter, various laws and policies all required retaining the evidence, as a criminal case was pending, but critical video evidence was deleted anyway.⁴ One of the officers whose video was deleted admitted they were relevant in ensuing litigation.⁵ Here, the risk of deletion is higher because Plaintiff alleges a pattern of

³ Ex. 2, Skeen BWC audit log, p. 6; Ex. 3, Hoover BWC audit log, p. 3.

⁴ Ex. 4, APD Policy 303 - Body Worn Camera Systems, COA 311; Ex. 5, Austin, Texas Code of Ordinances, § 2-11-11(A)(2), available at https://library.municode.com/tx/austin/codes/code_of_ordinances?nodeId=TIT2AD_CH2-11INMA; Ex. 6, Ordinance No. 20141120-015, p. 10, § 2-11-11(A)(2); Ex. 7, Public Safety Local Records Control Schedule, p. 2; TEX. PENAL CODE 37.09; Ex. 8, Order granting Motion to Dismiss.

⁵ Ex. 9, Dep. of B. Hoover, 131:1-7; see *Yeager v. Jester et al.*, No. 1:19-cv-1197 (W.D. Tex.).

misconduct that was not even investigated, so the relevant evidence would be subject to a shorter retention period.⁶

Accordingly, staying discovery as to the City would unfairly prejudice Plaintiff.

D. Dodds will not be unfairly prejudiced by proceeding.

Dodds broadly argues that asserting his Fifth Amendment rights shows he is unfairly prejudiced by proceeding in this civil case. But that is not the law and in fact he has already demonstrated he will not be prejudiced, particularly by discovery proceeding as to the City.

“Under Fifth Circuit law, a blanket invocation of the Fifth Amendment privilege is insufficient to relieve a civil litigant of the responsibility to answer questions put to him during the civil discovery process.” *Duncan*, 2015 WL 5511253, at *5 (internal quotation omitted). “[A] party to a civil case must selectively invoke his Fifth Amendment right as to specific inquiries, and the court then determines whether to sustain the privilege with respect to each inquiry.” *Id.* at *12. “Even where a party has a legitimate claim of privilege with respect to certain questions or lines of inquiry, that person may not be entitled to invoke his privilege to remain totally silent.” *SEC v. First Fin Grp. of Tex., Inc.*, 659 F.2d 660, 668 (5th Cir. 1981). “A party is not entitled to decide for himself whether he is protected by the fifth amendment privilege[;]” instead, the propriety of invoking the Fifth Amendment “is for the court to decide after conducting a particularized inquiry, deciding, in connection with each specific area that the questioning party seeks to explore, whether or not the privilege is well-founded.” *Id.* “The movant should at least be required to make a specific showing of the harm it will suffer without a stay and why other methods of protecting its interests are insufficient.” *Gonzalez*, 571 F. Supp 2d at 764.

⁶ See Ex. 1, City of Austin Records Control Schedule, pp. 3–4 (100-year retention period for cases closed by arrest, but only mentioning a 5-year period for “claims”).

Dodds does not attempt to make any specific showing of harm. Instead, Dodds only points to the fact that he would likely exercise his Fifth Amendment rights in response to key questions in this case. But Dodds' choice to exercise his Fifth Amendment rights alone fails to show specific harm that he would suffer. Indeed, Dodds' answer to Plaintiff's original complaint contains his denial of all key facts in this case, showing that Dodds intends to actively deny Plaintiff's claims while simultaneously arguing that he is restrained from doing so. Doc. 9.

Another district court considered similar participation in the case to weigh against a stay where, just like this case, the defendant "denied all of Plaintiffs' allegations as to" the relevant conduct. *Alcala v. Texas Webb Cty.*, 625 F. Supp. 2d 391, 403 (S.D. Tex. 2009). That court reasoned that if the defendant has already denied wrongdoing—just like Dodds has—then "there does not seem to be anything incriminating about [the defendant] testifying." *Id.* Thus, just like *Alcala*, this Court should find that since Dodds himself has demonstrated he is able to respond to the allegations without impairing his right to remain silent, he is also able to participate in discovery.

Dodds has failed to identify any prejudice in this case that is not simply Dodds having to engage with discovery that concerns bad facts for his case. And his sole argument is not applicable at all to the claims against this City, which will not require him to invoke the Fifth Amendment. As such, this factor weighs against a stay.

E. The interests of this Court weigh against a stay pending Dodds' potential criminal indictment.

Granting a stay may cause this case to languish for years until whenever Dodds' criminal proceedings finally conclude.

"In determining the propriety of a stay, a court can consider its own interests in efficient administration and judicial economy." *Gonzalez*, 571 F. Supp. 2d at 765. "Considering judicial

efficiency, a court must analyze the extent to which the outcome of the criminal proceeding would simplify the issues in the civil proceeding[; ...] considering judicial expediency, a court has an obligation to move its docket, and not let cases languish before it.” *Duncan*, 22015 WL 5511253, at *13-14. “A policy of freely granting stays solely because a litigant is defending simultaneous multiple suits interferes with judicial administration.” *Gonzalez*, 571 F. Supp. 2d at 765 (internal quotations omitted).

Given the three-year criminal case backlog in Texas, Dodds is asking this Court to let this case sit idle on its docket for a lengthy and unspecified amount of time, delaying Plaintiff’s ability to seek justice (assuming Dodds is even indicted). This Court has an interest in moving this case forward, even if there is “a possibility that the Court will have to rule on selective claims of Fifth Amendment privilege and objections to specific information requests during the discovery process.” *Alcala*, 625 F. Supp. 2d at 406.

F. The interests of the public and third parties also weigh against a stay.

The final consideration for courts in ruling on a motion to stay are the public and third-party interests at stake. “The public has simultaneous interests in the resolution of civil cases with minimal delay, prosecuting criminal cases, and in maintaining the integrity of criminal defendants’ constitutional rights.” *Duncan*, 2015 WL 5511253 at *14. This factor weighs in favor of a stay “where denying a stay risks endangering a defendant’s Fifth Amendment rights and granting a stay will not significantly delay this case.” *Bean*, 220 F. Supp. 3d at 778.

As discussed above, there is minimal danger that allowing this case to proceed would endanger the integrity of Dodds’ right to invoke the Fifth Amendment. Conversely, granting a stay will assuredly cause significant, even years-long, delay. The public has an above-average interest in the resolution of this civil case, due to the national attention on policing and the pressure required

to bring to light details of APD's misconduct and callous attitude toward sexual assault. There has been substantial coverage of APD's public and systemic failures to take sexual assault seriously.⁷ The public has an interest in confidence in their local law enforcement. The public generally, and the citizens of the City of Austin in particular, have an interest in how law enforcement officers in their communities conduct themselves when interacting with members of the public. There is also considerable public interest in correcting instances of police misconduct in Texas.

This final consideration weighs against Dodds' motion.

IV. Conclusion

Dodds' motion to stay has failed to overcome the strong presumption in favor of discovery in parallel civil cases to a criminal case, or make the strong showing that proceeding in this parallel civil case would so burden him as to make his criminal and civil defenses impossible. Accordingly, Plaintiff respectfully requests this Court deny Dodds' motion and allow Plaintiff to move forward with discovery—particularly discovery as to the City.

Dated: May 26, 2022.

⁷ See e.g., Ryan Autullo, *Austin to pay \$825k, make policy changes to resolve sexual assault lawsuits*, Austin American-Statesman (Jan 27, 2022) (available at <https://www.statesman.com/story/news/2022/01/27/austin-city-council-settles-sexual-assault-lawsuits-policy-changes/9240678002/>).

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

By my signature below I certify that a true and correct copy of this document has been filed with the Court's electronic case filing system on all parties who have appeared thereby.

 /s/ Jeff Edwards
Jeff Edwards

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:

1:22-cv-00299

**PLAINTIFF'S RESPONSE TO DEFENDANT WALTER DODDS' MOTION TO STAY
DISCOVERY PENDING CRIMINAL PROCEEDINGS**

Exhibit 1

City of Austin Records Control Schedule



Local Government Records Control Schedule

SLR 500

Form SLR 540 must accompany this form.

Page 1 of 5

Date: mm/dd/yyyy

| | | |
|--|-----------------------|---------------------|
| Name of Government City of Austin | Department All | Division All |
|--|-----------------------|---------------------|

| TSL RECORD SERIES NUMBER | COA RECORD SERIES NUMBER | RECORD TITLE AND DESCRIPTION | RETENTION PERIOD | REMARKS | VITAL OR HISTORICAL |
|--------------------------|--------------------------|--|------------------|--|---------------------|
| | SAF24-05A | <p>ACCREDITATION REPORTS</p> <p>Forensics Laboratory</p> <p>Annual or biennial cumulative reports, periodic reports not included in cumulative and special audit reports of internal and external accreditation audits from any Forensics Laboratory discipline.</p> | AC + 100 years | <p>AC = Date of final report.</p> <p>Custodian is the Austin Police Department: Forensics Division.</p> | |
| GR1000-03(g) | GAR25-15A | <p>BOARDS AND COMMISSIONS</p> <p>Meeting Backup</p> <p>Supporting documentation for Board and Commission meetings including correspondence and reports.</p> | CYE + 10 years | <p>CYE = Calendar year end.</p> <p>Prior to January 2010, the department liaison is the custodian and required to retain the record for 2 years as per previous State requirements. January 2010 and forward, the OCC is the custodian.</p> <p>Archival Review: Records are to be reviewed by the Austin History Center for historical value prior to destruction.</p> | AR |

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| CITY OF AUSTIN RECORDS CONTROL SCHEDULE | Department: All | Division/Office: All |
| | Date: mm/dd/yyyy | Page: 2 of 5 |

| TSL RECORD SERIES NUMBER | COA RECORD SERIES NUMBER | RECORD TITLE AND DESCRIPTION | RETENTION PERIOD | REMARKS | VITIM OR HISTORICAL |
|----------------------------|--------------------------|---|------------------|--|---------------------|
| | LEG55-40A | <p>CLAIMS AND DAMAGES</p> <p>Documents various types of general liability claims filed against the City. These include personal injury, property damage, motor vehicle accident, false arrest, and others. May include: subrogation packages, copy of hospital, physicians, ambulance and medication bills, death and birth certificates, reports, photographs, summaries, reviews, notices, audio and videotapes, transcriptions of recorded statements, memoranda, correspondence, and related documents used in processing the claim.</p> | AC + 5 years | <p>AC = Resolution of claim or determination claim is uncollectable.</p> <p>Custodian is Austin Energy, the Law Department or Telecommunications and Regulatory Affairs as applicable.</p> | |
| | PHS25-30A | <p>CRIME VICTIM COMPENSATION APPLICATIONS</p> <p>Applications submitted on behalf of crime victims seeking reimbursement from state Crime Victims' Compensation Fund for medical, counseling, etc. expenses related to the crime.</p> | AC | <p>AC = Upon confirmation of receipt.</p> <p>Custodian is the creating department.</p> | |
| GR1025-08(a); GR1025-08(b) | FIN45-62A | <p>GRANT RECORDS</p> <p>Federal Aviation Administration (FAA)</p> <p>Airport Construction</p> <p>All records related to Federal Aviation Administration Grant Program for construction projects built to FAA standards and documenting federal obligations in order to continue serving the purpose for which it was developed.</p> | AC + 25 years | <p>AC = Fiscal year end or other specified requirement of the grant whichever occurs last.</p> <p>Custodian is the creating department.</p> <p>FAA Airport Compliance Manual - Order 5190.6B.</p> | |
| | GAR05-50A | <p>INDEPENDENT CITIZEN REDISTRICTING COMMISSION (ICRC) RECORDS</p> <p>Redistricting Work Papers</p> <p>Documents, such as notes, non-record copies, reference material, drafts, and calculations, created and acquired for use in the redistricting process.</p> | CYE + 20 years | <p>CYE = Calendar year end.</p> <p>Custodian is the Office of the City Clerk.</p> <p>Archival Review: Records are to be reviewed by the Austin History Center for historical value prior to destruction.</p> | AR |

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| CITY OF AUSTIN RECORDS CONTROL SCHEDULE | Department: All | Division/Office: All |
| | Date: mm/dd/yyyy | Page: 3 of 5 |

| TSL RECORD SERIES NUMBER | COA RECORD SERIES NUMBER | RECORD TITLE AND DESCRIPTION | RETENTION PERIOD | REMARKS | VITAL OR HISTORICAL |
|--------------------------|--------------------------|--|------------------|---|---------------------|
| | SAF24-10A | <p>LABORATORY CASE RECORDS</p> <p>Records and documentation related to the analysis of evidence for a specific case.</p> | AC + 100 years | <p>AC = Date of final report issuance for the lab number in question.</p> <p>Custodian is the Austin Police Department: Forensics Division.</p> | |
| | SAF24-15A | <p>MAINTENANCE, REPAIR, AND INSPECTION RECORDS</p> <p>Forensics Laboratory Equipment</p> <p>Documentation of laboratory equipment maintenance and repair records including printouts of work orders. Includes records of instrument calibration documentation, maintenance logs, validations, and manuals of instruments used to conduct toxicology, histology, and other laboratory tests and procedures.</p> | LA + 5 years | <p>LA = Life of the asset.</p> <p>Custodian is the Austin Police Department: Forensics Division.</p> | |
| | GAR30-20A | <p>MEETING MINUTES</p> <p>City Governing Bodies and Steering Committees</p> <p>Non-Council Related</p> <p>Written minutes of City governing board and steering committee meetings documenting topics discussed and approved plans and decisions.</p> | CYE + 10 years | <p>CYE = Calendar year end.</p> <p>Custodian is the board or committee's supporting department.</p> <p>Archival Review: Records are to be reviewed by the Austin History Center for historical value prior to destruction.</p> <p>Note: For meeting minutes concerning Council and Council Related Bodies, use GAR30-05A.</p> | AR |

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| CITY OF AUSTIN RECORDS CONTROL SCHEDULE | Department: All | Division/Office: All |
| | Date: mm/dd/yyyy | Page: 4 of 5 |

| TSL RECORD SERIES NUMBER | COA RECORD SERIES NUMBER | RECORD TITLE AND DESCRIPTION | RETENTION PERIOD | REMARKS | VITAL OR HISTORICAL |
|--------------------------|--------------------------|---|------------------|--|---------------------|
| | SAF20-51A | <p>OFFENSE INVESTIGATION RECORDS</p> <p>Cases Closed by arrest or citation</p> <p>Cases with DNA</p> <p>Offense and supplemental offense reports; investigation reports and notes; witness statements; latent fingerprints; results of chemical analysis and polygraph tests; crime scene, mug shot, and other photographs; laboratory reports; arrest reports (Class C misdemeanors only); citations, affidavits; criminal process; victim impact statements; and other records relating and customary to the investigation of criminal offenses or other violations of state law or local ordinance.</p> | AC + 100 years | AC = Date of arrest or citation. Custodian is the creating department. | |
| | GAR30-04A | <p>ONLINE MESSAGE BOARD RECORDS</p> <p>Records documenting the discussions posted by elected officials and designated staff to an online message board as defined by Section 551.006 (Open Meetings) of the Texas Government Code. Includes attachments.</p> | AC + 6 years | AC = 30 days after topic inactivity. Custodian is the Office of the City Clerk. Texas Government Code, Sec. 551.006 Archival Review: Records are to be reviewed by the Austin History Center for historical value prior to destruction. | AR |
| | SAF24-20A | <p>PERSONNEL QUALITY AUDIT FILES</p> <p>Records of each employee's history with the Forensics Laboratory beginning with initial hire. Includes audit notebooks, proficiency test summaries, court testimony evaluations, casework authorizations, statement of qualifications, training records, and continuing education.</p> | AC + 100 years | AC = Separation or discharge. Custodian is the Austin Police Department: Forensics Division. | |

RECORDS MANAGEMENT DIVISION
RECEIVED

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|---|------------------|----------------------|
| CITY OF AUSTIN RECORDS CONTROL SCHEDULE | Department: All | Division/Office: All |
| | Date: mm/dd/yyyy | Page: 5 of 5 |

| TSL RECORD SERIES NUMBER | COA RECORD SERIES NUMBER | RECORD TITLE AND DESCRIPTION | RETENTION PERIOD | REMARKS | VITAL OR HISTORICAL |
|--------------------------|--------------------------|--|------------------|--|---------------------|
| | SAF24-25A | <p>POLICIES AND PROCEDURES</p> <p>Forensics Laboratory</p> <p>Executive orders, directives, manuals, and similar documents that establish and define the policies, procedures, rules, and regulations governing the operations or activities of the Forensics Laboratory. Includes policies and procedures related to deviations (approved and rejected), changes by memo, Physical Evidence Handbook, Training Manuals, document authorizations, forms, and employee acknowledgement records.</p> | AC + 100 years | <p>AC = Until superseded, expired, or discontinued.</p> <p>Custodian is the Austin Police Department: Forensics Division.</p> | |
| | SAF24-30A | <p>QUALITY CONTROL REPORTS OR LOGS</p> <p>Forensics Laboratory</p> <p>Quality audit and quality control reports or logs from any Forensics Laboratory section not contained within a case record.</p> | AC + 5 years | <p>AC = Date of the last entry on the record sheet, log or journal or one accreditation period, whichever is longer.</p> <p>Custodian is the Austin Police Department: Forensics Division.</p> | |

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

§
§
§
§
§
§
§
§
§
§

CAUSE OF ACTION:

1:22-cv-00299

**PLAINTIFF'S RESPONSE TO DEFENDANT WALTER DODDS' MOTION TO STAY
DISCOVERY PENDING CRIMINAL PROCEEDINGS**

Exhibit 2

T. Skeen Body-Worn Camera Audit Log



Austin TX PD
Austin, TX, US



Document generated: 17 May 2021 - 18:47:44 -05:00 by Hemberger, Gretchen(AP8308)

EVIDENCE AUDIT TRAIL

| Evidence | | Source | |
|--------------|--|---------------------------------|-----------------------------|
| Evidence ID | 183220299 | Device Type | Axon Body 2 |
| Categories | Police Event | Device Name | X81124048 |
| Title | AXON Body 2 Video 2018-11-18 0241 | Serial Number | X81124048 |
| | | Other | Axon Body 2 |
| Checksum | Sha2- 495ec9c078e1fd0ea5ea9c32e5afaeee978a739f79bce36fb823 a94bc9542af5 | | |
| Record Start | 18 Nov 2018 02:41:32 | | |
| Uploaded | 18 Nov 2018 06:55:01 | Usage | |
| Uploader | Skeen, Timothy (Badge ID: AP8437) | | |
| Unique ID | D01EA84F781E4BD78D3A303A92C77B2A | Page views | 24 |
| | | File downloads | |
| | | Video playbacks | 23 |
| | | Last Viewed Or Downloaded On | 17 May 2021 18:47:43 |

| # | Date | Time | User | Activity |
|----|-------------|-------------------|---------------|---|
| 1 | 18 Nov 2018 | 02:41:32 (-06:00) | System | Recording started after Axon Signal activation using trigger(s) 5 |
| 2 | 18 Nov 2018 | 02:48:04 (-06:00) | System | Marker added to evidence at time 0h:6m:39s due to function button press |
| 3 | 18 Nov 2018 | 03:11:33 (-06:00) | System | Recording stopped due to event button hold |
| 4 | 18 Nov 2018 | 03:11:51 (-06:00) | System | Evidence accessed using Axon application |
| 5 | 18 Nov 2018 | 03:11:53 (-06:00) | System | Category 'Police Event' added to video metadata using Axon application |
| 6 | 18 Nov 2018 | 03:11:54 (-06:00) | System | Evidence accessed using Axon application |
| 7 | 18 Nov 2018 | 03:12:07 (-06:00) | System | External ID '183220299' added to video metadata using Axon application |
| 8 | 18 Nov 2018 | 05:50:10 (-06:00) | System | Evidence accessed using Axon application |
| 9 | 18 Nov 2018 | 05:50:19 (-06:00) | System | Evidence accessed using Axon application |
| 10 | 18 Nov 2018 | 05:50:20 (-06:00) | System | Evidence streamed using Axon application |
| 11 | 18 Nov 2018 | 05:50:24 (-06:00) | System | Evidence streamed using Axon application |
| 12 | 18 Nov 2018 | 05:54:36 (-06:00) | System | Evidence accessed using Axon application |
| 13 | 18 Nov 2018 | 05:54:46 (-06:00) | System | Evidence accessed using Axon application |
| 14 | 18 Nov 2018 | 06:30:07 (-06:00) | System | Evidence successfully uploaded using Axon Dock |

| # | Date | Time | User | Activity |
|----|-------------|-------------------|--|--|
| 15 | 18 Nov 2018 | 06:55:01 (-06:00) | System | Evidence automatically deleted from camera after successful upload using Axon Dock |
| 16 | 18 Nov 2018 | 06:55:02 (-06:00) | System | Evidence Record Created |
| 17 | 18 Nov 2018 | 06:55:02 (-06:00) | Skeen, Timothy (Badge ID: AP8437) Username: AP8437 Email: e99bdee6f7a845b8bea1867bfa13f87e@austintexas.gov User ID: 622BB86765AF44FBB24E396A2D791B2A | External ID '183220299' added |
| 18 | 18 Nov 2018 | 06:55:02 (-06:00) | System | Retention Level Updated Deletion is now scheduled for 18 May 2019 03:41:32 (-05:00) |
| 19 | 18 Nov 2018 | 06:55:02 (-06:00) | Skeen, Timothy (Badge ID: AP8437) Username: AP8437 Email: e99bdee6f7a845b8bea1867bfa13f87e@austintexas.gov User ID: 622BB86765AF44FBB24E396A2D791B2A | Category 'Police Event' Added Deletion is now scheduled for 18 May 2019 03:41:32 (-05:00) |
| 20 | 19 Nov 2018 | 01:53:18 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 21 | 19 Nov 2018 | 01:53:19 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 22 | 19 Nov 2018 | 01:53:27 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 23 | 19 Nov 2018 | 02:01:45 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 24 | 19 Nov 2018 | 02:01:46 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 25 | 19 Nov 2018 | 02:02:09 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 26 | 19 Nov 2018 | 02:24:27 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 27 | 19 Nov 2018 | 02:24:28 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 28 | 19 Nov 2018 | 02:24:35 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 29 | 21 Nov 2018 | 16:00:08 (-06:00) | Lyons, Wade (Badge ID: AP5936) Username: AP5936 User ID: c89ee03e40a54c46b3f25f94a6d9aa5a | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 30 | 21 Nov 2018 | 16:00:09 (-06:00) | Lyons, Wade (Badge ID: AP5936) Username: AP5936 User ID: c89ee03e40a54c46b3f25f94a6d9aa5a | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 31 | 21 Nov 2018 | 16:00:15 (-06:00) | Lyons, Wade (Badge ID: AP5936) Username: AP5936 User ID: c89ee03e40a54c46b3f25f94a6d9aa5a | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 32 | 22 Nov 2018 | 21:53:45 (-06:00) | Skeen, Timothy (Badge ID: AP8437) Username: AP8437 User ID: 622bb86765af44fbb24e396a2d791b2a | Evidence Record Accessed. Client IP Address: 162.89.0.59 |
| 33 | 22 Nov 2018 | 21:53:46 (-06:00) | Skeen, Timothy (Badge ID: AP8437) Username: AP8437 User ID: 622bb86765af44fbb24e396a2d791b2a | Media File Buffered by System at Page Load. Client IP 162.89.0.59 |
| 34 | 22 Nov 2018 | 21:53:51 (-06:00) | Skeen, Timothy (Badge ID: AP8437) Username: AP8437 User ID: 622bb86765af44fbb24e396a2d791b2a | Evidence Record Streamed. Client IP Address: 162.89.0.59 |

| # | Date | Time | User | Activity |
|----|-------------|-------------------|--|---|
| 35 | 28 Nov 2018 | 00:44:34 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 36 | 28 Nov 2018 | 00:44:34 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 37 | 28 Nov 2018 | 00:44:39 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 38 | 28 Nov 2018 | 04:29:30 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 39 | 28 Nov 2018 | 04:29:30 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 40 | 28 Nov 2018 | 04:29:52 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 41 | 28 Nov 2018 | 04:40:20 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Added |
| 42 | 28 Nov 2018 | 04:40:31 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Edited |
| 43 | 28 Nov 2018 | 04:44:56 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 44 | 28 Nov 2018 | 05:14:43 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 45 | 28 Nov 2018 | 05:29:43 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 46 | 28 Nov 2018 | 05:44:43 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 47 | 28 Nov 2018 | 05:50:35 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Added |
| 48 | 28 Nov 2018 | 05:50:57 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Edited |
| 49 | 28 Nov 2018 | 05:51:01 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Removed |
| 50 | 28 Nov 2018 | 05:51:18 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Added |
| 51 | 28 Nov 2018 | 05:51:43 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Edited |
| 52 | 28 Nov 2018 | 05:53:05 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Added |
| 53 | 28 Nov 2018 | 05:53:37 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Edited |
| 54 | 28 Nov 2018 | 05:54:04 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Added |
| 55 | 28 Nov 2018 | 05:54:23 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Edited |

| # | Date | Time | User | Activity |
|----|-------------|-------------------|--|---|
| 56 | 28 Nov 2018 | 05:55:17 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Added |
| 57 | 28 Nov 2018 | 05:55:32 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Edited |
| 58 | 28 Nov 2018 | 05:56:11 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Added |
| 59 | 28 Nov 2018 | 05:56:29 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Edited |
| 60 | 28 Nov 2018 | 05:56:53 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Edited |
| 61 | 05 Dec 2018 | 04:45:21 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Evidence Record Accessed. Client IP Address: 162.89.0.58 |
| 62 | 05 Dec 2018 | 04:45:23 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Media File Buffered by System at Page Load. Client IP 162.89.0.58 |
| 63 | 05 Dec 2018 | 04:46:01 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Evidence Record Streamed. Client IP Address: 162.89.0.58 |
| 64 | 05 Dec 2018 | 04:58:06 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Media File Buffered by System at Page Load. Client IP 162.89.0.58 |
| 65 | 05 Dec 2018 | 06:21:39 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Evidence Record Accessed. Client IP Address: 162.89.0.58 |
| 66 | 05 Dec 2018 | 06:21:39 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Media File Buffered by System at Page Load. Client IP 162.89.0.58 |
| 67 | 05 Dec 2018 | 06:23:16 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Evidence Record Accessed. Client IP Address: 162.89.0.58 |
| 68 | 05 Dec 2018 | 06:23:17 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Media File Buffered by System at Page Load. Client IP 162.89.0.58 |
| 69 | 07 Dec 2018 | 00:56:45 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Accessed. Client IP Address: 162.89.0.58 |
| 70 | 07 Dec 2018 | 00:56:48 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Media File Buffered by System at Page Load. Client IP 162.89.0.58 |
| 71 | 07 Dec 2018 | 01:03:10 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Accessed. Client IP Address: 162.89.0.58 |
| 72 | 07 Dec 2018 | 01:03:12 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Media File Buffered by System at Page Load. Client IP 162.89.0.58 |
| 73 | 07 Dec 2018 | 01:03:40 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Streamed. Client IP Address: 162.89.0.58 |
| 74 | 07 Dec 2018 | 04:23:06 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 75 | 07 Dec 2018 | 04:23:07 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 76 | 07 Dec 2018 | 04:23:10 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |

| # | Date | Time | User | Activity |
|----|-------------|-------------------|--|---|
| 77 | 07 Dec 2018 | 04:28:32 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 78 | 08 Dec 2018 | 03:30:04 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Accessed. Client IP Address: 162.89.0.58 |
| 79 | 08 Dec 2018 | 03:30:05 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Media File Buffered by System at Page Load. Client IP 162.89.0.58 |
| 80 | 08 Dec 2018 | 03:30:16 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Streamed. Client IP Address: 162.89.0.58 |
| 81 | 08 Dec 2018 | 03:46:54 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 82 | 08 Dec 2018 | 03:46:55 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 83 | 08 Dec 2018 | 03:47:05 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 84 | 08 Dec 2018 | 03:49:01 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Marker Added |
| 85 | 08 Dec 2018 | 03:49:31 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Marker Edited |
| 86 | 09 Dec 2018 | 00:31:45 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Accessed. Client IP Address: 162.89.0.59 |
| 87 | 09 Dec 2018 | 00:31:47 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Media File Buffered by System at Page Load. Client IP 162.89.0.59 |
| 88 | 09 Dec 2018 | 00:31:59 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Streamed. Client IP Address: 162.89.0.59 |
| 89 | 09 Dec 2018 | 00:46:40 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Accessed. Client IP Address: 162.89.0.58 |
| 90 | 09 Dec 2018 | 00:46:41 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Media File Buffered by System at Page Load. Client IP 162.89.0.58 |
| 91 | 09 Dec 2018 | 00:46:44 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Streamed. Client IP Address: 162.89.0.58 |
| 92 | 10 Dec 2018 | 09:41:44 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Accessed. Client IP Address: 162.89.0.58 |
| 93 | 10 Dec 2018 | 09:41:45 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Media File Buffered by System at Page Load. Client IP 162.89.0.58 |
| 94 | 10 Dec 2018 | 09:42:19 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Streamed. Client IP Address: 162.89.0.58 |
| 95 | 11 Dec 2018 | 04:28:34 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 96 | 11 Dec 2018 | 04:28:35 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 97 | 11 Dec 2018 | 04:28:50 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |

| # | Date | Time | User | Activity |
|-----|-------------|-------------------|--|---|
| 98 | 11 Dec 2018 | 04:36:26 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 99 | 13 Dec 2018 | 19:47:59 (-06:00) | Guajardo, Richard (Badge ID: AP3440) Username: AP3440 User ID: bf7cd4dccc1b464e841c136d1d923119 | Evidence Record Accessed. Client IP Address: 162.89.0.59 |
| 100 | 13 Dec 2018 | 19:48:01 (-06:00) | Guajardo, Richard (Badge ID: AP3440) Username: AP3440 User ID: bf7cd4dccc1b464e841c136d1d923119 | Media File Buffered by System at Page Load. Client IP 162.89.0.59 |
| 101 | 13 Dec 2018 | 19:48:10 (-06:00) | Guajardo, Richard (Badge ID: AP3440) Username: AP3440 User ID: bf7cd4dccc1b464e841c136d1d923119 | Evidence Record Streamed. Client IP Address: 162.89.0.59 |
| 102 | 14 Dec 2018 | 03:35:19 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Evidence Record Accessed. Client IP Address: 162.89.0.58 |
| 103 | 14 Dec 2018 | 03:35:20 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Media File Buffered by System at Page Load. Client IP 162.89.0.58 |
| 104 | 14 Dec 2018 | 03:35:43 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Evidence Record Streamed. Client IP Address: 162.89.0.58 |
| 105 | 24 Dec 2018 | 05:19:36 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 106 | 24 Dec 2018 | 05:19:37 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 107 | 24 Dec 2018 | 05:20:04 (-06:00) | Ingram, Derick (Badge ID: AP4646) Username: AP4646 User ID: 0fe07b07b49d4f98a74ec7acd2f11345 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 108 | 18 May 2019 | 04:33:13 (-05:00) | System | Delete Request Received |
| 109 | 18 May 2019 | 04:33:13 (-05:00) | System | Queued for Deletion Comment: Delete trigger processed. Trigger Type: Delete_Trigger Condition: Datetime_Reached Value: 5/18/2019 8:41:32 AM Deletion is now scheduled for 25 May 2019 04:33:13 (-05:00) |
| 110 | 18 May 2019 | 04:33:13 (-05:00) | System | Delete Request Received |
| 111 | 18 May 2019 | 04:33:13 (-05:00) | System | Queued for Deletion Comment: Delete trigger processed. Trigger Type: Delete_Trigger Condition: Datetime_Reached Value: 5/18/2019 8:41:32 AM Deletion is now scheduled for 25 May 2019 04:33:13 (-05:00) |
| 112 | 25 May 2019 | 05:15:57 (-05:00) | System | Deleted |
| 113 | 12 Dec 2019 | 10:50:55 (-06:00) | Spangler, Mark (Badge ID: AP1507) Username: AP1507 User ID: 4110b65099604e758cd2a6e4fcc8a462 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 114 | 17 May 2021 | 18:47:35 (-05:00) | Hemberger, Gretchen (Badge ID: AP8308) Username: AP8308 User ID: 0d624948cd924cbb921346326baddbce | Evidence Record Accessed. Client IP Address: 162.89.0.57 |

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:

1:22-cv-00299

**PLAINTIFF'S RESPONSE TO DEFENDANT WALTER DODDS' MOTION TO STAY
DISCOVERY PENDING CRIMINAL PROCEEDINGS**

Exhibit 3

B. Hoover Body-Worn Camera Audit Log



Austin TX PD
Austin, TX, US



Document generated: 17 May 2021 - 18:44:00 -05:00 by Hemberger, Gretchen(AP8308)

EVIDENCE AUDIT TRAIL

| Evidence | Source |
|--|---|
| Evidence ID: 183220299 | Device Type: Axon Body 2 |
| Categories: Police Event | Device Name: X81185656 |
| Title: AXON Body 2 Video 2018-11-18 0242 | Serial Number: X81185656 |
| | Other: Axon Body 2 |
| Checksum: Sha2- 179d2bb74131f40900851ecec2cb623e2629620645416fb5842 3cdcafd70f075 | |
| Record Start: 18 Nov 2018 02:42:01 | |
| Uploaded: 18 Nov 2018 06:57:23 | Usage |
| Uploader: Hoover, Bradley (Badge ID: AP8211) | |
| Unique ID: AA746C40BFC6447DB36EB17B39B43072 | Page views: 12 |
| | File downloads |
| | Video playbacks: 6 |
| | Last Viewed Or Downloaded On: 17 May 2021 18:44:00 |

| # | Date | Time | User | Activity |
|----|-------------|-------------------|---|--|
| 1 | 18 Nov 2018 | 02:42:01 (-06:00) | System | Recording started after Axon Signal activation using trigger(s) 5 |
| 2 | 18 Nov 2018 | 02:50:58 (-06:00) | System | Recording stopped due to camera power down |
| 3 | 18 Nov 2018 | 06:50:30 (-06:00) | System | Evidence successfully uploaded using Axon Dock |
| 4 | 18 Nov 2018 | 06:57:22 (-06:00) | System | Evidence automatically deleted from camera after successful upload using Axon Dock |
| 5 | 18 Nov 2018 | 06:57:23 (-06:00) | System | Evidence Record Created |
| 6 | 18 Nov 2018 | 14:02:38 (-06:00) | System | Retention Level Updated Deletion is now scheduled for 18 May 2019 03:42:01 (-05:00) |
| 7 | 18 Nov 2018 | 14:02:38 (-06:00) | System | Category 'Police Event' Added Deletion is now scheduled for 18 May 2019 03:42:01 (-05:00) |
| 8 | 18 Nov 2018 | 14:02:38 (-06:00) | System | External ID Updated to '183220299' |
| 9 | 19 Nov 2018 | 01:51:59 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 10 | 19 Nov 2018 | 01:52:00 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 11 | 19 Nov 2018 | 01:52:06 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |

| # | Date | Time | User | Activity |
|----|-------------|-------------------|--|---|
| 12 | 19 Nov 2018 | 02:04:13 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 13 | 19 Nov 2018 | 02:04:14 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 14 | 19 Nov 2018 | 02:04:21 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 15 | 19 Nov 2018 | 02:23:51 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 16 | 19 Nov 2018 | 02:23:52 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 17 | 19 Nov 2018 | 02:23:55 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 18 | 21 Nov 2018 | 15:58:31 (-06:00) | Lyons, Wade (Badge ID: AP5936) Username: AP5936 User ID: c89ee03e40a54c46b3f25f94a6d9aa5a | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 19 | 21 Nov 2018 | 15:58:32 (-06:00) | Lyons, Wade (Badge ID: AP5936) Username: AP5936 User ID: c89ee03e40a54c46b3f25f94a6d9aa5a | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 20 | 21 Nov 2018 | 15:58:40 (-06:00) | Lyons, Wade (Badge ID: AP5936) Username: AP5936 User ID: c89ee03e40a54c46b3f25f94a6d9aa5a | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 21 | 28 Nov 2018 | 00:45:12 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 22 | 28 Nov 2018 | 00:45:13 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 23 | 28 Nov 2018 | 00:45:20 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 24 | 28 Nov 2018 | 00:54:10 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Added |
| 25 | 28 Nov 2018 | 00:54:27 (-06:00) | Polk, Aaron (Badge ID: AP7096) Username: AP7096 User ID: 6f780dd2118c46e3bf06a9b5e1217e32 | Marker Edited |
| 26 | 07 Dec 2018 | 04:21:07 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 27 | 07 Dec 2018 | 04:21:08 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Media File Buffered by System at Page Load. Client IP 162.89.0.57 |
| 28 | 07 Dec 2018 | 04:21:15 (-06:00) | Lichter, Deanna (Badge ID: AP4648) Username: AP4648 User ID: 1bf75b392bd943e99190977af6e9be48 | Evidence Record Streamed. Client IP Address: 162.89.0.57 |
| 29 | 18 May 2019 | 04:33:15 (-05:00) | System | Queued for Deletion Comment: Delete trigger processed. Trigger Type: Delete_Trigger Condition: Datetime_Reached Value: 5/18/2019 8:42:01 AM Deletion is now scheduled for 25 May 2019 04:33:15 (-05:00) |
| 30 | 18 May 2019 | 04:33:15 (-05:00) | System | Delete Request Received |
| 31 | 18 May 2019 | 04:33:15 (-05:00) | System | Delete Request Received |

| # | Date | Time | User | Activity |
|----|-------------|-------------------|--|--|
| 32 | 18 May 2019 | 04:33:15 (-05:00) | System | Queued for Deletion Comment: Delete trigger processed. Trigger Type: Delete. Trigger Condition: Datetime_Reached Value: 5/18/2019 8:42:01 AM Deletion is now scheduled for 25 May 2019 04:33:15 (-05:00) |
| 33 | 25 May 2019 | 05:16:46 (-05:00) | System | Deleted |
| 34 | 25 May 2019 | 05:16:46 (-05:00) | System | Deleted |
| 35 | 12 Dec 2019 | 10:51:10 (-06:00) | Spangler, Mark (Badge ID: AP1507) Username: AP1507 User ID: 4110b65099604e758cd2a6e4fcc8a462 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 36 | 12 Dec 2019 | 11:06:29 (-06:00) | Spangler, Mark (Badge ID: AP1507) Username: AP1507 User ID: 4110b65099604e758cd2a6e4fcc8a462 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 37 | 12 Dec 2019 | 11:22:25 (-06:00) | Spangler, Mark (Badge ID: AP1507) Username: AP1507 User ID: 4110b65099604e758cd2a6e4fcc8a462 | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 38 | 24 Jan 2020 | 09:55:08 (-06:00) | Richman, Robert (Badge ID: AP3258) Username: AP3258 User ID: acef2fec3b2842fab176ad254b7d6a4d | Evidence Record Accessed. Client IP Address: 162.89.0.57 |
| 39 | 13 Apr 2020 | 22:05:47 (-05:00) | Donovan, Scott (Badge ID: AP6131) Username: AP6131 User ID: b6093db7441a48abbcd2bc1a6529db4 | Evidence Record Accessed. Client IP Address: 162.89.0.58 |
| 40 | 17 May 2021 | 18:43:27 (-05:00) | Hemberger, Gretchen (Badge ID: AP8308) Username: AP8308 User ID: 0d624948cd924cbb921346326baddbce | Evidence Record Accessed. Client IP Address: 162.89.0.57 |

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:

1:22-cv-00299

**PLAINTIFF'S RESPONSE TO DEFENDANT WALTER DODDS' MOTION TO STAY
DISCOVERY PENDING CRIMINAL PROCEEDINGS**

Exhibit 4

APD Policy 303 – Body Worn Camera Systems



Austin Police Department
General Orders

Body Worn Camera Systems

303.1 PURPOSE AND SCOPE

The use of Body Worn Camera (BWC) system provides an unbiased audio/video recording of events that employees encounter. These recordings can be useful for the documentation of evidence, the preparation of offense reports, and future court testimony. BWC systems can improve community relations and deter inappropriate conduct by both the members of the public and the police department.

This order covers the use of the Department issued and personally owned BWC systems. This order does not cover the use of surreptitious recording devices used in undercover operations.

303.2 DEPARTMENT ISSUED BODY WORN CAMERA

BWC equipment is to be used primarily by uniformed personnel as authorized per assignment by the Department and must be used unless otherwise authorized by the rank of Commander or above.

- (a) Employees equipped with a Department issued BWC system must be trained in the operation of the equipment prior to its use. BWC equipment will be used in accordance with Department training and the BWC operations manual.
- (b) Unless otherwise authorized by the Chief of Police or his/her designee, BWC's will be worn consistent with the training and manufacturer's recommendations, in regards to fields of view and officer safety. Employees will adhere to the following dimensions for placement of the BWC:
 1. From the center of the sternum, no more than four inches to the right or left on the outermost layer of clothing such that the camera has an unobstructed view.
 2. No higher than four inches below the top button of the uniform shirt and no lower than six inches below the top button of the uniform shirt.
 3. Exemptions to the placement of the BWC in accordance with this order will be authorized by the rank of Commander or above. Examples for exemptions may include, but are not limited to, SWAT, OCD, and Mounted Patrol.
- (c) Employees shall ensure that their BWC equipment has adequate battery charge and storage space to complete their regular tour of duty.
 1. Sworn personnel assigned to the units below are required to power on the device at the beginning of their tour of duty and not power the device off until the end of that tour of duty.
 - (a) Patrol,
 - (b) DTAC Patrol,
 - (c) George District Representatives,
 - (d) Mounted Patrol,
 - (e) Court Services,

Austin Police Department

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Body Worn Camera Systems

- (f) Park Patrol,
 - (g) Lake Patrol,
 - (h) Commercial Vehicles,
 - (i) DWI,
 - (j) Motors,
 - (k) Highway Response,
 - (l) Metro Tac,
 - (m) Patrol K9,
 - (n) Gangs,
 - (o) Criminal Interdiction.
2. Sworn personnel not assigned to the units above are not considered to be “first responders” and are therefore not required to power on their assigned Body Worn Camera at the beginning of their tour of duty. However, if at any time their duties and responsibilities require any type of field work where they could be called upon to take enforcement action, their device will be properly attached and powered on for the entirety of the time they are in that role.
- (d) Employees shall test the BWC equipment at the commencement of their tour of duty and shall classify the video as '10-41'.
 - (e) The BWC equipment test shall consist of employees recording the following:
 - 1. Employee name;
 - 2. Employee number; and
 - 3. The current date and time.
 - (f) Employees shall review the recording to verify the BWC microphone is operational, and the date and time is accurate.
 - (g) Employees who discover an operational defect with the BWC system shall attempt to correct the system following the received training on the device (i.e., Reseating cables, Cycling the power, etc.). If the BWC is found to have a physical defect or malfunction:
 - 1. Employees shall notify an on-duty supervisor, and write up the device for service describing the events leading up to the failure.
 - 2. Employees shall notify their dispatcher to have a note added to their activity log that their BWC system has failed.
 - 3. Employees shall notate on the device repair form if there is existing video which was unable to be uploaded because of the device's failure.
 - 4. Employees shall complete a supplement to any report in which there is video on the defective camera that was unable to be uploaded to Evidence.com.
 - (h) Employees shall not:

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1. Bypass or attempt to override the equipment;
2. Erase, alter, or delete any recording produced by the BWC; or
3. Use any non-issued chargers, adapters, or cables with the BWC system.

303.2.1 WHEN DEPARTMENT ISSUED BWC SYSTEM USE IS REQUIRED

This section is not intended to describe every possible situation where the system may be used. In some circumstances it may not be possible to capture images of an incident due to conditions or location of the camera, however the audio portion can be valuable evidence and is subject to the same activation requirements. The BWC should only be activated for law enforcement purposes.

- (a) All units responding to a scene shall activate their department issued BWC equipment when they:
 1. Arrive on-scene to any call for service;
 2. Have detained or arrested a person;
 3. Are attempting to detain or arrest a person;
 4. By the nature of the call for service, are likely to detain or arrest a person; or
 5. Any consensual contact in which the officer or a citizen believes activation of the BWC would be in the best interest of the community.
- (b) Examples of when the department issued BWC system must be activated include, but are not limited to:
 1. Traffic stops;
 2. Foot pursuits, until completion of enforcement action;
 3. DWI investigations including field sobriety tests;
 4. Warrant service;
 5. Investigatory stops; or
 6. Any contact that becomes adversarial in an incident that would not otherwise require recording.
- (c) Officers that are issued a BWC shall utilize the BWC when engaging in Off-Duty LERE Overtime.
- (d) In addition to the required situations, employees may activate the system anytime they believe its use would be appropriate and/or valuable to document an incident.
- (e) There may be instances in which an officer is required to take immediate action in response to an event which may not allow time to activate their BWC. In those situations, it may be impractical or unreasonable for employees to activate their BWC system before taking police action. It is expected that once the immediacy of the situation is over, employees will activate their BWC system to record the remainder of the incident. Officers shall articulate the reasoning for the delayed activation of their BWC in an offense report, supplement, or other form of Department approved documentation.

Austin Police Department

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303.2.2 ADVISEMENT AND CONSENT

Officers should inform individuals they are being recorded unless doing so would be unsafe, impractical or impact the investigation of criminal activity.

303.2.3 WHEN DEPARTMENT ISSUED BWC SYSTEM DEACTIVATION IS AUTHORIZED

Once the BWC system is activated it shall remain on until the incident has concluded or until deactivation is permissible in accordance with this order.

- (a) For purposes of this section, conclusion of an incident has occurred when:
 - 1. All arrests have been made and arrestees have been transported; and
 - 2. No further law enforcement action is likely to occur (e.g., waiting for a tow truck or a family member to arrive.)
- (b) Employees may choose to discontinue a recording currently in progress for any non-confrontational encounter with a person, including an interview of a witness or victim.
- (c) Employees shall adhere to posted policies of any Law Enforcement, Court, or Corrections entity that prohibit the use of BWC systems therein (i.e. TCSO, Courts, Juvenile Detention Centers).
- (d) Employees may deactivate the audio portion by engaging the mute button on the body worn camera, for administrative reasons only, as follows:
 - 1. The reason for audio deactivation must be recorded verbally prior to audio deactivation; and
 - 2. After the purpose of audio deactivation has concluded, employees will reactivate the audio track.
- (e) For purposes of this section, an "administrative reason" refers to:
 - 1. Personal conversations unrelated to the incident being recorded;
 - 2. Officer to officer training (e.g., when a Field Training Officer or Field Training Supervisor wishes to speak to an officer enrolled in the Field Training Program about a training issue);
 - 3. Any reason authorized by a supervisor. The identity of the supervisor granting the authorization shall be stated prior to the audio deactivation.

303.2.4 VICTIM AND WITNESS STATEMENTS

When conducting an investigation, the officer shall attempt to record the crime victim or witness' statement with the body worn camera. The recording may be valuable evidence that contributes to or compliments an investigation. While evidence collection is important, the Department also recognizes it is important for officers to maintain credibility with people wanting to share information with law enforcement.

On occasion, an officer may encounter a reluctant crime victim or witness who does not wish to make a statement on camera. In these situations, the officer should continue to develop rapport with the individual while balancing the need for evidence collection with the individual's request for privacy.

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Body Worn Camera Systems

Should the officer use discretion and not record the crime victim or witness statement with the body worn camera, the officer shall document the reason for not fully recording the statement with the body worn camera. In these instances, officers may still record with an audio recorder. Officers should work with victim services when possible in determining what type of statement will be taken.

- (a) If a citizen, other than a victim or witness as described in this section requests that an officer turn off the BWC, the officer will explain that APD General Orders requires the camera to be activated and recording until the conclusion of the incident or until there is no further law enforcement action necessary.

303.2.5 WHEN DEPARTMENT ISSUED BWC SYSTEM USE IS NOT REQUIRED

Activation of the BWC system is not required:

- (a) During break and lunch periods
- (b) When not in service and not on a call
- (c) When in service, but not on a call.
- (d) Employees shall not utilize the body worn camera in the following circumstances:
 - (a) A potential witness who requests to speak to an officer confidentially or desires anonymity;
 - (b) A victim or witness who requests that he or she not be recorded as a condition of cooperation and the interests of justice require such cooperation;
 - (c) During tactical briefings, or the discussion of safety and security procedures;
 - (d) Public or private locker rooms, changing rooms, restrooms, unless taking police action;
 - (e) Doctor's or lawyer's offices, unless taking police action;
 - (f) Medical or hospital facilities, unless taking police action;
 - (g) At a school, where minor children are present, unless taking police action;
 - (h) To monitor persons based solely upon the person's political or religious beliefs or upon the exercise of the person's constitutional rights to freedom of speech and religious expression, petition, and assembly under the United States Constitution, or because of the content or viewpoint of the person's protected speech;
 - (i) While in any magistrate's or judge's office or in any courtroom, except under exigent circumstances; i.e. police action being taken;
 - (j) During departmental or supervisory meetings.

303.3 REQUIRED CLASSIFICATION OF BWC RECORDINGS

All BWC recordings shall be assigned a category or classification. Doing so determines the length of time the recording is retained in the Evidence.com storage system.

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- (a) Employees shall ensure that all BWC recordings are uploaded from the camera to the storage system prior to the completion of their scheduled tour of duty unless approved by a supervisor.
- (b) Employees shall ensure that within two weeks from the recording date all evidence is properly tagged in Evidence.com to include:
 - 1. Event ID: all recordings, except those classified as "Non-Event", shall include the 9-digit incident number when available using the following format: YYJJJ#### (e.g. 100711267).
 - 2. Categories.
- (c) Unless involved in a response to resistance, an arrest or directed by a supervisor, employees utilizing a BWC during LERE overtime are permitted to download and classify their recordings during their next regularly scheduled work day.
- (d) For purposes of this section, a "Non-Event" video generally refers to a recording that meets all of the following criteria:
 - 1. Video where no investigatory stop is made;
 - 2. Video that does not include any call for service;
 - 3. Video where no person has been detained or arrested; and
 - 4. Video where no enforcement action is documented.
- (e) Detectives are responsible for verifying the classification of recordings for assigned incidents within 30 days of the recording. Detectives are also responsible for reclassifying recordings when necessary to ensure proper retention.

303.3.1 SUPERVISOR INSPECTION

Sergeants shall conduct quarterly inspections of their employees' BWC recordings to ensure they are complying with BWC general order. These inspections will be electronically documented and sent to the lieutenant within the chain-of-command.

303.3.2 DOCUMENTING BWC SYSTEM USE

Any incident recorded with a BWC system shall be documented in the employee's report. If a citation was issued, a notation of "BWC" shall be placed in the notes section of the citation.

303.3.3 COPIES OF BWC SYSTEM RECORDINGS

BWC media recordings shall be used for official APD business only. This may include public information requests after the recording has been reviewed by the Department Legal Advisor and approved for release by the Department. Copies of BWC System Recordings will not be provided unless the person requesting the copy is authorized to view the recording and does not otherwise have access to view the recording using the BWC system. When a copy is made, it is the responsibility of the person receiving the copy to comply with records retention as outlined in General Orders.

Austin Police Department

General Orders

Body Worn Camera Systems

303.3.4 BWC RECORDING RETENTION SCHEDULE

Videos shall be retained for the longest period of time consistent with the City of Austin's Records Management Ordinance, Chapter 2-11, and any applicable City Records Control Schedules and/or the State Local Government Retention Schedules. At a minimum all BWC recordings shall be retained for 181 days.

303.3.5 STORAGE AND SECURITY OF BWC SYSTEM RECORDINGS

Officers will upload the media contained on their BWC utilizing the approved upload procedures (wireless, docking station, etc.).

303.3.6 REQUESTS FOR BWC RECORDINGS

The Department shall comply with all applicable laws pertaining to the release of BWC recordings. News or other media outlet requests for video will be processed through the Public Information Office (PIO). All other open records requests will be processed through the department coordinator in Central Records.

303.4 PERSONALLY OWNED BWC SYSTEMS

Personally owned BWC's are not permitted for use by employees.

303.5 REVIEW OF ALL BWC SYSTEM RECORDINGS

This section outlines the review of BWC system recordings.

- (a) Recordings may be reviewed:
 - 1. By the employee to make sure the BWC system is operational;
 - 2. By the employee to assist with the writing of a report, supplement, memorandum, or prior to making a statement about the incident;
 - 3. By authorized persons for the purpose of reviewing evidence;
 - 4. By a supervisor investigating a specific act of employee conduct; or
 - 5. By authorized Department personnel participating in an official investigation, such as a personnel complaint, administrative inquiry, or a criminal investigation.
- (b) Recordings may be shown for the purpose of training. If an involved employee objects to showing a recording, his objection will be submitted to his commander to determine if the training value outweighs the employee's objection.
- (c) In no event shall any recording be used or shown to ridicule or embarrass any employee.
- (d) Employees shall not obtain, attempt to obtain, or convert for their personal use or for the unauthorized use of another person, any information obtained by a BWC system.
- (e) Employees shall not make personal copies or attempt to upload recordings to social networking sites (e.g., YouTube, Facebook).

Austin Police Department
General Orders

Valid 11/1/2018 to 12/17/2018

Body Worn Camera Systems

303.6 REVIEW OF BODY WORN CAMERA ORDER

This order will be reviewed for continuous effectiveness and adherence to local, state, and federal laws by the Department.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:

1:22-cv-00299

**PLAINTIFF'S RESPONSE TO DEFENDANT WALTER DODDS' MOTION TO STAY
DISCOVERY PENDING CRIMINAL PROCEEDINGS**

Exhibit 5

Austin, Texas Code of Ordinances § 2-11-11

CHAPTER 2-11. - INFORMATION MANAGEMENT.

§ 2-11-1 - DEFINITIONS.

- (A) Except as provided in Subsection (B), words and phrases in this chapter have the same meaning they have in the Local Government Records Act.
- (B) In this chapter:
- (1) CITY ARCHIVIST means the manager of the Austin History Center of the Austin Public Library acting under the direction and supervision of the director of the Library Department, or the equivalent position as may be established in the Library Department.
 - (2) COMMISSION means director and librarian of the Texas State Library and Archives Commission.
 - (3) CUSTODIAN, in this chapter, means the department that creates or receives a record, information, or data in the course of the department's business function and is responsible for that record, information, or data.
 - (4) DEPARTMENT means a City department, or the functional equivalent.
 - (5) DEPARTMENT DIRECTOR means the officer or employee who is in charge of a department.
 - (6) DIGITAL, when used in reference to information, means the information is maintained in an electronic data format that requires an electronic device to create, store, access, retrieve, or read the information.
 - (7) EMPLOYEE means a person employed by the City.
 - (8) END USER means any individual, including an elected official, board and commission member, applicant, employee, contractor, vendor, volunteer, or temporary employee who is granted access to City information or systems.
 - (9) INFORMATION MANAGEMENT means the administration of information and data, its use and transmission, and the application of theories and techniques of information science to create, modify, or improve information and data handling systems.
 - (10) INFORMATION SECURITY means protecting information and information systems from unauthorized access, use, disclosure, disruption, modification, or destruction in order to provide integrity, confidentiality, and availability.
 - (11) INFORMATION SECURITY AUDIT means the independent review and examination of a system's records or information and activities to determine the adequacy of system controls, ensure compliance with established security policy and procedures, detect breaches in security services, and recommend any changes that are indicated for countermeasures.
 - (12) LOCAL GOVERNMENT RECORDS ACT means Title 6 (Records), Subtitle C (*Records Provisions Applying to More Than One Type of Local Government*), of the Texas Local Government Code, and includes the rules adopted by the commission under the Local Government Records Act.
 - (13) OFFICIAL means the mayor, a member of the city council, a municipal court judge (including a substitute judge), and a person appointed by the mayor or the city council to a City board, task force, or other City body.
 - (14) PHYSICAL, when used in reference to a record, means that the record is maintained in a tangible form,

such as paper, photographic film, analog tape, or a similar medium.

(15) RECORD means a local government record of the City, and includes a digital record and a physical record.

(16) RECORDS CONTROL SCHEDULE means the document prepared by, or under the authority of, the city clerk listing the records maintained by the City, their retention periods, and records disposition information necessary to administer the information management program.

Source: Ord. No. 20141120-015, Pt. 1, 12-1-14; Ord. No. 20190919-017, Pt. 2, 9-30-19.

§ 2-11-2 - PURPOSE; APPLICABILITY; COMPLIANCE.

- (A) This chapter implements the Local Government Records Act.
- (B) This chapter, the information management program, and the records control schedule apply to all information in whatever form the information exists.
- (C) This chapter is cumulative of the Local Government Records Act.
- (D) Each City official and City employee shall comply with the information management program adopted under this chapter. The information management program is cumulative of this chapter and the Local Government Records Act.
- (E) A person does not comply with the information management program unless the person complies with this chapter and the Local Government Records Act.

Source: Ord. No. 20141120-015, Pt. 1, 12-1-14; Ord. No. 20190919-017, Pt. 3, 9-30-19.

§ 2-11-3 - RECORDS MANAGEMENT OFFICER.

- (A) The city clerk is the records management officer under Local Government Code Section 203.025 (*Designation of Records Management Officer*) for the City, and shall:
 - (1) develop, implement, and administer a City-wide information management program that complies with the Local Government Records Act;
 - (2) coordinate, and to the extent practicable, standardize information management practices among departments;
 - (3) serve on each director-level technology governance or oversight committee established by a City department;
 - (4) maintain the records control schedule and approve changes to the records control schedule at intervals set by the information management program;
 - (5) report annually to the council and the city manager on the implementation of the information management program in each City department;
 - (6) report to the city manager noncompliance with the information management program by a department director, City employee, or City contractor;
 - (7) report to the council noncompliance with the information management program by a City official;
 - (8) appoint a city records and information management officer to implement this chapter, subject to the direction of the city clerk;
 - (9) provide storage, retrieval, and destruction services of physical records no longer required to be kept in active office space and transferred to the records center;

- (10) provide support for City-wide document and imaging management systems and services designed to manage information;
 - (11) develop a preservation program for the preservation and access to long-term and permanent information in cooperation with the Austin History Center;
 - (12) provide consulting services and training to departments and employees on the information management program, information technology requirements, and other subjects supporting information management;
 - (13) assist department information administrators to identify essential information and establish a disaster recovery plan for information.
- (B) Subject to the direction of the city clerk, the city records and information management officer may perform a duty assigned by this chapter to the city clerk.

Source: Ord. No. 20141120-015, Pt. 1, 12-1-14; Ord. No. 20190919-017, Pt. 4, 9-30-19.

§ 2-11-4 - INFORMATION GOVERNANCE COMMITTEE.

- (A) The members of the information governance committee are:
- (1) the city clerk;
 - (2) the city manager;
 - (3) the city records and information management officer;
 - (4) the city archivist;
 - (5) the city chief information security officer;
 - (6) the city attorney;
 - (7) the director of the Human Resources Department;
 - (8) the director of the Communications and Technology Management Department;
 - (9) the controller;
 - (10) the purchasing officer;
 - (11) a departmental information administrator, appointed by the city manager, from an enterprise-fund department; and
 - (12) a departmental information administrator, appointed by the city manager, from a general-fund department.
- (B) The city clerk is the chair of the information governance committee.
- (C) The city records and information management officer is a non-voting member and the secretary for the information governance committee.
- (D) The information governance committee shall:
- (1) assist the city clerk and the chief information security officer in the development, implementation, and management of information governance policies, procedures, and best practices;
 - (2) to the extent practicable promote standard information governance practices among departments;
 - (3) annually review City policies related to compliance with applicable law regarding the creation, storage, retention, destruction, disposition, information security, and accessibility of City information;
 - (4) adopt necessary changes and improvements to City policies related to information governance that are not inconsistent with this chapter;

- (5) review each change to the records control schedule submitted by the city clerk;
 - (6) recommend to the council amendments to this chapter as required; and
 - (7) support and promote information governance within the City.
- (E) The city clerk shall convene the committee at least twice each fiscal year. An action of the committee requires a majority vote of the committee members present.
- (F) The information governance committee is neither a governing body nor a City board, and is not subject to Chapter 2-1 (City Boards).

Source: Ord. No. 20141120-015, Pt. 1, 12-1-14; Ord. No. 20190919-017, Pt. 5, 9-30-19.

§ 2-11-5 - INFORMATION MANAGEMENT PROGRAM.

The information management program must:

- (1) comply with the Local Government Records Act;
- (2) to the extent practicable, standardize records management practices among City departments;
- (3) in cooperation with the information governance committee, establish guidelines for the implementation of the records control schedule;
- (4) establish training requirements for department information administrators and department information management team members;
- (5) establish guidelines for City information technology systems and services to ensure that the systems and services create, store, manage, protect, preserve, dispose of, and provide access to records and information in compliance with the information management program;
- (6) establish guidelines for the transfer of records and information when a function is transferred from one department to another department;
- (7) establish guidelines for the destruction of records and information, including the information that must be maintained in a destruction log;
- (8) establish procedures for the suspension of destruction of records or information as allowed by Section 2-11-10 (Destruction or Disposition of Records or Information);
- (9) improve the efficiency of information management;
- (10) enable the city clerk to perform the duties prescribed by this chapter;
- (11) establish guidelines and eligibility criteria for transferring records to microfilm, or to an electronic or digital format, including guidelines for the disposition of records that have been transferred;
- (12) establish guidelines to ensure adequate protection of the essential records and information of the City, including a disaster recovery plan for records and information;
- (13) regulate the operations and use of the records center serving as the depository of inactive physical records with continuing value to the City, except records that have been transferred to the Austin History Center for preservation as historical records; and
- (14) establish guidelines to ensure the preservation of long-term or permanent physical and digital records of the City in cooperation with the Austin History Center.

Source: Ord. No. 20141120-015, Pt. 1, 12-1-14; Ord. No. 20190919-017, Pt. 6, 9-30-19.

§ 2-11-6 - DUTIES OF A COUNCIL OFFICE - INFORMATION MANAGEMENT.

- (A) A council member shall maintain information created or received by the council office in compliance with the information management program.
- (B) A council member may designate the city clerk as information administrator for the council member's office.
- (C) Unless the city clerk is the information administrator for a council office, the council member must perform the duties of the information administrator as if the council office were a department, or appoint an employee of the council office to assume those duties.

Source: Ord. No. 20141120-015, Pt. 1, 12-1-14; Ord. No. 20190919-017, Pt. 7, 9-30-19.

§ 2-11-7 - DUTIES OF DEPARTMENT DIRECTORS - INFORMATION MANAGEMENT.

- (A) Each department director shall cooperate with the city clerk to implement this chapter. A department director may not refuse to comply with the requirements of this chapter.
- (B) Each department director shall:
 - (1) document the services, programs, and duties that are the responsibilities of the director's department;
 - (2) maintain the department's records and information in accordance with the information management program;
 - (3) include information management requirements in department policies and procedures; and
 - (4) ensure that the department's information administrator and information management team have sufficient time and resources to implement the information management program.
- (C) Each department director shall appoint a senior level manager as the department's information administrator to oversee the implementation of the information management program in the department, and shall allocate resources to implement the program in the department. A department director may serve as the department's information administrator. Each department director shall notify the city clerk in writing of the appointment of the department's information administrator.
- (D) Each department director whose department has more than one division or more than one physical location shall ensure that each division and location has an employee responsible for the implementation of the information management program in that division or location. The department director shall notify the city clerk in writing of the appointment of each responsible employee under this subsection.
- (E) Each department director is responsible for compliance with this chapter for information created by a City board, commission, task force, or similar entity for which the department provides support.
- (F) A department director, official, or the official or employee in charge of an inter-departmental working group or committee, must consult the city clerk or the city records and information management officer before recommending or implementing a change to information management or information technology that is reasonably likely to affect:
 - (1) compliance with the information management program; or
 - (2) the City's processes or capabilities relating to the creation, storage, retention, destruction, disposition, security, or accessibility of information.

Source: Ord. No. 20141120-015, Pt. 1, 12-1-14; Ord. No. 20190919-017, Pt. 8, 9-30-19.

§ 2-11-8 - DUTIES OF A DEPARTMENT INFORMATION ADMINISTRATOR.

- (A) Each department information administrator shall:
- (1) cooperate with the city clerk to implement the information management program in the department;
 - (2) distribute information about the information management program to department employees;
 - (3) ensure that the creation, storage, retention, destruction, disposition, security, and accessibility of the department's information are in compliance with the department's information management program;
 - (4) implement the records control schedule to ensure that records or information are retained and disposed of in accordance with the records control schedule;
 - (5) transfer a physical record that is no longer required for the conduct of department business to the records center;
 - (6) identify essential information of the department and establish, implement, and maintain a disaster recovery plan;
 - (7) review the records control schedule at intervals set by the city clerk to determine if the schedule reflects current department practices and complies with the information management program;
 - (8) review each new information technology system or system enhancement to ensure that the new system or system enhancement addresses and complies with the information management program;
 - (9) assist the city clerk in producing an annual report to the city manager on the implementation of the information management program in the department;
 - (10) notify the city clerk within 24 hours of the discovery of any loss, theft, or damage to a department record or information.

Source: Ord. No. 20141120-015, Pt. 1, 12-1-14; Ord. No. 20190919-017, Pt. 9, 9-30-19.

§ 2-11-9 - THE DEPARTMENT INFORMATION MANAGEMENT TEAM.

- (A) Each department shall have an information management team consisting of:
- (1) the department's information administrator, who is the chair of the team;
 - (2) the city clerk's staff assigned to work with the department; and
 - (3) for a department that has more than one division or physical location:
 - (a) at least one employee, designated by the director, who is responsible for information management in a division in the department; and
 - (b) at least one employee, designated by the director, who is responsible for information management in a location of the department.
- (B) The information management team shall:
- (1) meet at intervals set by the information management program;
 - (2) invite to each meeting the city clerk's staff assigned to work with the department;
 - (3) review the records control schedule and department information management practices at intervals set by the city clerk to determine if the schedule and practices comply with the information management program, and implement corrective action for program compliance;
 - (4) complete reports required by the city clerk; and
 - (5) complete training required by the information management program.

Source: Ord. No. 20141120-015, Pt. 1, 12-1-14; Ord. No. 20190919-017, Pt. 10, 9-30-19.

§ 2-11-10 - RECORDS CONTROL SCHEDULE.

- (A) The city clerk, in cooperation with each department director, shall prepare a records control schedule for each department that lists each record created or received by the department, the retention period for each type of record, and any other information needed to implement the information management program.
- (B) The length of a retention period, or a change in the length of a retention period, shall be determined by the city clerk after consultation with the information governance committee. After considering any comments made by the information governance committee the city clerk shall adopt each control schedule and each change to a control schedule.
- (C) The city clerk shall submit a records control schedule to the commission as required by the commission.
- (D) The record control schedule maintained by the city clerk is the City's official control schedule, with which every department must comply.

Source: Ord. No. 20141120-015, Pt. 1, 12-1-14; Ord. No. 20190919-017, Pt. 11, 9-30-19.

§ 2-11-11 - DESTRUCTION OR DISPOSITION OF RECORDS OR INFORMATION.

- (A) When the retention period for a record or information has expired, the information administrator shall approve the destruction of the record or information unless:
 - (1) a request for the record or information under Chapter 552 (*Public Information Act*) of the Government Code is pending;
 - (2) the city attorney determines that the subject matter of the record or information is related to pending or anticipated litigation, or to an ongoing legal matter;
 - (3) the subject matter of the record or information is related to an ongoing audit, or an ongoing review by a governmental regulatory agency;
 - (4) a department director or information administrator requests the city clerk in writing, and states the reason, that the record or information be permitted to be retained for an additional period, and the request is approved in writing by the city clerk;
 - (5) the city archivist determines that the record or information is of historical value.
- (B) The information administrator of each department shall record the destruction of records or information carried out under this chapter or another law and maintain a destruction log.
- (C) The city clerk may destroy a record or information that is obsolete or that is not identified on the record control schedule if:
 - (1) the destruction of the record or information has been approved by the records management committee; and
 - (2) the commission has approved a request for authorization to destroy the record or information.
- (D) A record or information approved for destruction under this chapter and state law may be destroyed by:
 - (1) the information administrator of the department that has custody of the record; or
 - (2) the city clerk.
- (E) Before an official or employee may destroy the original or source document of a record that has been

transferred to microfilm or to an electronic or digital format, the employee or official must obtain written authorization from the city clerk.

Source: Ord. No. 20141120-015, Pt. 1, 12-1-14; Ord. No. 20190919-017, Pt. 12, 9-30-19.

§ 2-11-12 - RECORDS CENTER.

(A) The city clerk shall maintain a records center that provides:

- (1) storage of physical records no longer required to be kept in active office space;
- (2) an information retrieval service for the benefit of City offices; and
- (3) a method for destruction of a physical record in storage whose retention period has expired.

(B) If a physical record is no longer required in the conduct of current business the departmental information administrator shall promptly transfer the record to the records center, or if the retention period has expired, destroy the record as provided by this chapter.

Source: Ord. No. 20141120-015, Pt. 1, 12-1-14; Ord. No. 20190919-017, Pt. 13, 9-30-19.

§ 2-11-13 - MANAGEMENT OF DIGITAL RECORDS.

(A) The creation, maintenance, preservation, and storage of a digital record, including the conversion of a physical record to a digital record, must comply with the information management program.

(B) The city clerk shall review a department or inter-departmental plan to acquire or implement an information technology system or service that creates, stores, manages, protects, preserves, destroys, or provides access to digital records. If the system or service is inconsistent with the information management program the city clerk shall report the inconsistency to the appropriate director and the city manager.

Source: Ord. No. 20141120-015, Pt. 1, 12-1-14; Ord. No. 20190919-017, Pt. 14, 9-30-19.

§ 2-11-14 - RECORDS OR INFORMATION WITH HISTORICAL VALUE.

(A) An information administrator, the city archivist, and the city clerk may agree to transfer custody of a record or information that has historical value to the Austin History Center. If a City record or information is transferred to the custody of the Austin History Center, ownership of the record or information remains with the City.

(B) The Austin History Center is the custodian of a record or information belonging to a discontinued department that does not have a named successor.

(C) The director of the Library Department shall establish guidelines for the preservation of records or information that are of historic value.

Source: Ord. No. 20141120-015, Pt. 1, 12-1-14; Ord. No. 20190919-017, Pt. 15, 9-30-19.

§ 2-11-15 - OWNERSHIP OF CITY INFORMATION.

(A) Information is the sole property of the City. An official or employee has no personal property right to information.

(B) An official or employee may not:

- (1) destroy, remove, or use information except in the course of the official's or the employee's official duties;
- or,

- (2) sell, loan, give away, destroy, or otherwise alienate information from the City's custody except in compliance chapter or state or federal law.
- (C) The City may demand and receive from a person City information in the person's possession, if the removal of the information was not authorized by law.
- (D) A City official or employee shall, at the expiration of the official's or employee's term, appointment, or employment, deliver to the City all information in the official's or employee's possession.
- (E) Information received or created by a City contractor in fulfillment of the contract, except information specifically relating only to the contractor's internal administration, is the property of the City. The contractor may not dispose of or destroy information that is City property, and shall:
- (1) maintain the information within compliance with this chapter; and
 - (2) deliver the information, in all requested formats and media, along with all finding aids and metadata, to the City at no cost:
 - (a) when requested by a director or an authorized City employee; and
 - (b) when the contract is completed or terminated.

Source: Ord. No. 20141120-015, Pt. 1, 12-1-14; Ord. No. 20190919-017, Pt. 16, 9-30-19.

§ 2-11-16 - INFORMATION SECURITY OFFICE.

- (A) The information security office is created as an administrative office and shall report to the deputy or assistant city manager as assigned.
- (B) The chief information security officer leads the office and manages the citywide information security program.
- (C) Each official and employee shall comply with the information security requirements defined in and subsequent to this chapter.
- (D) The information security office shall:
- (1) perform information security duties;
 - (2) establish and maintain a citywide information security program and information security architecture;
 - (3) provide leadership, strategic direction, and coordination for the citywide information security program, including the adoption, development, and management of relevant, policies, programs, and associated requirements;
 - (4) include the following elements:
 - (a) a citywide information security risk management program;
 - (b) a citywide information security assessment and authorization program;
 - (c) a citywide internal information security audit program; and
 - (d) a citywide information security operations function, including information security incident response.
 - (5) establish and maintain an information security governance committee;
 - (6) provide confidential reports and confidential briefings to city council at least annually as authorized by law; and
 - (7) advise the city manager on information security.
- (E) The chief information security officer shall:

- (1) possess professional qualifications, including training and experience, required to administer the functions c under this section; and
- (2) maintain an industry-recognized, product-neutral certification with an ethical behavior clause, in information security, information privacy, or information risk for the entirety of employment in the position.

(F) Employees in the information security office shall have direct access as permitted by law, and other regulations as appropriate, to employees, information, and systems necessary to carry out the responsibilities defined in this section.

Source: Ord. No. 20190919-017, Pt. 17, 9-30-19.

§ 2-11-17 - DUTIES OF DEPARTMENT DIRECTORS - INFORMATION SECURITY.

(A) Each department director must:

- (1) require the implementation of the information security program and all subsequent information security requirements within their department; and
- (2) include an information security resource expenditure allocation for each information resource, system, and IT related agreement, purchase, and project prior to acquiring the item.

Source: Ord. No. 20190919-017, Pt. 18, 9-30-19.

§ 2-11-18 - DUTIES OF END USERS - INFORMATION SECURITY.

Each end user shall comply with the information security program and all subsequent information security requirements.

Source: Ord. No. 20190919-017, Pt. 19, 9-30-19.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:

1:22-cv-00299

**PLAINTIFF'S RESPONSE TO DEFENDANT WALTER DODDS' MOTION TO STAY
DISCOVERY PENDING CRIMINAL PROCEEDINGS**

Exhibit 6

Austin, Texas Code of Ordinances § 20141120-015

ORDINANCE NO. 20141120-015

AN ORDINANCE REPEALING AND REPLACING CHAPTER 2-11 OF THE CITY CODE RELATING TO RECORDS MANAGEMENT.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. City Code Chapter 2-11(*Records Management*) is repealed and replaced with a new Chapter 2-11 to read:

CHAPTER 2-11. RECORDS MANAGEMENT.

§ 2-11-1 DEFINITIONS.

- (A) Except as provided in subsection (B), words and phrases in this chapter have the same meaning they have in the Local Government Records Act.
- (B) In this chapter:
- (1) CITY ARCHIVIST means the manager of the Austin History Center of the Austin Public Library acting under the direction and supervision of the director of the Library Department, or the equivalent position as may be established in the Library Department.
 - (2) COMMISSION means director and librarian of the Texas State Library and Archives Commission.
 - (3) DEPARTMENT means a City department, or the functional equivalent.
 - (4) DEPARTMENT DIRECTOR means the officer or employee who is in charge of a department.
 - (5) DIGITAL, when used in reference to a record, means the record is maintained in an electronic data format that requires an electronic device to create, store, access, retrieve, or read the record.
 - (6) EMPLOYEE means a person employed by the City.
 - (7) LOCAL GOVERNMENT RECORDS ACT means Title 6 (*Records*), Subtitle C (*Records Provisions Applying to More Than One Type of Local Government*), of the Texas Local Government Code, and includes the rules adopted by the commission under the Local Government Records Act.

- (8) OFFICIAL means the mayor, a member of the city council, a municipal court judge (including a substitute judge), and a person appointed by the mayor or the city council to a City board, task force, or other City body.
- (9) PHYSICAL, when used in reference to a record, means that the record is maintained in a tangible form, such as paper, photographic film, analog tape, or a similar medium.
- (10) RECORD means a local government record of the City, and includes a digital record and a physical record.

§ 2-11-2 PURPOSE; APPLICABILITY; COMPLIANCE.

- (A) This chapter implements the Local Government Records Act.
- (B) This chapter, the records management program, and the records control schedules apply to all records in whatever form the records exist, including all digital records and all physical records.
- (C) This chapter is cumulative of the Local Government Records Act.
- (D) Each City official and City employee shall comply with the records management program adopted under this chapter. The records management program is cumulative of this chapter and the Local Government Records Act.
- (E) A person does not comply with the records management program unless the person complies with this chapter and the Local Government Records Act.

§ 2-11-3 RECORDS MANAGEMENT OFFICER.

- (A) The city clerk is the records management officer under Local Government Code, § 203.025 (*Designation of Records Management Officer*) for the City, and shall:
 - (1) develop, implement, and administer a City-wide records management program that complies with the Local Government Records Act;
 - (2) coordinate, and to the extent practicable, standardize records management practices among departments;
 - (3) serve on each director-level technology governance or oversight committee established by a City department;

- (4) prepare, review, and approve each new and amended records control schedule for each City department, and make necessary changes to the schedules at intervals set by the records management program;
- (5) report annually to the council and the city manager on the implementation of the records management program in each City department;
- (6) report to the city manager noncompliance with the records management program by a department director, City employee, or City contractor;
- (7) report to the council noncompliance with the records management program by a City official;
- (8) appoint a city records manager to implement this chapter, subject to the direction of the city clerk;
- (9) provide storage, retrieval, and destruction services of physical records no longer required to be kept in active office space and transferred to the records center;
- (10) provide support for City-wide document and imaging management systems and services designed to manage digital records;
- (11) establish a micrographics program for the preservation of permanent records not transferred to the Austin History Center;
- (12) provide consulting services and training to departments and employees on the implementation of the records management program, records and information technology requirements, and other subjects related to records and information management; and
- (13) assist department records administrators to identify essential records and establish a disaster recovery plan for records.

(B) Subject to the direction of the city clerk, the city records manager may perform a duty assigned by this chapter to the city clerk.

§ 2-11-4 RECORDS MANAGEMENT COMMITTEE.

(A) The members of the records management committee are:

- (1) the city clerk;
- (2) city manager;

- (3) the city records manager;
 - (4) the city archivist;
 - (5) the city auditor;
 - (6) the city attorney;
 - (7) the director of the Human Resources Department;
 - (8) the director of the Communications and Technology Management Department;
 - (9) the comptroller;
 - (10) the purchasing officer;
 - (11) a departmental records administrator, appointed by the city manager, from an enterprise-fund department; and
 - (12) a departmental records administrator, appointed by the city manager, from a general-fund department appointed by the city manager.
- (B) The city clerk is the chair of the records management committee. The city records manager is the secretary of the records management committee.
- (C) The records management committee shall:
- (1) assist the city clerk in the development, implementation, and management of the records management program;
 - (2) to the extent practicable promote standard records management practices among departments;
 - (3) annually review the performance of the program;
 - (4) annually review City policies related to compliance with applicable law regarding the creation, storage, retention, destruction, disposition, security, or accessibility of City records;
 - (5) adopt necessary changes and improvements to City policies and to the records management program that are not inconsistent with this chapter;
 - (6) review each records control schedule submitted by the city clerk;
 - (7) recommend to the council amendments to this chapter as required; and

- (8) support and promote the records management program.
- (D) The city clerk shall convene the committee at least twice each fiscal year. Six members of the committee are a quorum. An action of the committee requires a majority vote of the committee members present.
- (E) The records management committee is neither a governing body nor a City board, and is not subject to Chapter 2-1 (*City Boards*).

§ 2-11-5 RECORDS MANAGEMENT PROGRAM.

- (A) The city clerk shall submit the records management program to the city manager for approval. The records management program approved by the city manager is the City's records management program.
- (B) The records management program must:
 - (1) comply with the Local Government Records Act;
 - (2) to the extent practicable, standardize records management practices among City departments;
 - (3) in cooperation with the commission, establish guidelines for the implementation of records control schedules;
 - (4) establish training requirements for department records administrators and department records management team members;
 - (5) establish guidelines for City information technology systems and services to ensure that the systems and services create, store, manage, protect, preserve, dispose of, and provide access to records in compliance with the records management program;
 - (6) establish guidelines for the transfer of records when a function is transferred from one department to another department;
 - (7) establish guidelines for the destruction of records, including the information that must be maintained in a destruction log;
 - (8) establish procedures for the suspension of records destruction as allowed by Section 2-11-10 (*Destruction or Disposition of Records*);
 - (9) improve the efficiency of recordkeeping;
 - (10) enable the city clerk to perform the duties prescribed by this chapter;

- (11) establish guidelines and eligibility criteria for transferring records to microfilm, or to an electronic or digital format, including guidelines for the disposition of records that have been transferred;
- (12) provide adequate protection of the essential records of the City, including a disaster recovery plan for records;
- (13) regulate the operations and use of the records center serving as the depository of inactive records with continuing value to the City, except records that have been transferred to the Austin History Center for preservation as historical records; and
- (14) establish guidelines to ensure the preservation of long-term or permanent physical and digital records of the city.

§ 2-11-6 DUTIES OF A COUNCIL OFFICE.

- (A) A council member shall maintain a record created or received by the council office in compliance with the records management program.
- (B) A council member may designate the city clerk as records administrator for the council member's office.
- (C) Unless the city clerk is the records administrator for a council office, the council member must perform the duties of the records administrator as if the council office were a department, or appoint an employee of the council office to assume those duties.

§ 2-11-7 DUTIES OF DEPARTMENT DIRECTORS.

- (A) Each department director shall cooperate with the city clerk to implement this chapter. A department director may not refuse to comply with the requirements of this chapter based on a City ordinance or policy relating to a duty, recordkeeping requirement, or other responsibility of the departmental director.
- (B) Each department director shall:
 - (1) document the services, programs, and duties that are the responsibilities of the director's department;
 - (2) maintain the department's records in accordance with the records management program;
 - (3) include records and information management requirements in department policies and procedures; and

- (4) ensure that the department's records administrator and records management team have sufficient time and resources to implement the records management program.
- (C) Each department director shall appoint a senior level manager as the department's records administrator to oversee the implementation of the records management program in the department, and shall allocate resources to implement the program in the department. A department director may serve as the department's records administrator. Each department director shall notify the city clerk in writing of the appointment of the department's records administrator.
- (D) Each department director whose department has more than one division or more than one physical location shall ensure that each division and location has an employee responsible for the implementation of the records management program in that division or location. The department director shall notify the city clerk in writing of the appointment of each responsible employee under this subsection.
- (E) A department director is responsible for compliance with this chapter for records created by a City board, commission, task force, or similar entity for which the department provides support.
- (F) A department director, official, or the official or employee in charge of an inter-departmental working group or committee, must consult the city clerk or the city records manager before recommending or implementing a change to records management or information technology that is reasonably likely to affect:
 - (1) compliance with the records management program; or
 - (2) the City's processes or capabilities relating to the creation, storage, retention, destruction, disposition, security, or accessibility of records.

§ 2-11-8 DUTIES OF A DEPARTMENT RECORDS ADMINISTRATOR.

- (A) Each department's records administrator shall:
 - (1) cooperate with the city clerk to implement the records management program in the department;
 - (2) distribute information about the records management program to department employees;

- (3) ensure that the creation, storage, retention, destruction, disposition, security, and accessibility of the department's records are in compliance with the department's records management program;
- (4) implement the department records control schedule to ensure that records are retained for the approved retention period;
- (5) transfer a physical record that is no longer required for the conduct of department business to the records center;
- (6) identify essential records of the department and establish, implement, and maintain a records disaster recovery plan;
- (7) review the department records control schedule at intervals set by the city clerk to determine if the schedule reflects current department practices and complies with the records management program;
- (8) review each new information technology system or system enhancement to ensure that the new system or system enhancement addresses and complies with the records management program;
- (9) assist the city clerk in producing an annual report to the city manager on the implementation of the records management program in the department; and
- (10) notify the city clerk within 24 hours of the discovery of any loss, theft, or damage to a department record.

§ 2-11-9 THE DEPARTMENT RECORDS MANAGEMENT TEAM.

(A) Each department shall have a records management team consisting of:

- (1) the department's records administrator, who is the chair of the team;
- (2) the city clerk's staff assigned to work with the department; and
- (3) for a department that has more than one division or physical location:
 - (a) at least one employee, designated by the director, who is responsible for records management in a division in the department; and
 - (b) at least one employee, designated by the director, who is responsible for records management in a location of the department.

(B) The records management team shall:

- (1) meet at intervals set by the records management program;
- (2) invite to each meeting the city clerk's staff assigned to work with the department;
- (3) review the department records control schedules and records management practices at intervals set by the city clerk to determine if the schedules and practices comply with the records management program, and implement corrective action for program compliance;
- (4) complete reports required by the city clerk; and
- (5) complete training required by the records management program.

§ 2-11-10 RECORDS CONTROL SCHEDULES.

- (A) The city clerk, in cooperation with each department director, shall prepare a records control schedule for each department that lists each record created or received by the department, the retention period for each type of record, and any other information needed to implement the records management program.
- (B) The length of a retention period, or a change in the length of a retention period, shall be determined by the city clerk after consultation with the records management committee. After considering any comments made by the records management committee, the city clerk shall adopt each control schedule and each change to a control schedule.
- (C) The city clerk shall submit a records control schedule that requires commission review to the commission. If the commission does not accept a schedule for filing, the city clerk shall amend the schedule to make it acceptable for filing.
- (D) The city clerk shall maintain an official set of control schedules for the City. The control schedules maintained by the city clerk are the City's official control schedules, with which every department must comply.

§ 2-11-11 DESTRUCTION OR DISPOSITION OF RECORDS.

- (A) When the retention period for a record has expired, the records administrator shall approve the destruction of the record unless:
 - (1) a request for the record under Chapter 552 (*Public Information Act*) of the Government Code is pending;

- (2) the city attorney determines that the subject matter of the record is related to pending or anticipated litigation, or to an ongoing legal matter;
 - (3) the subject matter of the records is related to an ongoing audit, or an ongoing review by a governmental regulatory agency;
 - (4) a department director or records administrator requests the city clerk in writing, and states the reason, that the record be permitted to be retained for an additional period, and the request is approved in writing by the city clerk; or
 - (5) the city archivist determines that the record is of historical value.
- (B) The records administrator of each department shall record the destruction of records carried out under this chapter or another law and maintain a destruction log.
- (C) The city clerk may destroy a record that is obsolete or that is not identified on a records control schedule if:
- (1) the destruction of the record has been approved by the records management committee; and
 - (2) the commission has approved a request for authorization to destroy the record.
- (D) A record approved for destruction under this chapter and state law may be destroyed by:
- (1) the records administrator of the department that has custody of the record; or
 - (2) the city clerk.
- (E) Before an official or employee may destroy the original or source document of a record that has been transferred to microfilm or to an electronic or digital format, the employee or official must obtain written authorization from the city clerk.

§ 2-11-12 RECORDS CENTER.

- (A) The city clerk shall maintain a records center that provides:
- (1) storage of records no longer required to be kept in active office space;

- (2) an information retrieval service for the benefit of City offices; and
 - (3) a method for destruction of a record in storage whose retention period has expired.
- (B) If a department record is no longer required in the conduct of current business the departmental records administrator shall promptly transfer the record to the records center, or if the retention period has expired, destroy the record as provided by this chapter.

§ 2-11-13 MANAGEMENT OF DIGITAL RECORDS.

- (A) The creation, maintenance, preservation, and storage of a digital record, including the conversion of a physical record to a digital record, must comply with the records management program.
- (B) The city clerk shall review a department or inter-departmental plan to acquire or implement an information technology system or service that creates, stores, manages, protects, preserves, destroys, or provides access to digital records. If the system or service is inconsistent with the records management program the city clerk shall report the inconsistency to the appropriate director and the city manager.

§ 2-11-14 RECORDS WITH HISTORICAL VALUE.

- (A) A records administrator, the city archivist, and the city clerk may agree to transfer custody of a record that has historical value to the Austin History Center. If a City record is transferred to the custody of the Austin History Center, ownership of the record remains with the City.
- (B) The Austin History Center is the custodian of a record belonging to a discontinued department that does not have a named successor.
- (C) The director of the Library Department shall establish guidelines for the preservation of records that are of historic value.

§ § 2-11-15 OWNERSHIP OF CITY RECORDS.

- (A) A record is the sole property of the City. An official or employee has no personal property right to a record.
- (B) An official or employee may not:
- (1) destroy, remove, or use a record except in the course of the official's or the employee's official duties; or

- (2) sell, loan, give away, destroy, or otherwise alienate a record from the City's custody except in compliance with this chapter or state or federal law.
- (C) The City may demand and receive from a person a City record in the person's possession, if the removal of the record was not authorized by law.
- (D) A City official or employee shall, at the expiration of the official's or employee's term, appointment, or employment, deliver to the City all records in the official's or employee's possession.
- (E) A record received or created by a City contractor in fulfillment of the contract, except a record specifically relating only to the contractor's internal administration, is the property of the City. The contractor may not dispose of or destroy a record that is City property, and shall:
 - (1) maintain the record with in compliance with this chapter; and
 - (2) deliver the record, in all requested formats and media, along with all finding aids and metadata, to the City at no cost:
 - (a) when requested by a director or an authorized City employee; and
 - (b) when the contract is completed or terminated.

PART 2. This ordinance takes effect on December 1, 2014.

PASSED AND APPROVED

November 20, 2014

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§

Lee Leffingwell
Mayor

APPROVED: _____
Karen M. Kennard
City Attorney

ATTEST: _____
Jannette S. Goodall
City Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:

1:22-cv-00299

**PLAINTIFF'S RESPONSE TO DEFENDANT WALTER DODDS' MOTION TO STAY
DISCOVERY PENDING CRIMINAL PROCEEDINGS**

Exhibit 7

Public Safety Local Records Control Schedule

Figure: 13 TAC §7.125(a)(5)



LOCAL SCHEDULE PS (Fourth Edition)

RETENTION SCHEDULE FOR RECORDS OF PUBLIC SAFETY AGENCIES

This schedule establishes mandatory minimum retention periods for records commonly found in public safety agencies. No local government office may dispose of a record listed in this schedule prior to the expiration of its retention period. A records control schedule of a local government may not set a retention period that is less than that established for the record in this schedule. Original paper records listed in this schedule may be disposed of prior to the expiration of their minimum retention periods if they have been microfilmed or electronically stored pursuant to the provisions of the Local Government Code, Chapter 204 or Chapter 205, as applicable, and rules of the Texas State Library and Archives Commission adopted under authority of those chapters. Actual disposal of such records by a local government is subject to the policies and procedures of its records management program.

Destruction of local government records contrary to the provisions of the Local Government Records Act of 1989 and administrative rules adopted under it, including this schedule, is a Class A misdemeanor and, under certain circumstances, a third-degree felony (Penal Code, Section 37.10). Anyone destroying local government records without legal authorization may also be subject to criminal penalties and fines under the Public Information Act (Government Code, Chapter 552).

INTRODUCTION

The Government Code, Section 441.158, provides that the Texas State Library and Archives Commission shall issue records retention schedules for each type of local government, including a schedule for records common to all types of local government. The law provides further that each schedule must state the retention period prescribed by federal or state law, rule of court, or regulation for a record for which a period is prescribed; and prescribe retention periods for all other records, which periods have the same effect as if prescribed by law after the records retention schedule is adopted as a rule of the Commission. If applicable, the wording of the records series will match that of any federal or state law, rule of court, or regulation, and citation to law, rule, or regulation will be provided in the Remarks section.

Retention periods listed in this schedule apply to records in any medium. If records are stored electronically, they must remain available and accessible until the expiration of the retention period assigned by this schedule, along with any hardware or software required to access or read them. Electronic records may include electronic mail (e-mail), websites, electronic publications, or any other machine-readable format. Paper or microfilm copies may be retained in lieu of electronic records.

The use of social media applications may create public records. Any content (messages, posts, photographs, videos, etc.) created or received using a social media application may be considered records, and should be managed appropriately. The retention of social media records is based on content and function. Local governments will need to consult the relevant records retention schedule for the minimum retention periods.

Unless otherwise stated, the retention period for a record is in calendar years from the date of its creation. The retention period applies only to an official record, as distinct from convenience or working copies created for informational purposes. Where several copies are maintained, each local government should decide which shall be the official record, and in which of its divisions or departments it will be maintained. Local governments should establish policies and procedures in their records management programs to provide for the systematic disposal of copies.

A local government record whose retention period has expired may not be destroyed if any litigation, claim, negotiation, audit, public information request, administrative review, or other action involving the record is initiated; its destruction shall not occur until the completion of the action and the resolution of all issues that arise from it.

A local government record whose retention period expires during any litigation, claim, negotiation, audit, public information request, administrative review, or other action involving the record may not be destroyed until the completion of the action and the resolution of all issues that arise from it.

If a record described in this schedule is maintained in a bound volume of a type in which pages were not meant to be removed, the retention period, unless otherwise stated, dates from the date of last entry.

If two or more records listed in this schedule are maintained together by a local government and are not severable, the combined record must be retained for the length of time of the component with the longest retention period. A record whose minimum retention period on this schedule has not yet expired and is **less than permanent** may be disposed of if it has been so badly damaged by fire, water, or insect or rodent infestation as to render it unreadable, or if portions of the information in the record have been so thoroughly destroyed that remaining portions are unintelligible. If the retention period for the record is **permanent** in this schedule, authority to dispose of the damaged record must be obtained from the Director and Librarian of the Texas State Library and Archives Commission. A Request for Authority to Destroy Unscheduled Records (Form SLR 501) should be used for this purpose.

Certain records listed in this schedule are assigned the retention period of AV (as long as administratively valuable). This retention period affords local governments the maximum amount of discretion in determining a specific retention period for the record described.

Use of Asterisk (*)

The use of an asterisk in this edition of Local Schedule PS indicates that the record is either new to this edition, the retention period for the record has been changed, or amendments have been made to the description of or remarks concerning the record. An asterisk is not used to indicate minor amendments to grammar or punctuation.

ABBREVIATIONS USED IN THIS SCHEDULE

AV – As long as administratively valuable
CE – Calendar year end
CFR – Code of Federal Regulations
FE – Fiscal year end
LA – Life of asset

TAC – Texas Administrative Code
USC – United State Code
US – Until Superseded

| Record Number | Record Title | Record Description | Retention Period | Remarks |
|---------------|-----------------------------|--|------------------|--|
| PS4050-05c | WEAPONS RECORDS | Records documenting the sale, gift, loss, or destruction of public safety weaponry. | 3 years. | |
| PS4050-05d | WEAPONS RECORDS | Inventories of weapons. | US + 3 years. | |
| PS4050-06 | SURVEILLANCE VIDEOS | Video surveillance for, but not limited to, security of property and persons. | AV. | |
| *PS4050-07 | GPS TRACKING RECORDS | Global Positioning System (GPS) data used to track locations of a government fleet vehicle when such tracking is part of standard operating procedure. | 30 days. | Retention Note: If used as part of an investigation, retain as part of item number PS4075-01 or PS4125-05. |
| *PS4050-08 | PROTECTIVE CLOTHING RECORDS | Includes bullet-resistant and stab-resistant vests, SWAT equipment, fireproof clothing, and other protective and safety wear. | | Retention Note: Use GR1075-21 for other personal equipment assigned if it is not listed elsewhere in this schedule. |
| *PS4050-08a | PROTECTIVE CLOTHING RECORDS | Daily or other periodic reports on the inspection of protective clothing. | 3 years. | |
| *PS4050-08b | PROTECTIVE CLOTHING RECORDS | Inventories of protective clothing. | US. | |

SECTION 1-3: PERSONNEL RECORDS

Retention Note: This part supplements and should be used in conjunction with Part 3 of Local Schedule GR (Records Common to All Governments).

| Record Number | Record Title | Record Description | Retention Period | Remarks |
|---------------|--|---|------------------|--|
| *PS4075-01 | INTERNAL AFFAIRS INVESTIGATION RECORDS | Records documenting the initiation, investigation, and disposition of internal affairs investigations of alleged misconduct by law enforcement officers, fire department personnel, emergency medical services personnel, and other employees subject to internal affairs investigations. | | Retention Notes: a) Retention periods for this record group date from the completion of the investigation. b) Use GR1050-07 for investigations and reviews conducted by a Firefighters' and Police Officers' Civil Service Commission. |
| PS4075-01a | INTERNAL AFFAIRS INVESTIGATION RECORDS | Records of investigation of law enforcement shooting incidents that result in death or injury to any person, including a police officer. | PERMANENT. | |

| Record Number | Record Title | Record Description | Retention Period | Remarks |
|---------------|----------------------------|--|--|---|
| *PS4125-02 | ARREST REPORTS | Arrest reports and fingerprints for each person arrested by the law enforcement agency and charged with a felony or a misdemeanor. (1) Class C misdemeanors and unclassified violations of state law or local ordinance punishable by fine only. (2) All other offenses. | 6 months. 75 years, or date of death of individual, if known, whichever sooner. | Retention Note: If the arrest report lacks any information listed in Code of Criminal Procedure §60.051(a)(1)-(3) and (b)(1), (3)-(8), documents from PS4125-05 sufficient to provide the missing information must be kept for as long as the retention period of this series. If the person arrested is a juvenile, the law enforcement agency should use item numbers PS4225-06, PS4225-08, or PS4225-10. |
| *PS4125-03 | BAIL BOND RECORDS | Record of bail or recognizance bonds taken by a sheriff or other peace officer pursuant to Code of Criminal Procedure. §§17.20-17.22 and as required by §17.39. | 3 years; or 3 years after last entry if in bound volume. | |
| *PS4125-04 | VIDEO AND AUDIO RECORDINGS | Video or audio recordings captured by police officers or as part of an automated enforcement program. | | For security camera videos, see GR1075-25. |
| *PS4125-04a | VIDEO AND AUDIO RECORDINGS | Video or audio recordings from police vehicles of persons on whom charges are not filed. | 90 days after the date of the stop. | By law - Code of Criminal Procedure §2.135(b) |
| *PS4125-04b | VIDEO AND AUDIO RECORDINGS | Video or audio recordings from police vehicles of persons on whom charges are filed or related to an administrative investigation of an officer. | Follow retention period for item number PS4125-05b if charges filed or item number PS4075-01 if officer subject to internal affairs investigation. | By law - Code of Criminal Procedure §2.135(b). |
| *PS4125-04c | VIDEO AND AUDIO RECORDINGS | Red-light camera videos that do not capture a violation, or for which a notice of violation is not mailed. | 30 days. | By law - Transportation Code §707.011(b). |

| Record Number | Record Title | Record Description | Retention Period | Remarks |
|---------------|-------------------------------|---|---|--|
| *PS4125-04d | VIDEO AND AUDIO RECORDINGS | Red-light camera videos that capture a violation. | Date civil penalty paid or 31 days after judgment, whichever sooner. | By law - Transportation Code §707.016. |
| *PS4125-04e | VIDEO AND AUDIO RECORDINGS | Officer-worn camera videos that do not capture a violation, use of deadly force by an officer, or are otherwise unrelated to an administrative or criminal investigation of an officer. | 90 days. | By law - Occupations Code §1701.655(b)(2). |
| *PS4125-04f | VIDEO AND AUDIO RECORDINGS | Officer-worn camera videos that capture use of deadly force by an officer, are otherwise related to an administrative or criminal investigation of an officer, or capture a violation by any person. | Follow retention periods for items PS4075-01 or PS4125-05, as appropriate, but not less than 90 days. | By law - Occupations Code §1701.660(a). |
| *PS4125-05 | OFFENSE INVESTIGATION RECORDS | Offense and supplemental offense reports; investigation reports and notes; witness statements; latent fingerprints; results of chemical analysis and polygraph tests; crime scene, mug shot, and other photographs; laboratory reports; arrest reports (Class C misdemeanors only); citations; affidavits; criminal processes; victim impact statements; subpoenas; and other records of a law enforcement agency relating and customary to the investigation of criminal offenses or other violations of state law or local ordinance. | | |
| PS4125-05a | OFFENSE INVESTIGATION RECORDS | Cases not cleared. | Until the statute of limitations has expired. | By law – Code of Criminal Procedure, Chapter 12. |

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:

1:22-cv-00299

**PLAINTIFF'S RESPONSE TO DEFENDANT WALTER DODDS' MOTION TO STAY
DISCOVERY PENDING CRIMINAL PROCEEDINGS**

Exhibit 8

Order Granting Motion to Dismiss as to M. Yeager-
Huebner

Cause No. C1CR18-215825

THE STATE OF TEXAS

C-1-CR-18-215825

IN THE COUNTY COURT
AT LAW NO. 9 OF
TRAVIS COUNTY, TEXAS

vs.
Michael Yeager-Hulbner

MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the State of Texas by and through her Attorney, and respectfully requests the Court to dismiss the above entitled and numbered criminal action in which the defendant is charged with the offense of Evading Arrest Detention, for the reason:

- The evidence is insufficient;
- The defendant was convicted in another case;
- The complaining witness has requested dismissal;
- The case has been refilled;
- The defendant is unapprehended;
- The defendant is deceased;
- The defendant has been granted immunity in light of his testimony;
- Restitution made;
- Other: Interest of Justice

and for cause would show the Court the following:

FILED FOR RECORD
2019 AUG 23 PM 2:16
DANA DEBEAUVOIR
COUNTY CLERK
TRAVIS COUNTY, TEXAS

WHEREFORE, it is prayed that the above entitled and numbered cause be dismissed.

I, Dana DeBeauvoir, County Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office on 10/20/2020



Dana DeBeauvoir, County Clerk
By Deputy: Ember Bolen

Respectfully submitted
Nehal Mittal
Asst. County Attorney
8/23/19 Date Signed

ORDER

The foregoing motion having been presented to me on this the 23 day of Aug A.D. 2019, and the same having been considered, it is, therefore, ORDERED, ADJUDGED and DECREED that said above entitled and numbered cause be and the same is hereby dismissed.

[Signature]
Judge of the County Court At Law
No. 9 of Travis County, Texas

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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CAUSE OF ACTION:

1:22-cv-00299

**PLAINTIFF'S RESPONSE TO DEFENDANT WALTER DODDS' MOTION TO STAY
DISCOVERY PENDING CRIMINAL PROCEEDINGS**

Exhibit 9

Excerpts from the Deposition of B. Hoover

Bradley Hoover - 4/2/2021

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

| | | |
|----------------------|---|-----------------------|
| MICHAEL YEAGER, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| VS. |) | CIVIL ACTION |
| |) | |
| DUSTY JESTER, in his |) | NO.: 1:19-CV-01197-LY |
| individual capacity, |) | |
| |) | |
| Defendant. |) | |

ORAL DEPOSITION OF

BRADLEY HOOVER

APRIL 2, 2021

(Reported Remotely)

ORAL DEPOSITION OF BRADLEY HOOVER, produced as a witness at the instance of the PLAINTIFF, and duly sworn, was taken in the above-styled and numbered cause on April 2, 2021, from 10:06 a.m. to 1:21 p.m., via Zoom, before Claudia White, CSR in and for the State of Texas, reported by machine shorthand, at Bastrop, Texas, pursuant to the Federal Rules of Civil Procedure.

WRIGHT WATSON & ASSOCIATES

1250 South Capital of Texas Highway, Building 3, Suite 400 Austin, Texas 78746 (512) 474-4363

Bradley Hoover - 4/2/2021

A P P E A R A N C E S
(Via Zoom)

FOR THE PLAINTIFF:

Mr. David James
Mr. Jeff Edwards
EDWARDS LAW
The Haehnel Building
1101 East 11th Street
Austin, Texas 78702
(512) 623-7727
david@edwards-law.com
jeff@edwards-law.com

FOR THE DEFENDANT:

Mr. H. Gray Laird
CITY OF AUSTIN LAW DEPARTMENT
P.O. Box 1546
Austin, Texas 78767
(512) 974-1342
gray.laird@austintexas.gov

ALSO PRESENT:

Ms. Priscilla Chavez

WRIGHT WATSON & ASSOCIATES

Bradley Hoover - 4/2/2021

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| | Exhibit 4 Unaltered version of still photo..... | | 35 |
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| | Exhibit 6 Probable cause affidavit..... | | 87 |
| 13 | | | |
| 14 | REQUESTED DOCUMENTS/INFORMATION | | |
| 15 | NO. DESCRIPTION | | PAGE |
| 16 | NONE | | |
| 17 | | | |
| | CERTIFIED QUESTIONS | | |
| 18 | NO. | | PAGE/LINE |
| 19 | NONE | | |
| 20 | | | |
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WRIGHT WATSON & ASSOCIATES

Bradley Hoover - 4/2/2021

1 THE REPORTER: Today's date is April the
2 2nd, 2021. The time is 10:00 a.m.

3 This is the oral deposition of Officer
4 Bradley Hoover, and it is being conducted remotely in
5 accordance with the Current Emergency Order Regarding
6 the COVID-19 State of Disaster.

7 The witness is located in Bastrop, Texas.

8 I am Claudia White, Certified Shorthand
9 Reporter No. 8242 for the state of Texas. I am
10 administering the oath and reporting the deposition
11 remotely by stenographic means from my residence within
12 the state of Texas.

13 Would counsel please state their
14 appearances for the record, beginning with the
15 Plaintiff.

16 MR. JAMES: This is David James for the
17 Plaintiff, I'm located in Houston, Texas.

18 MR. LAIRD: And this is Gray Laird for the
19 Defendants, and I'm in Austin.

20 THE REPORTER: Mr. Hoover, I need you to
21 raise your right hand to be sworn, sir.

22 (Witness sworn remotely.)

23 THE REPORTER: You may proceed, Mr. James.

24 MR. JAMES: Thank you.
25

WRIGHT WATSON & ASSOCIATES

Bradley Hoover - 4/2/2021

1 BRADLEY HOOVER,
2 having been first duly sworn, testified as follows:
3 DIRECT EXAMINATION
4 BY MR. JAMES:
5 Q. Good morning. I know we just introduced
6 ourselves, but could you please state your name for the
7 record, Officer.
8 A. Bradley Hoover.
9 Q. Do you understand that I'm an attorney and I
10 represent Michael Yeager-Huebner, the Plaintiff in this
11 case?
12 A. I understand.
13 Q. Do you understand that -- that we're here today
14 about a lawsuit that has been brought against the City
15 of Austin, you, and some other officers, relating to
16 your interactions with my client on November 18, 2018?
17 A. I understand.
18 Q. Have you ever given testimony in a deposition
19 before?
20 A. Yeah, once. Long time ago.
21 Q. Oh, I just want to go through, quickly, the
22 ground rules for you, so we're on the same page, okay?
23 A. Okay.
24 Q. So, first, even though we're in a Zoom
25 conference room, you should try to do your best to give

WRIGHT WATSON & ASSOCIATES

Bradley Hoover - 4/2/2021

1 fluid situation.

2 Obviously, hindsight, looking back, you can
3 say, oh, I should have done that better, I should have
4 done that better. But in the moment, you know, we don't
5 get that -- that luxury of sometimes having time. And a
6 lot of our responses are based off of the people that we
7 deal with and their actions.

8 Q. Well, and you agree that, like, the policies
9 for APD are written with that in mind, right? They're
10 written to be -- to broadly describe how you should act.
11 They're not like you have to queue it like this every
12 single time, they're not like cookie-cutter, correct?

13 A. Correct.

14 Q. And so, you know, of course officers make
15 mistakes, but if you're outside the policy, that's --
16 that's generally unreasonable, correct?

17 MR. LAIRD: Object to the form.

18 A. Correct.

19 Q. (BY MR. JAMES) And, likewise, you know, a
20 reasonable and competent officer should be following
21 their -- their training, correct?

22 A. Correct.

23 Q. And if -- if there was a case where you weren't
24 following your training, you agree that that would be
25 unreasonable, correct?

WRIGHT WATSON & ASSOCIATES

Bradley Hoover - 4/2/2021

1 Q. And you don't have any, like, specialized
2 training in crime scene reconstruction or anything like
3 that, right?

4 A. Well, that's what I was looking at. I mean, I
5 have, you know, total, over 24, 2,500 hours of training.
6 So, I mean, if you could be -- yeah, I've taken crime
7 scene classes, I've taken hostage negotiations school,
8 vehicle assault ambush. I mean, I was a mental health
9 officer, so I did a couple hundred hours of class on
10 that. I was a field training officer, I was the shift
11 intoxilyzer operator. So I don't know if you want to
12 narrow it down.

13 Q. Yeah, no, I understand. So in your follow-up
14 on this case, did you do any kind of analysis of the
15 crime scene, beyond, you know, your interactions with
16 the scene and going to collect your body-worn camera?

17 A. No. Not -- not anything out of the ordinary.

18 Q. Did you take any kind of measurements?

19 A. No, sir.

20 Q. Did you do any kind of analysis of the videos?

21 A. Well, of course, when I was writing my report,
22 you know, that night, I went through, until my body
23 camera came off, you know, what my DMAV picked up. And
24 most of it was -- you know, I looked at Officer Jester's
25 camera, I looked at Officer Skeen's, but mainly it was

WRIGHT WATSON & ASSOCIATES

Bradley Hoover - 4/2/2021

1 mine and Officer Skeen's, because he was next to me for
2 the majority of the time.

3 Q. Okay. And so you watched them and listened to
4 those -- those three videos, right?

5 A. Correct.

6 Q. Did you do any kind of, like, I don't know,
7 specialized analysis, like trying to enhance them or do,
8 like, a frame-by-frame analysis of any kind?

9 A. I don't recall doing that. I mean --

10 Q. Do you have any specialized training in video
11 analysis?

12 A. No, sir.

13 Q. Do you have any specialized training in audio
14 analysis?

15 A. No, sir.

16 Q. Did you send any emails about this arrest,
17 other than to your attorney?

18 A. I don't believe so.

19 Q. Other than your report and your affidavit for
20 arrest and detention, did you write anything down about
21 this arrest?

22 A. No, sir.

23 Q. Have you made any posts on Facebook or social
24 media about this arrest?

25 A. No, sir.

WRIGHT WATSON & ASSOCIATES

Bradley Hoover - 4/2/2021

1 Q. Okay. And your body-worn camera footage, and
2 Officer Skeen's body-worn camera footage, and
3 potentially another -- other officer's who interacted
4 with Sarah and Michael, that's relevant to your charge
5 of evading arrest, right?

6 A. Yes.

7 Q. So, like, that's information, that's evidence,
8 that you would want the DA to have, or the ACA, in this
9 case, to have, because it could potentially be used,
10 right?

11 A. Sure.

12 Q. Do you have any idea -- like, we have received
13 a lot of videos in this case, but not your body-worn
14 camera, not Officer Skeen's, and not a couple of other
15 officers.

16 Do you have any idea about the discrepancy,
17 like why some video was saved and not others?

18 A. I wasn't aware of anybody not having any other
19 video, besides mine.

20 MR. JAMES: Okay. I believe those are all
21 the questions that I have for you, so I appreciate your
22 -- your time and your patience.

23 And I'll pass the witness.

24 MR. LAIRD: And we'll reserve our questions
25 until the time of trial, but we do want to read and

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Bradley Hoover - 4/2/2021

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

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|----|----------------------|---|-----------------------|
| 1 | | | |
| 2 | | | |
| 3 | MICHAEL YEAGER, |) | |
| 4 | |) | |
| 5 | Plaintiff, |) | CIVIL ACTION |
| 6 | |) | |
| 7 | VS. |) | |
| 8 | |) | NO.: 1:19-CV-01197-LY |
| 9 | |) | |
| 10 | DUSTY JESTER, in his |) | |
| 11 | individual capacity, |) | |
| 12 | |) | |
| 13 | Defendant. |) | |
| 14 | |) | |
| 15 | |) | |
| 16 | |) | |
| 17 | |) | |
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| 25 | |) | |

REPORTER'S CERTIFICATION
DEPOSITION OF BRADLEY HOOVER
APRIL 2, 2021

I, Claudia White, Certified Shorthand Reporter in
and for the State of Texas, hereby certify to the
following:

That the witness, BRADLEY HOOVER, was duly sworn by
the officer and that the transcript of the oral
deposition is a true record of the testimony given by
the witness;

I further certify that pursuant to Federal Rules of
Civil Procedure, Rule 30(e)(1)(A) and (B) as well as
Rule 30 (e) (2) that the signature of the deponent:

 X was requested by the deponent and/or a party
before completion of the deposition and is to be
returned within 30 days from date of receipt of the

Bradley Hoover - 4/2/2021

1 transcript. If returned, the attached Changes and
2 Corrections and Signature pages contain any changes and
3 the reasons therefor;

4 ___ was not requested by the deponent and/or a
5 party before the completion of the deposition.

6 That \$_____ is the deposition officer's charges
7 for preparing the original deposition transcript and any
8 copies of exhibits, charged to PLAINTIFF;

9 That pursuant to information given to the
10 deposition officer at the time said testimony was taken,
11 the following includes counsel for all parties of
12 record:

13 FOR THE PLAINTIFF:

14 Mr. David James
15 Mr. Jeff Edwards
16 EDWARDS LAW
17 The Haehnel Building
18 1101 East 11th Street
19 Austin, Texas 78702
20 (512) 623-7727
21 david@edwards-law.com
22 jeff@edwards-law.com

19 FOR THE DEFENDANT:

20 Mr. H. Gray Laird
21 CITY OF AUSTIN LAW DEPARTMENT
22 P.O. Box 1546
23 Austin, Texas 78767
24 (512) 974-1342
25 gray.laird@austintexas.gov

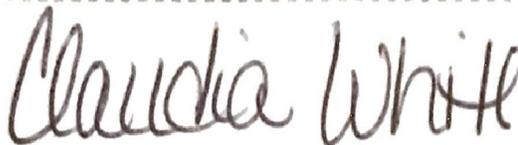
25 I further certify that I am neither counsel for,

WRIGHT WATSON & ASSOCIATES

Bradley Hoover - 4/2/2021

1 related to, nor employed by any of the parties or
2 attorneys in the action in which this proceeding was
3 taken, and further that I am not financially or
4 otherwise interested in the outcome of the action.

5 Certified to by me this 19th day of April, 2021.

6
7 
8

9 Claudia White, Texas CSR# 8242
10 Expiration Date: 5/31/21
11 WRIGHT WATSON & ASSOCIATES
12 Firm Registration No. 225
13 1250 S. Capital of Texas Highway
14 Building 3, Suite 400
15 Austin, Texas 78746
16 512-474-4363
17 www.wrightwatson.com
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WRIGHT WATSON & ASSOCIATES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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§
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CAUSE OF ACTION:

1:22-cv-00299

**ORDER DENYING DEFENDANT WALTER DODDS’ MOTION TO STAY
DISCOVERY PENDING CRIMINAL PROCEEDINGS**

After considering Defendant Walter Dodds’ Motion to Stay Discovery Pending Criminal Proceedings, Plaintiff’s response, any reply, all applicable filings, all argument and evidence presented, and all applicable law, the Court hereby DENIES the motion in its entirety.

IT IS SO ORDERED.

SIGNED this _____ day of _____.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, and WALTER
DODDS,

Defendants.

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§
§

CAUSE OF ACTION:

1:22-cv-00299

PLAINTIFF’S SECOND AMENDED COMPLAINT

Plaintiff Jane Doe brings this 42 U.S.C. § 1983 case against the City of Austin and then-Austin Police Department Officer Walter Dodds, as Dodds sexually assaulted her.

I. PARTIES

1. Plaintiff Jane Doe is a resident of Travis County, Texas. Plaintiff files under a pseudonym to protect her privacy and safety.

2. Defendant City of Austin is a municipality that operates the Austin Police Department. The City’s policymaker for policing matters was former Police Chief Brian Manley at the time of the incident and is currently Chief Joseph Chacon. *The City has appeared in this case.*

3. Defendant Officer Walter Tyson Dodds was at the time of this incident an Austin Police Department officer and he is sued in his individual capacity for compensatory and punitive damages. Officer Dodds was acting under color of law as an Austin Police Department officer at all relevant times. *Dodds has answered.*

II. JURISDICTION AND VENUE

4. This Court has federal question jurisdiction over this 42 U.S.C. § 1983 action pursuant to 28 U.S.C. §§ 1331 and 1343.

5. This Court has general personal jurisdiction over Defendant City of Austin as it is located in Travis County, Texas and over Defendant Dodds as he resides in Lee County, Texas.

6. This Court has specific *in personam* jurisdiction over Defendants because this case arises out of conduct by Defendants that injured Plaintiff Jane Doe, and which occurred in Travis County, Texas, which is within the Western District of Texas.

7. Venue of this cause is proper in the Western District pursuant to 28 U.S.C. § 1391(b) because a substantial portion of the events or omissions giving rise to Plaintiff's claims occurred in Travis County, which is within the Western District of Texas.

III. FACTS

A. Dodds' attack on Doe

8. On April 18, 2020, Jane Doe and her boyfriend, A.G., had an argument during which A.G. had a breakdown, put a belt around his throat, and tightened it to threaten suicide.

9. Doe yelled to her nephew to go get help.

10. Doe's nephew went to his mother in a nearby apartment who called 911 to get help from APD.

11. At approximately 6:13pm, Defendant Officer Walter Dodds, while on duty as an Austin Police Officer, responded and arrived on scene.

12. Officer Dodds conducted interviews with Jane Doe and A.G.

13. Officer Dodds determined that A.G. was a danger to himself and needed to be placed under an emergency detention.

14. Austin Emergency Medical Services (EMS) arrived on scene and determined that A.G. would need to be transported to the hospital.

15. During Officer Dodds' interview with Doe, he asked for her phone number and told her that he would be calling her to tell her where A.G. was being taken.

16. At the end of the interview, Officer Dodds asked Doe about locking the door to her apartment.

17. Officer Dodds said, "What if someone sneaks in there? You don't want to be sleeping with some dude in there with you."

18. Officer Dodds then accompanied A.G. to the hospital and completed the required documentation for A.G.'s emergency detention.

19. Then at 6:54pm, Officer Dodds called Doe from his APD-issued cell phone.

20. Officer Dodds started the call by telling Doe which hospital A.G. had been taken to, but then began to ask if he could come over. Doe did not give consent for Officer Dodds to come to her home.

21. Officer Dodds then asked her if Doe would take off his uniform for him and again if he could come over. Again, Doe did not consent to allow the officer into her apartment or to take off his uniform. Doe ended the call.

22. Officer Dodds called Doe four more times from the same APD-issued cell phone between 6:54pm and 9:09pm, but Doe did not pick up any of these calls.

23. After 9:09pm, Doe fell asleep in her bedroom alone.

24. Sometime after Doe fell asleep, Officer Dodds again went to Doe's apartment and knocked on the door.

25. On information and belief, Dodds used his police vehicle to return to Doe's apartment.

26. Although Dodds' police vehicle is equipped with a tracking device that APD dispatchers and Dodds' supervisors could see, neither his supervisor nor the dispatchers challenged Dodds for returning to a residence where there was no reason for him to be.

27. Doe's minor nephew opened the door and saw Officer Dodds in his full uniform, including his gun and full duty belt.

28. Officer Dodds walked by Doe's nephew, directly into Doe's bedroom, and shut the door behind him.

29. Dodds did not have permission or authority to enter the home.

30. Because Officer Dodds was an armed police officer, Doe's minor nephew did not call for help or otherwise attempt to impede his entrance.

31. Doe awoke to Officer Dodds in her bedroom penetrating her vagina with his penis.

32. Doe was shocked, frightened, and confused about what was going on and never consented to any contact of any kind from Officer Dodds.

33. Officer Dodds then flipped her onto her stomach and forced his penis into her vagina two more times.

34. Officer Dodds was not wearing a condom and ejaculated onto the fitted sheet on her bed. Doe remained terrified.

35. That sheet was later tested for DNA evidence by APD. The DNA analysis confirmed that Officer Dodds' DNA was present on the sheet.

36. Over the next several days, Officer Dodds continued to call Doe from his APD-issued cell phone and terrorize her.

37. On April 25, 2020, Officer Dodds called Doe, disguising his number.

38. Doe picked up the phone, recognized Dodds' voice immediately, and heard him ask who she was with and what she was doing.

39. Terrified, Doe answered that she was with her husband and hung up the phone.

40. On April 26, 2020, at approximately 5:30pm, Doe saw Officer Dodds drive by her apartment complex in his police vehicle, slowly drove down the dead end of her parking lot, turned around and drove away. Doe's nephew took a photo of the vehicle, which APD later confirmed was Dodds' assigned police car for that day.

41. Again, neither Dodds' supervisor nor APD dispatchers challenged Dodds for taking his police vehicle to a residence where he had no reason to be.

42. On April 27, 2020, at 4:40pm, Dodds called Doe again, using *67 to hide his phone number.

43. Officer Dodds again asked her what she was doing and if he could come over. Doe, recording the call, repeatedly asked him to say his name, but Dodds only responded, "It's me."

44. On April 29, 2020, Doe called 911 to report the sexual assault by Officer Dodds.

45. Officer Walter Dodds was accused of Sexual Assault and Official Oppression and was arrested on September 10, 2020.

46. Dodds' criminal defense attorneys claimed that he had been indicted for those accusations, although Dodds filed a motion in this action claiming he has not yet been indicted.

B. The City was deliberately indifferent in hiring Dodds as an APD officer.

47. Attempting to find work as a police officer is appealing to sexual predators because the authority, training, and equipment associated with the position enables them to engage in sexual violence with less chance of detection.

48. Conditions of the policing profession create opportunities for sexual misconduct, as officers have power and authority over others, often work alone, often work without direct supervision, often work late into the night, and often engage with vulnerable populations who lack power, are perceived as less credible, or both.

49. Despite their expertise in evading law enforcement, over one hundred police officers are caught engaging in sexual violence every year in the United States.

50. Sexual misconduct by law enforcement officers is the most common single source of citizen complaints behind only excessive force.

51. Any competent police chief would know that there is a substantial risk that a prospective officer seeking employment would be a sexual predator.

52. On information and belief, the City's police chief knew at all relevant times that there was a substantial risk that prospective officers seeking work at APD would be sexual predators.

53. APD's decision-making to reject or hire prospective officers that it believes are substantially likely to be sexual predators is kept secret and not known to Plaintiff.

54. On information and belief, the City's police chief knew at all relevant times that a pattern of sexual predators had sought to work as police officers for APD.

55. Dodds' *modus operandi* in his attack upon Doe and his subsequent harassment in this case reflects planning and a habitual pattern strongly indicative of a serial sexual predator.

56. Dodds' background is also consistent with the profile of a serial sexual predator.

57. Most people who sexually assault a stranger will do so again, and have done so before.

58. Most people who are caught engaging in sexual assault have done so many times before people before.

59. On information and belief, Doe was not Dodds' first victim.

60. On information and belief, Dodds had abused his authority, training, and equipment as a police officer to sexually assault other people while working at law enforcement agencies prior to being hired by APD.

61. The full scope of APD's hiring policies, procedures, and practices are secret and not accessible to Plaintiff without the benefit of discovery or other court intervention.

62. APD routinely conducts pre-employment background investigations and conducts other pre-employment procedures for prospective new hires and cadets at the APD academy.

63. The full scope of APD's pre-employment process is secret and not accessible to Plaintiff without the benefit of discovery or other court intervention.

64. Based on the public version of APD policy, APD's pre-employment process is limited to a drug test, a review of public social media information, proof of citizenship, proof of age, proof of education, proof of criminal history checks, and proof of any military discharge.

65. Minimum police standards require the following additional pre-employment procedures pertinent to the risk of hiring a sexual predator:

- Authorization to search the prospective officer's full social media presence and a thorough review of those records for indicators of sexism and sexually abusive conduct;
- Pre-employment interviews with current and former romantic or sexual partners to inquire about any history of sexism or sexually abusive conduct;
- Personal interviews with polygraph examination calculated to detect biases such as sexism that are predictive of sexual violence, as well as to ask about behaviors that are predictive of sexual violence such as characteristic power and control tactics;
- Psychological screening for indicators of abusive tendencies; and

- Authorization to collect prior employment records, including with all prior law enforcement agencies; collection of those records; and review for incidents of prior sexual misconduct.

66. Enacting a hiring process that omits some or all of these rudimentary additional pre-employment procedures is substantially likely to permit sexual predators to become police officers.

67. The importance of the foregoing additional pre-employment procedures in preventing police departments from hiring sexual predators has been promulgated by nationally respected sources since long before this incident, such as the International Association of Chiefs of Police, Chief Thomas Tremblay, and End Violence Against Women International.

68. On information and belief, APD's police chief, and all competent police chiefs, are aware of the importance of the foregoing additional pre-employment procedures and the risk that failing to implement some or all of them is substantially likely to permit sexual predators to become police officers.

69. On information and belief, APD failed to implement each of the foregoing additional pre-employment procedures at all relevant times.

70. On information and belief, APD's police chief knew that APD's failure to implement some or all of the foregoing additional pre-employment procedures had caused APD to fail to detect and prevent the retention of sexual predators in the past, and that this would continue because APD failed to rectify the deficiencies.

71. On information and belief, if APD had implemented a process that included some or all of the foregoing additional pre-employment procedures at the time Dodds was hired, then APD would have detected Dodds as a likely sexual predator at that time, would not have hired him, and he would not have attacked Doe.

72. In the alternative, on information and belief, APD actually did know or was deliberately indifferent to the fact that Dodds was likely a serial sexual predator, but chose to hire him anyway.

C. APD was deliberately indifferent in failing to supervise Dodds.

73. APD has no policies, practices, or procedures to alert supervisors, dispatchers, or anyone else of obviously suspicious movements by officers and their patrol vehicles like Dodds' use of his patrol vehicle in this case.

74. Minimum police standards require police supervisors to watch for obvious signs of sexually predatory officers, such as:

- Unwarranted call backs to victims, witnesses, or suspects;
- Unwarranted visits to victims, witnesses, or suspects;
- Possessing sexually inappropriate material while on-duty;
- Using government equipment such as cell phones for inappropriate contact with community members, detainees, or co-workers; and
- Attempting to initiate sexual contact with anyone contacted within the context of law enforcement duties and activities.

75. Officer Dodds' patrol vehicle tracking system could easily be used to alert supervisors, dispatchers, and others within APD's command structure of obviously suspicious behavior like parking or driving by the same a private residence without an active call multiple times, thereby implementing the above supervisory methods.

76. Likewise, the APD-issued cell phone for officers could easily be monitored remotely for inappropriate contacts and communications of a sexual nature.

77. Accordingly, the above-described supervisory methods were easily feasible at all relevant times.

78. Failing to enact the above-described supervisory methods is substantially likely to permit sexual predators to act with impunity within a police force.

79. The importance of the above-described supervisory methods to deter, detect, and otherwise prevent sexual violence by police officers has been promulgated by nationally respected sources since long before this incident, such as the International Association of Chiefs of Police, Chief Thomas Tremblay, and End Violence Against Women International.

80. On information and belief, APD's police chief, and all competent police chiefs, are aware of the importance of the above-described supervisory methods and the risk that failing to implement some or all of them is substantially likely to permit sexual predators to act with impunity within a police force.

81. On information and belief, APD failed to implement each of the foregoing above-described supervisory methods at all relevant times.

82. On information and belief, APD's police chief knew that APD's failure to implement some or all of the above-described supervisory methods had caused APD to permit sexual predators to act with impunity within a police force in the past, and that this would continue because APD failed to rectify the deficiencies.

83. On information and belief, Dodds had previously used his APD-issued cell phone and his APD patrol vehicle to sexually assault, harass, and intimidate others that he had contacted in the course of his work as an APD officer, similar to this incident.

84. Because, on information and belief, APD has none of the above-described supervisory methods implemented, Dodds' previous misconduct and his misconduct in this case was not detected until Doe had already been assaulted and reported the crime herself.

85. If APD had used the above-described supervisory methods, then Dodds would have been interrupted by a minimally competent supervisor before he could attack Doe.

86. In the alternative, on information and belief, APD actually did know or was deliberately indifferent to the fact that Dodds was a serial sexual predator, but chose to retain him anyway and permit his crimes to continue.

D. APD was deliberately indifferent in failing to implement any policies prohibiting sexual misconduct by officers, as distinct from sexual harassment policies.

87. Minimum police standards require specific policies to forbid and deter sexual misconduct by police, such as:

- Forbidding officers from knowingly engaging in social or romantic relationships with confidential informants, victims, or witnesses involved with active investigations.
- Requiring officers to report misconduct by fellow officers.
- Prohibiting the following conduct and other conduct indicative of sexual predation:
 - Unwarranted call backs to victims, witnesses, or suspects;
 - Unwarranted visits to victims, witnesses, or suspects;
 - Possessing sexually inappropriate material while on-duty;
 - Using government equipment such as cell phones for inappropriate contact with community members, detainees, or co-workers; and
 - Attempting to initiate sexual contact with anyone contacted within the context of law enforcement duties and activities.

88. Failing to enact the above-described policies is substantially likely to permit sexual predators to act with impunity within a police force, as the lack of unequivocal minimum standards creates a substantial risk that officers will adopt a custom of not reporting on their colleagues and removes consistency in the application of important supervisory steps to detect sexual predators.

89. The importance of the above-described policies in the deterrence, detection, and prevention of sexual violence by police officers has been promulgated by nationally respected sources since long before this incident, such as the International Association of Chiefs of Police, Chief Thomas Tremblay, End Violence Against Women International, and the President's Task Force on 21st Century Policing.

90. On information and belief, APD's police chief, and all competent police chiefs, are aware of the importance of the above-described policies and the risk that failing to enact some or all of them is substantially likely to permit sexual predators to act with impunity within a police force.

91. APD failed to enact each of the foregoing above-described policies at all relevant times.

92. On information and belief, APD's police chief knew that APD's failure to enact some or all of the above-described policies had caused APD to permit sexual predators to act with impunity within a police force in the past, and that this would continue because APD failed to rectify the deficiencies.

93. On information and belief, Dodds had previously used his APD-issued cell phone and his patrol vehicle to sexually assault, harass, and intimidate others that he had contacted in the course of his duties, similar to this incident.

94. Because, on information and belief, APD has none of the above-described policies implemented, Dodds' previous misconduct and his misconduct in this case was not detected until Doe had already been assaulted and reported the crime herself.

95. If APD had enacted the above-described policies, then Dodds would have been interrupted by a minimally competent supervisor or colleague before he could attack Doe.

96. In fact, APD had, at all relevant times, no policies, training, procedures, or supervision whatsoever calculated to prevent police sexual misconduct, despite the fact that it is a widespread problem recognized by law enforcement agencies nationwide.

97. On information and belief, had APD enacted those obviously necessary policies, procedures, and supervision described above, then Dodds would have been detected and either never hired or expelled long before he encountered and attacked Doe.

98. In the alternative, on information and belief, APD actually did have such policies, but was deliberately indifferent, through its policymaker, to a custom of its officers routinely violating those policies and to Dodds' conduct in this case.

E. APD fostered an ongoing culture of sexual misconduct by APD officers by undermining any and all efforts to investigate, discipline, and arrest the perpetrators.

99. Sexual misconduct by law enforcement generates more citizen complaints than any other factor aside from excessive force.

100. However, APD has not published any statistics on citizen complaints specifically about sexual misconduct.

101. For 2002, the City reported 77 complaints of "bias," 59 complaints of "excessive force," 59 complaints of "failure of duty, and 51 complaints of "oppressive behavior." Among the subcategories of those complaints, APD reported 38 complaints of "harassment," 9 complaints of "misconduct," 7 complaints of "abuse of power," 2 complaints of "assault," 1 complaint of "family violence," 5 complaints of "coercion," and 32 complaints of "intimidation." It is unclear from the City's publication which of these categories, if any, includes sexual violence.

102. For 2003, the City used different categories which are also unclear. The City reported 65 "external" complaints about "use of force" and 75 "external" complaints about "Proper procedure."

103. The City also received 80 “internal” complaints in 2003, but it is unknown to Plaintiff what categories of allegations were involved in those complaints.

104. From 2004 through 2015, the City published a total number of “code of conduct” violations alleged against officers, a number which is reported to include sexual misconduct—but also includes confounding information such as complaints about rude language. These numbers reflect the following:

- 2004 – 245 alleged “code of conduct” violations by APD officers.
- 2005 – 441 alleged “code of conduct” violations by APD officers.
- 2006 – 396 alleged “code of conduct” violations by APD officers.
- 2007 – 497 alleged “code of conduct” violations by APD officers.
- 2008 – 660 alleged “code of conduct” violations by APD officers.
- 2009 – 576 alleged “code of conduct” violations by APD officers.
- 2010 – 416 alleged “code of conduct” violations by APD officers.
- 2011 – 337 alleged “code of conduct” violations by APD officers.
- 2012 – 319 alleged “code of conduct” violations by APD officers.
- 2013 – 372 alleged “code of conduct” violations by APD officers.
- 2014 – 342 alleged “code of conduct” violations by APD officers.
- 2015 – 366 alleged “code of conduct” violations by APD officers.

105. Plaintiff has not been able to locate other records reflecting the total number of alleged incidents involving sexual misconduct by APD officers.

106. On information and belief, many of these generically reported allegations were allegations of sexual assault by APD officers that the City declined to discipline or investigate.

107. On information and belief, the relevant policymaker was aware of that pattern of sexual misconduct allegations and that APD was not investigating the accused perpetrating officers.

108. The City did not begin to routinely publish complaints against APD officers until approximately 2019 except where officers were disciplined and, on information and belief, only a single officer was disciplined for sexual misconduct during the period from 2002 until September 2020.

109. Beginning in approximately 2019, the City began to publish, in part, some complaints made to the Office of Police Oversight, but the City continues to maintain supervisory complaints and complaints made to the APD Internal Affairs Division under a veil of secrecy.

110. Thus, APD maintains the vast majority of records of complaints about its officers' sexual misconduct behind a veil of secrecy.

111. Art Acevedo was the APD chief from 2007 until the end of 2016.

112. In May 2008, Acevedo found that APD Sergeant Dustin Lee, a 12-year veteran, had sexually harassed a coworker. However, Acevedo's initial discipline was rescinded so Lee remained on the force. In 2019, Lee, by then an APD Lieutenant who had been working in APD for 23 years, was arrested by Round Rock Police for sexual assault of a child.

113. In 2014, APD officers Michael Castillo and Mark Lytle were caught on their body worn cameras whistling at a woman walking by, mockingly suggesting she call the police, and then warning her that the police cannot "unrape you."

114. Despite the publicity, on information and belief, then-police chief Art Acevedo did not discipline Castillo or Lytle.

115. Also while chief, on information and belief, Acevedo dismissed allegations by his subordinate female officers that male APD officers had assaulted them. While he was the policymaker for law enforcement in Austin, Acevedo allegedly said some of these allegations of sexual violence by APD officers were just about “bad sex.”

116. On information and belief, during Acevedo’s tenure as chief, the sex crimes unit maintained a wall with photos of people the unit had unilaterally determined to have submitted a “false report” of sexual violence.

117. Acevedo was succeeded by Brian Manley, who served as chief from 2016 until 2021.

118. During Manley’s tenure, APD’s longstanding culture of sexual misconduct came to the forefront of the public consciousness.

119. On information and belief, during Manley’s tenure through the time of Doe’s assault, APD officers continued to be accused of credible claims of sexual misconduct, including—but not limited to—sexual violence against women.

120. On information and belief, from the beginning of Manley’s tenure until Dodds’ arrest, Manley was aware of the pattern of credible accusations that his officers had engaged in sexual violence.

121. On information and belief, internal reports were generated by APD, by the Office of the Police Monitor, by the Citizen Review Panel, and by other arms of the City about numerous accusations that its officers had engaged in sexual violence, but those reports were never published, APD never disciplined the officers, APD failed to seriously investigate the complaints, and APD never arrested the perpetrators.

122. Due to APD policy and Texas Public Information law, records of accusations against APD officers—including allegations of sexual assault—that APD itself deems unmeritorious are permanently hidden from public view and often destroyed after only a few years.

123. On information and belief, APD officers, including Manley, were widely aware that allegations of sexual violence against APD officers would not result in serious punishment.

124. On March 7, 2020, an unknown woman accused an APD officer of walking up to her, grabbing her arm, pushing her up against a car, and then groping her breast and vagina. The officer allegedly did not ask the victim for any information and had no reason to frisk the unknown woman. Based on available records, no officer was disciplined arising from the complaint.

125. A 2020 report by Lisa Tatum, ordered by the City of Austin's City Manager and released the day before Dodds attacked Doe, found that APD retained a culture of sexism.

126. The Tatum report found that APD's Senior Chaplain, Rick Randall, often makes sexist comments.

127. The Tatum investigation also received many reports from all across APD that sexist name calling, and use of derogatory terms associated with sex, persist.

128. A culture of sexism in a police department fosters sexual predators, and attracts them to attempt to work as officers in that department.

129. As discussed above, a key step in screening and rooting out sexual predators is to evaluate prospective officers and current officers' views for sexist bias, because such a bias is a strong predictor of sexually predatory behavior.

130. The importance of eliminating sexist bias in policing has been promulgated by nationally respected sources since long before this incident, such as the International Association

of Chiefs of Police, Chief Thomas Tremblay, End Violence Against Women International, the Department of Justice, and the President's Task Force on 21st Century Policing.

131. On information and belief, APD's police chief, and all competent police chiefs, are aware of the importance of eliminating sexism within their police department and the risk that failing to do so is substantially likely to foster sexually predatory behavior by officers.

132. APD failed to correct the sexist culture pervading APD at all relevant times.

133. On information and belief, APD's police chief knew that APD's failure to correct the sexist culture within the agency had caused APD officers to engage in sexual assault in the past, and that this would continue because APD failed to rectify the deficiencies.

134. On April 20, 2022, an unknown woman who worked for the City accused a male APD officer of sexually harassing almost every female he works with. The woman alleged that she and other victims were too afraid to come forward due to retaliation, that she had seen the officer pull on women's hair, slap their butts, and pressure them to send him nude photos.

F. APD's longstanding failure to investigate sexual violence

135. A 2018 study, sponsored by the U.S. Department of Justice, found that APD only made arrests in less than ten percent of sexual assault allegations during the year-long study period.

136. The percentage of arrests is even more abysmal for rape within the meaning of public reporting requirements,¹ and has been for at least the last ten years.

137. In 2011, out of 211 rapes reported to APD, APD made no arrests.

138. In 2012, out of 209 rapes reported to APD, APD made just 1 arrest.

139. In 2013, out of 217 rapes reported to APD, APD made no arrests.

¹ The Texas Penal Code does not use the term "rape," but the State of Texas and City of Austin often report the crime of "rape" when publishing statistics on crimes and arrests, as they rely upon the FBI's definition of the crime to organize their reporting.

140. In 2014, out of 571² rapes reported to APD, APD only made 4 arrests.

141. In 2015, out of 487 rapes reported to APD, APD only made 2 arrests.

142. In 2016, out of 747 rapes reported to APD, APD only made 3 arrests.

143. In 2017, out of 834 rapes reported to APD, APD only made 9 arrests.

144. In 2018, out of 787 rapes reported to APD, APD made 89 arrests.

145. This is partly because the agency intentionally underfunded investigating sexual assault.

146. In 2020, APD assigned only 19 detectives to handle about 1,000 sexual violence cases per year.

147. APD only had 17 sex crimes detectives in 2018, investigating 787 rapes. By comparison, APD had 12 detectives assigned to investigate 32 murders in 2018.

148. Sexual violence rarely leads to an arrest arising from a complaint to APD when compared to other crimes such as murder, assault, and theft of an automobile. This fact was reported to the Austin City Council in 2019.

149. Mayor Steve Adler remarked that the City of Austin has “far too many sexual assaults that are resulting in too few perpetrators being taken off our streets.”

150. APD’s policymaker was therefore aware at all relevant times that APD’s sex crimes unit had been woefully ineffective.

151. But APD is not just unskilled in investigating sexual violence; it instead chooses not to press charges for the supermajority of those cases despite sufficient evidence to do so.

² Prior to 2014, the FBI’s definition of “rape” was narrower, causing the number of reports and arrests so classified to be lower. APD also underreported the number of reported rapes in 2014, 2015, and 2016.

152. For years, APD affirmatively chose to close investigations without adequate investigation. APD covered up its lack of investigations by “exceptionally clearing” about 2 of every 3 rape cases that it closed during the years leading up to the attack on Doe. A case is only supposed to be “exceptionally cleared” if there is an identified suspect, the suspect’s location is known, and there is enough information to support an arrest, charge, or turning over the case to the court for prosecution, but for some reason the case does not lead to an arrest, charge, or other prosecution. That means that APD nonetheless did not arrest, charge, or turn over the case to the court system a supermajority of rape cases even when they had enough evidence to do so.

153. Even worse, in an audit of late 2017 rape cases handled by APD, the Texas Department of Public Safety determined that the Austin Police Department had wrongfully “exceptionally cleared” nearly one-third of its exceptionally cleared rape cases during the audited period.

154. The Texas Department of Public Safety audit further confirmed that nearly half of those wrongfully “exceptionally cleared” cases had “enough information to support an arrest, charge, and turning over to the court for prosecution.”

155. APD Chief Manley agreed with nearly all of DPS’s findings, admitting the majority of cases identified by DPS were closed improperly or should not have been closed at all.

156. But this intentional misclassification was not new information to APD’s policymaker. On information and belief, APD’s former head of sex crimes, Elizabeth Donegan, had internally complained about and resisted the practice for years.

157. Moreover, Donegan’s superiors within APD had pressured her to deliberately cover up the department’s poor investigating success by improperly “exceptionally clearing” cases. After

she was pushed out of the department, the rate of “exceptional clearance” rose. Manley admitted he had a “difference of opinion” with Donegan about this issue when he had her transferred.

158. Aside from Donegan’s prophetic complaints about “exceptional clearance,” she also publicly warned that APD’s sexual assault investigations were not adequately thorough.

159. These mirror problems with APD’s investigation in specific incidents that have been publicized.

160. For example, on information and belief, in the investigation of the sexual assault of Hanna Senko from 2006, APD never visited the scene of the crime, never interviewed witnesses, and decided to “exceptionally clear” the case before Senko’s blood test results even came back—even though she reported her assailant had suspiciously had pills in his pocket before the attack.

161. In investigating an October 2008 sexual assault, on information and belief, APD questioned the victim’s truthfulness, asked her about other men she had had sex with, and asked her whether she had a boyfriend.

162. To investigate the 2010 sexual assault of Julie Ann Nitsch, on information and belief, APD failed to collect physical evidence including the cords the assailant used as a weapon, broken locks, the glass door the assailant used to enter, or anything else that could be used to identify the assailant. Instead, APD asked Nitsch how much she had to drink, what she had been wearing, and why she lived in a bad neighborhood.

163. On December 24, 2014, on information and belief, Heather Sin was drugged at a bar and sexually assaulted by several men. The next morning, Sin awoke at railroad tracks and called the police. A physical exam confirmed many injuries including genital injuries consistent with sexual assault. An APD detective later spoke to her and made clear that he did not believe anything had happened to her and would wait on DNA results before investigating at all. After Sin

pressed for an explanation, APD suggested they were not pursuing the case because Sin had been drinking. Sin's case remained pending for at least 3 years.

164. On August 9, 2015, on information and belief, Marina Conner was sexually assaulted. During the assault, Conner made a phone call that recorded her cries for help. Conner spoke to an APD detective on the phone who promised to come meet her, but he never did. Conner obtained a written confession from the assailant. Despite this evidence, APD decided not to pursue the case.

165. On January 7, 2016, on information and belief, Anisha Ituah was sexually assaulted by a patient at a state hospital. Her family called APD, but APD refused to dispatch anyone, so APD never collected forensic evidence from Ituah. APD's detective also complained to Ituah that he had a huge case load of over 300 rape victims and he cannot get every case done. The detective also blamed Ituah for her own assault and suggested he would not investigate. Travis County later told her family that APD was not pursuing the case.

166. Even more alarming is APD's response to a series of sexual violence that Amanda Day reported to APD. In 2018, on information and belief, APD told her that it would not investigate because she had previously consented to "kissing and stuff" with her violent assailant who repeatedly sexually assaulted her. The APD officer also asked her what panties she was wearing and inaccurately told the victim that the sexual assaults were "family violence," before refusing to investigate further.

167. Also in 2018, on information and belief, APD closed a case investigating sexual assault allegations by Jessica Ragsdill. In that case, APD obtained video footage confirming the suspect had entered a hotel room with the victim while she was so intoxicated that she could not stand. APD also had photographic evidence reflecting that the sexual assault was so violent that

Ragsdill was bleeding and bruised. But APD decided not to pursue the case regardless, and “exceptionally cleared” the report of sexual assault.

168. In January 2018, on information and belief, Emily Borchardt was repeatedly and violently sexually assaulted by a ring of sex traffickers who abducted her, locked her in a motel room, and repeatedly threatened to kill her. After at least 10 hours, Borchardt finally escaped and called APD. The first officer to respond rolled his eyes and was impatient. APD failed to collect surveillance video or other physical evidence from the motel. The detective assigned to the case told Borchardt’s mother that some of the events “sounded consensual.” The detective later characterized the bruising on Borchardt’s neck where her assailants had strangled her as a “hickey.” Eventually APD declined to pursue the investigation further.

169. On information and belief, during the years leading up to the attack on Doe, APD officers routinely told sexual assault victims that their assaults “sounded consensual.”

170. On information and belief, during the years leading up to the attack on Doe, APD officers routinely characterized victims of sexual violence as “bad victims” if they knew their attacker.

171. On information and belief, during the years leading up to the attack on Doe, APD detectives assigned to investigate sexual violence often rolled their eyes at the victim’s allegations, then dismissed them because the assailant claimed the encounter was consensual.

172. On information and belief, during the years leading up to the attack on Doe, APD officers assigned to investigate sexual violence routinely criticized victims for their clothing, for where they live, and for drinking alcohol.

173. As a proximate and obviously foreseeable result of APD's deplorable sex crimes investigation practices, APD officers believed they could engage in sexual violence with impunity, and many of them did so in a pattern of misconduct for years.

174. On information and belief, APD's police chief was aware that the deficiencies in the sex crimes investigation practices and the fact that these deficiencies had caused, and would continue to cause, APD officers to sexually assault citizens with impunity.

175. On information and belief, during the years leading up to the attack on Doe, many APD officers have been accused of sexual assault but not arrested or disciplined.

176. A single, high profile counter-example proves the rule. In December 2018, Manley terminated an APD commander, Jason Dusterhoft, for allegedly beating his then-girlfriend, including by strangling her during sex, despite, on information and belief, knowing that this allegation was not credible and that this allegation had instead been manufactured by APD's sex crimes unit on Manley's own orders.

177. Dusterhoft countered that Manley had intentionally used the sex crimes division to pressure his ex-girlfriend into fabricating the allegations, pointing out that Manley himself admitted the allegations were not credible.

178. Dusterhoft alleges, in an ongoing lawsuit, that he had personally alerted Manley to a then-dire backlog in sexual assault kit testing—a backlog which was a source of enormous public embarrassment for Manley. The entire controversy reinforced the belief, which was widespread amongst APD officers and known to APD's policymaker, that APD did not take allegations of sexual assault seriously.

179. Therefore, Manley's actions and statements with respect to Dusterhoft further aggravated the widespread belief amongst APD officers that allegations of sexual violence were

never taken seriously, as the sex crimes unit was already widely viewed to lack integrity and Manley's alleged actions further severely undermined its credibility.

180. The ineffectiveness of the sex crimes unit, coupled with its inherent sexual bias and lack of credibility, for years contributed to a culture of tolerance for sexual violence within APD, thereby undermining its deterrence effect and its effectiveness at detecting and preventing future sexual assaults by APD officers. These facts were well known to Manley and his predecessors at all relevant times.

181. Because APD systemically engaged in sexual violence, continued to hire officers without any protections in place against hiring sexual predators, refused to supervise its officers to prevent such violence, refused to enact any policies prohibiting that violence, refused to properly investigate sexual violence, systemically covered up their failures, and maintained a culture that tolerated sexual violence even by police officers, predators like Officer Dodds were hired, given the tools that enabled them to prey on the most vulnerable civilians, emboldened in their efforts, and believed they could engage in that sexual violence with impunity, causing even more sexual violence by APD officers—including Dodds' attack on Doe in this case.

IV. CAUSES OF ACTION

A. FOURTH AND FOURTEENTH AMENDMENT VIOLATIONS – AS TO DEFENDANT OFFICER DODDS

182. Plaintiff incorporates the preceding paragraphs as if alleged herein.

183. Austin Police Department Officer Dodds, while acting under color of law, violated Plaintiff Doe's substantive due process right to bodily integrity by penetrating her with his penis without her consent.

184. Doe has suffered significant injuries as a result of Officer Dodds' sexual assault.

185. Austin Police Department Officer Dodds' assault shocks the conscience. Without any legitimate reason, Officer Dodds entered Plaintiff's home at night, penetrated her without her consent, and proceeded to intentionally terrify her by driving by her home in his APD cruiser and calling her cell phone with his APD-issued phone from blocked numbers.

186. Therefore, Austin Police Department Officer Dodds violated Doe's clearly established Fourteenth Amendment right to bodily integrity in such a way that clearly shocks the conscience and directly and proximately caused Doe to suffer significant injuries.

187. In addition, Austin Police Department Officer Dodds, while acting under color of law, entered Plaintiff Doe's home without permission and used excessive force on Plaintiff Doe by penetrating her with his penis without her consent in her own home.

188. Officer Dodds unlawfully entered Doe's home and then seized Doe by using force on her, trapping her in her bedroom, restraining her freedom to leave, and restraining her freedom to decline his unwanted sexual conduct and penetration.

189. Austin Police Department Officer Dodds' use of force was wholly excessive to any conceivable need, objectively unreasonable in light of clearly established law, conscience shocking and directly caused Plaintiff Doe to suffer serious injuries.

190. Therefore, Austin Police Department Officer Dodds violated Doe's clearly established Fourth Amendment rights.

191. Officer Dodds acted under color of law in the course of his violations of Plaintiff Doe's rights when he used his police investigation of her 911 call as pretext to find out where she lived, her phone number, and whether she would be vulnerable to his assault; used his police investigation as a pretext to contact her again and press unwanted sexual advances; used his police-issued phone to call her repeatedly before the sexual assault; used his APD badge and uniform to

gain access to her home; kept his uniform on—including his APD badge and APD issued gun—while sexually assaulting Doe; intimidated her nephew with his authority as a police officer as well as his uniform, badge, and service weapon; and terrified her with his service weapon and police authority. Officer Dodds also subsequently drove by her home in his APD cruiser in order to further terrify and intimidate her, and called and texted her from his APD-issued cell phone, in an effort to prevent her from reporting the misconduct and prepare to attack her again.

192. As a direct and proximate result of Austin Police Department Officers Dodds' actions, Doe suffered and continues to suffer significant injuries.

193. Doe brings these claims pursuant to 42 U.S.C. § 1983.

B. PUNITIVE/EXEMPLARY DAMAGES – AS TO DEFENDANT DODDS

194. Plaintiff incorporates the preceding paragraphs as if alleged herein.

195. Defendant's conduct was egregious, reckless, and endangered countless community members. Plaintiff seeks punitive damages as well to deter future similar violations of constitutional rights.

C. FOURTH AND FOURTEENTH AMENDMENT – FAILURE TO TRAIN, SUPERVISE, AND PROTECT AS TO DEFENDANT CITY OF AUSTIN

196. Plaintiff incorporates the preceding paragraphs as if alleged herein.

197. The City of Austin, had the following policies, practices, or customs in place when APD Officer Dodds sexually assaulted Doe:

- a. Failure to train officers about detecting, preventing, and prohibiting sexual harassment and sexual assault;
- b. On information and belief, hiring officers known or that should have been known to have sexually harassed or sexually assaulted in the past;
- c. Failing to adopt simple pre-employment procedures to screen out officers who were or would likely become sexual predators;

- d. Failure to supervise officers known or that should have been known to have sexually harassed or sexually assaulted in the past;
- e. Failure to implement simple procedures to detect highly suspicious behavior by officers, such as Dodds' driving back to the same private residence multiple times for no legitimate reason and using his APD-issued cell phone to send sexual transmissions and harass Doe;
- f. Failure to implement straightforward policies to prohibit and help detect highly suspicious behavior typical of officers who engage in sexual violence;
- g. Failure to discipline officers for domestic violence or sexual assault in the past;
- h. Wrongfully clearing complaints that officers and members of the public engaged in sexual assault;
- i. Wrongfully failing to investigate complaints that officers and members of the public engaged in sexual assault;
- j. Adopting a culture of tolerance for sexual violence, unjustified skepticism of reports of sexual violence, and sexist views which contributed to further sexual violence by officers;
- k. Failure to adequately investigate officers' history of sexism, sexual harassment, or sexual assault in the past;
- l. Failure to protect the public from known dangerous servants while giving them the tools and authority to perpetrate attacks on innocent civilians with impunity; and
- m. Failure to investigate, discipline, and arrest APD officers accused of sexual assault.

198. Each of the policies, practices, or customs delineated above was actually known, constructively known, approved, and/or ratified by City of Austin and its policymaker for law enforcement purposes, Chief of Police, Brian Manley, and was promulgated with deliberate indifference to Doe's Fourth and Fourteenth Amendment rights under the United States Constitution. Moreover, the known and obvious consequence of these policies, practices, or customs was that Austin Police Department officers would be placed in recurring situations where constitutional violations similar to those inflicted on Doe would result. Accordingly, these policies also made it highly predictable that the particular violations alleged here, all of which were under color of law, would result.

199. Consequently, the policies and conduct delineated above were a moving force of Plaintiff's constitutional deprivations and injuries, and proximately caused severe damages to Plaintiff.

200. Plaintiff Doe brings this claim pursuant to 42 U.S.C. § 1983.

V. DAMAGES

201. Plaintiff Doe seeks the following damages:

- a. Past and future medical expenses;
- b. Past and future economic damages, including (but not limited to) loss of earning capacity;
- c. Past and future physical pain and mental anguish;
- d. Past and future impairment;
- e. Past and future disfigurement;
- f. Punitive damages as to Defendant Dodds only;
- g. Loss of consortium; and,
- h. Attorneys' fees pursuant to 42 U.S.C. § 1988.

VI. JURY DEMAND

202. Pursuant to Federal Rule of Civil Procedure 48, Plaintiff hereby requests a jury trial.

VII. PRAYER FOR RELIEF

203. To right this injustice, Plaintiff requests the Court:

- a. Award compensatory damages against Defendants;
- b. Award exemplary damages against Defendant Dodds only;
- c. Award Plaintiff costs and fees, including but not limited to expert fees and attorneys' fees, pursuant to 42 U.S.C. § 1988;

- d. Award pre-judgment and post-judgment interest at the highest rate allowable under the law; and,
- e. Award and grant such other just relief as the Court deems proper.

Dated: May 25, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature below I certify that a true and correct copy of this document has been filed with the Court's electronic case filing system and served on all parties who have thereby appeared.

/s/ Jeff Edwards
Jeff Edwards

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

| | | |
|-----------------------------------|---|--|
| JANE DOE, | § | |
| Plaintiff, | § | |
| | § | |
| v. | § | CIVIL ACTION NO. 1:22-cv-00299-RP |
| | § | |
| CITY OF AUSTIN, and WALTER | § | |
| DODDS, | § | |
| Defendants. | § | |

**DEFENDANT CITY OF AUSTIN’S MOTION TO DISMISS
PLAINTIFF’S SECOND AMENDED COMPLAINT**

Defendant City of Austin (the “City”), files this Motion to Dismiss Plaintiffs’ Second Amended Complaint (*Dkt. 17*) pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). In support of the Motion, the City respectfully shows the following:

I. SUMMARY OF MOTION

In this civil rights case, Plaintiff, the victim of an alleged sexual assault, sued the City claiming it violated her constitutional rights under the Fourth and Fourteenth Amendments by fostering a culture within its police department wherein officers believed it was okay for them to commit sex crimes on duty. By Plaintiff’s theory, the City somehow tacitly or actively promoted the idea of its officers committing sex crimes, and these actions were the “moving force” of former officer Dodds’ crimes, thereby entitling Plaintiff to damages from the City caused by Dodds’ actions. In an extensively expanded amended pleading, Plaintiff attempts to paint a picture of a police department staffed and managed by brutes and criminals who assault women with impunity.

Factually, nothing could be further from the truth. Legally, Plaintiff’s theory ignores well-established authority prohibiting *respondeat superior* liability. Plaintiff seeks to pioneer new frontiers of municipal culpability for the unauthorized acts of (former) employees. Neither the alleged facts nor the law supports a claim against the City. Those claims must be dismissed.

II. FACTS ALLEGED

A. Dodds' assault on Plaintiff.

Plaintiff's Second Amended Complaint details a sexual assault that took place on April 18, 2020. Earlier that night, police were summoned to Plaintiff's apartment after she and her boyfriend quarreled and he threatened suicide. *Dkt. 17, ¶¶8-11*. Defendant Walter Dodds, then an officer with the Austin Police Department (APD), responded to the call. *Id. ¶¶11-12*. Dodds determined, and EMS confirmed, the boyfriend needed to be hospitalized. *Id. ¶¶13-14*. Plaintiff alleges Dodds asked for her phone number so he could let her know where her boyfriend was taken. *Id. ¶15*. Plaintiff's boyfriend was then taken to the hospital. *Id. ¶18*. Later, Dodds called Plaintiff on his APD-issued phone, told her where her boyfriend was and "began to ask if he could come over" and "take off his uniform." *Id. ¶¶20-21*. Plaintiff did not agree to that, and the call ended. *Id.*

Dodds phoned Plaintiff several more times that night, but she did not answer and went to bed. *Id. ¶¶22-23*. Dodds later returned to Plaintiff's apartment in his APD uniform, knocked on the door, and was let in by her nephew. *Id. ¶¶24-28*. Dodds entered Plaintiff's bedroom and shut the door. *Id. ¶28*. Plaintiff woke up to Dodds sexually assaulting her. *Id. ¶31*. In the following days, Dodds allegedly phoned her several times. *Id. ¶¶36-43*. His APD vehicle was seen once driving near Plaintiff's apartment complex. *Id. ¶40*. Ten days after the assault, on April 29, Plaintiff called 911 to report it. *Id. ¶44*. All of Dodds' alleged contact with Plaintiff occurred before she reported the assault to the police. *Id. ¶¶8-44*. On September 10, 2020, Dodds was charged with sexual assault and official oppression and was arrested. *Id. ¶45*. Those criminal charges remain pending.

B. Allegations related to the City's purported culpability.

Plaintiff does not allege anyone else employed at APD knew of Dodds' sexual assault, that he was carrying out any police duties at the time he committed the crime, or that APD responded to her complaint improperly. Rather, premised on the theory that police officers are more likely to be

sexual predators, she alleges APD lacks sufficient policies regarding hiring, supervising, and training officers. In a conclusory assertion, Plaintiff alleges sexual predators seek out law enforcement jobs because it creates opportunities to commit sexual misconduct. *Id.* ¶47. Plaintiff then alleges “upon information and belief” APD should know there is a substantial risk that job applicants are sexual predators. *Id.* ¶52. Footed on these broad allegations, Plaintiff alleges APD’s hiring process does not include pertinent provisions Plaintiff claims are necessary to screen out sexual predators from the hiring pool. *Id.* ¶¶61-70. She further alleges APD should have supervised Dodds better by detecting and monitoring “suspicious” behavior such as calling Plaintiff on his cell phone and driving near the area where she lived. *Id.* ¶¶74-81. Additionally, she conclusorily asserts APD failed to properly train officers to prevent sexual misconduct and did not have specified policies necessary “to forbid and deter” sexual misconduct. *Id.* ¶87, 96. Finally, Plaintiff concludes APD failed to discipline officers who sexually harassed people or engaged in sexual violence, failed to investigate sexual assaults generally, and “tolerated sexual violence” among its officers, emboldening them to “engage in sexual violence with impunity.” *Id.* ¶¶87-181.

As explained below, the *facts* alleged by Plaintiff (as opposed to conclusions and speculation) do not support these rhetorical characterizations of unrelated events. The actual facts demonstrate APD *did* take action against police officers determined to have assaulted women, firing the only other officer named in the Complaint based on assault allegations. *Id.* ¶176. Other instances cited involve alleged events not at all comparable to Plaintiff’s alleged sexual assault, including inappropriate comments, sexual harassment, sexism in the workplace, and APD’s failure to properly investigate assault cases *not involving APD officers*. *Id.* ¶¶112-13, 126, 134, 160-68.

Plaintiff sued Dodds individually and the City for violating her constitutional rights, asserting Dodds’ assault was “highly predictable” because of APD’s “policies, practices, or customs,” which were “a moving force” of Dodds’ crime. *Id.* ¶¶197-99. Plaintiff amended her pleading twice.

III. LEGAL AUTHORITY

A. The law regarding dismissal motions under Rule 12(b)(1) and (6).

Dismissal of a complaint is appropriate under Federal Rule of Civil Procedure 12(b)(1) when the court lacks statutory or constitutional power to adjudicate the claims at issue. *Geraci v. City of Austin*, 1:19-CV-340-SH, 2020 WL 1644004, at *2 (W.D. Tex. Apr. 2, 2020) (citing *Home Builders Ass’n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998)). A plaintiff who fails to plead a cognizable claim against a governmental entity under §1983 fails to overcome the entity’s governmental immunity. *See id.*, at *4.

Relatedly, Rule 12(b)(6) permits a court to dismiss a complaint for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). To overcome a motion to dismiss under Rule 12(b)(6), the plaintiff must plead sufficient facts to state a claim for relief that is facially plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.” *Taylor v. Books A Million*, 296 F.3d 376, 378 (5th Cir. 2002). Thus, a court may begin by identifying pleadings that “because they are no more than conclusions, are not entitled to the assumption of truth.” *Ashcroft*, 556 U.S. at 679.

B. The law on municipal liability for constitutional violations under 42 U.S.C. § 1983.

A municipality may be liable for constitutional violations under 42 U.S.C § 1983, but there is no *respondeat superior* liability. *Monell v. Dep’t of Social Servs. of New York*, 436 U.S. 658, 691 (1978). A municipality is only liable for “acts directly attributed to it ‘through some official action or imprimatur.’” *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009). To proceed with a §1983 claim against a city, a plaintiff must “show the deprivation of a federally protected

right caused by action taken ‘pursuant to an official municipal policy.’” *Valle v. City of Houston*, 613 F.3d 536, 541 (5th Cir. 2010). Specifically, a plaintiff “must identify: (1) an official policy (or custom), of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose ‘moving force’ is that policy or custom.” *Id.* at 541-42.

A policy or custom is official only “when it results from the decision or acquiescence of the municipal officer or body with final policymaking authority over the subject of the offending policy.” *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). A policy will support liability if it was promulgated with a deliberate indifference to the “known or obvious consequence” that constitutional violations would result. *Bd. of Cnty. Comm’rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 407 (1997); *Est. of Davis v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005). Deliberate indifference is a high standard—a showing of simple or even heightened negligence will not suffice. *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001). To establish the “moving force” requirement, a plaintiff must show a direct causal link between the policy and the constitutional violation. *Id.* at 580. The pleading requirements “must not be diluted” because when a court “fails to adhere to [the] rigorous requirements of...causation, municipal liability collapses into *respondeat superior* liability.” *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998).

IV. ARGUMENT

A. Plaintiff has not alleged a *Monell* claim for failure to implement adequate policies for hiring, training, and supervision.

Plaintiff’s critique of law enforcement does not support a *Monell* claim. Underlying Plaintiff’s theories of inadequate hiring policies, training, and supervision by APD is the premise that law enforcement applicants are more likely to be sexual predators, thus necessitating special policies tailored to preventing sexual misconduct. *See Dkt. 17*, ¶¶47-54. This liability theory rests on unreasonable inferences and unsupported conclusions and strains credulity. The facts underlying this allegation may suggest liability is *conceivable*, but not that is *plausible*. *See Iqbal*, 555 U.S. at

680. Assessing the plausibility of a claim is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. Here, the specifics of APD’s hiring process and APD’s response to the only other substantiated incident of sexual assault by an officer are clear from the pleadings. It is simply implausible that all APD candidates are likely sexual predators, thus necessitating additional screening, training, and supervision procedures over and above those already in place. Plaintiff’s conclusion that police work appeals to sexual predators because they can avoid detection *if* they are hired, is a debatable argument, not a fact. It is equally conceivable that most individuals who seek law enforcement careers do so out of respect for the law and a desire to help protect the public, and not to commit sex crimes. And any alleged “opportunities” for sexual misconduct created by conditions of the policing profession, *see Dkt. 17, ¶48*, are countered by deterrents, such as a high-profile criminal prosecution. The Complaint also alleges “over one hundred police officers are caught engaging in sexual violence every year in the United States,” without any context as to whether this occurs on or off duty, or any other information from which one could reasonably infer that police officers tend to be sex criminals in greater proportions than other employees. Similarly, Plaintiff’s assertion that citizen complaints of sexual misconduct by law enforcement officers is second only to excessive force provides absolutely no context to suggest the prevalence of such complaints or how many are substantiated. *Id. ¶50*. These stage-setting conclusions do not establish that there is a heightened risk police officers will commit sexual assault while on-duty.

1. The Complaint does not establish *Monell* liability related to APD’s hiring practices.

Plaintiff claims that the City is liable for violations of her constitutional rights because it hired Dodds, who then went on to sexually assault Plaintiff. *Id. ¶¶47-72; 197(b)-(c)*. This claim rests on the contention that APD has inadequate pre-employment screening procedures to root out and disqualify likely sexual predators. But publicly available information, referred to in the Complaint,

establishes otherwise. Specifically, the “public version” of APD’s recruiting website *does* detail its hiring process, which includes processes Plaintiff deems necessary.

Here, the Complaint directs attention to “the public version of APD policy” regarding pre-employment screening, concluding that those policies are not enough. *Dkt. 17, ¶¶64*. Thus, these policies are central to Plaintiffs’ claims against the City of deliberate indifference in hiring Dodds. *See id. ¶¶47-72*. A true and correct copy of the publicly available pre-employment procedures and requirements is attached to this motion as **Ex. A**.¹ That document is properly considered in determining whether a claim has been made and which allegations should be taken as true.² When conclusory allegations and unwarranted deductions of fact are contradicted by facts disclosed in the exhibits to the motion to dismiss, the allegations in the complaint need not be taken as true. *See Carter v. Target Corp.*, 541 F. App’x 413, 417 (5th Cir. 2013).

Plaintiff alleges “[b]ased on the public version of APD policy, APD’s pre-employment process is limited to a drug test, a review of public social media information, proof of citizenship, proof of age, proof of education, proof of criminal history checks, and proof of any military discharge.”³ *Dkt. 17, ¶¶64*. Plaintiff then lists additional pre-employment procedures required to meet “minimum police standards” for vetting applicants to avoid hiring sex offenders. *Id. ¶¶65*. Plaintiff asserts through a strained causal chain that if APD had implemented a more appropriate pre-employment screening process, it would not have hired Dodds, and she would not have been assaulted. *Id. ¶¶71*.

¹ These are captured as screenshots and can be found at <https://www.apdrecruiting.org/hiring-process>.

² In deciding a motion to dismiss, the court may consider the pleadings, which include documents incorporated into the complaint by reference, and information subject to judicial notice. *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011). Documents attached to a motion to dismiss are considered a part of the pleadings if they are referred to in the plaintiff’s complaint and are central to the plaintiff’s claims. *Collins v. Morgan Stanley Dean Winter*, 224 F.3d 496, 490-99 (5th Cir. 2000); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (finding courts must consider documents incorporated into complaint by reference).

³ The Complaint artfully asserts “the *full* scope” of APD’s pre-employment process is “secret,” but in the next paragraph details “the *public version* of APD policy.” *Dkt. 17, ¶¶63-64*. As discussed herein, APD’s publicly available policy speaks for itself and does so clearly without conclusory characterizations by Plaintiff.

But APD’s public recruiting website establishes that the actual pre-employment screening process is much more extensive than the bare-bones process alleged in the Complaint, and *includes* some of the very protocols Plaintiff characterizes as “minimum standards” for identifying sexual predators. *See id.* ¶65. APD processes include a series of psychological questionnaires, a psychological interview, and a polygraph examination. *Ex. A, p. 2, 6-7, 9-10.* The questionnaires are “designed to measure a variety of personality and psychological factors related to police work.” *Id. p. 9.* A psychologist conducts an interview and decides whether the applicant “meets the mental and emotional fitness to function successfully” as an APD officer. *Id. p. 9-10.* Further, applicants undergo an extensive background investigation that requires them to provide, among other things, detailed contact information for prior employers, current and past romantic partners, and other personal references. *Id. p. 6-7.* In addition, those with law enforcement backgrounds must provide their personnel file and any Internal Affairs investigations involving the candidate, or an addendum explaining the reasons why it cannot be provided and efforts made to obtain this information. *Id. p. 7.* Thus, despite the Complaint’s conclusions, APD in fact has in place hiring policies aimed at avoiding hiring likely sexual predators—the very policies Plaintiff claims APD lacks.⁴

The Complaint would have the Court infer that APD should have known Dodds in particular was a known serial sexual predator, and not hired him. *See Dkt. 17, ¶¶55-60.* This unwarranted inference falls short for pleading purposes. Here, the pleading takes great liberties as it departs from actual facts. For example, the Complaint conclusorily asserts “Dodds’ background is also consistent with the profile of a serial sexual predator.” *Id. ¶56.* What his pre-APD “background” was appears nowhere in the pleading. The Complaint also alleges Dodds’ “*modus operandi*” in this alleged assault “reflects planning and a habitual pattern strongly indicative of a serial sexual predator,” *id. ¶ 55*, without any supporting facts or context. The Complaint further claims “on

⁴ Although not alleged in the Complaint, APD hired Dodds in 2017. The Complaint focuses on APD’s current hiring policy, and nowhere suggests those policies were different in 2017 when Dodds was hired.

information and belief” Doe was not Dodds’ first victim and he committed other sexual assaults working at previous law enforcement agencies. *Id.* ¶¶59-60. Even if this statement were true, there is no allegation Dodds committed any other sexual assaults while working for APD, or that APD had actual or constructive knowledge that he had sexually assaulted others in prior jobs. Even if the facts suggested APD was negligent in hiring Dodds, that does not give rise to §1983 liability. *See Rivera v. Bonner*, 952 F.3d 560, 565 (5th Cir. 2017) (“A showing of simple or even heightened negligence will not suffice” to impose *Monell* liability in context of hiring).

Nor has Plaintiff alleged facts of a pattern of APD hiring sexual predators, knowingly or intentionally. The alleged facts show the opposite. Despite the contentions that police officers are more likely to commit sexual violence, the Complaint identifies only two other specific instances of a sexual assault by an APD officer, discussed in greater detail in section IV.B.1. *Dkt. 17*, ¶¶124, 176. This trio of alleged isolated events simply does not amount to a constitutionally infirm “pattern” of poor hiring decisions at APD. With no facts showing a pattern, the Complaint instead asserts that during Chief Manley’s tenure an unspecified number of APD officers “continued to be accused of credible claims of sexual misconduct, including—but not limited to—sexual violence against women.” *Id.* ¶119. But this vague and conclusory assertion does not permit a reasonable inference that APD’s hiring policies caused Dodds to assault Plaintiff. There is no factual basis for casting these claims as credible, no indication of how many individual officers were accused or how many accusations were of sexual assault, or any allegations these accusations were the result of APD’s hiring policies. *See Doe v. Edgewood Indep. Sch. Dist.*, 964 F.3d 351, 368 (5th Cir. 2020) (finding no municipal liability where plaintiff had not shown a pattern of constitutional violations or decision by policymaker to continue following “an approach that they know or should know has failed to prevent” such constitutional violations).⁵

⁵ Plaintiff’s alternative theory that “on information and belief, APD actually did know or was deliberately indifferent to the fact that Dodds was likely a serial sexual predator, but chose to hire him anyway,” *Dkt. 17*, ¶72, is insufficient to establish *Monell* liability. A plaintiff must allege the existence of a policy or custom of deliberate indifference to

2. The Complaint has not alleged a *Monell* claim under a theory of failure to train.

Plaintiff claims the City is liable for her alleged assault due to APD’s failure to train officers. *Dkt. 17, §IV(C)*. Theories of municipal culpability under §1983 are at their most tenuous on a failure to train claim. *Connick v. Thompson*, 563 U.S. 51, 61 (2011). A plaintiff must show that a city’s failure to train its employees shows a “deliberate indifference” to constitutional rights. *Farmer v. Brennan*, 511 U.S. 825, 840 (1994). In this regard, a plaintiff must show that “in light of the duties assigned to specific officers..., the need for more or different training is obvious, and the inadequacy so likely to result in violations of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need.” *Sanders-Burns v. City of Plano*, 594 F.3d 366, 382 (5th Cir. 2010) (citing *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)). Generally, a plaintiff must demonstrate a pattern of similar violations arising from training. *Id.* at 382; *Snyder*, 142 F.3d at 799 (“[P]roof of a single...incident ordinarily is insufficient to hold a municipality liable for inadequate training.”). Proving that an injury could have been avoided had a government employee been better or more trained on the particular injury-causing conduct will not suffice to meet a §1983 plaintiff’s burden. *Canton*, 489 U.S. at 391.

Here, Plaintiff alleges no facts whatsoever regarding how APD trained any officers during the relevant period on how to handle reports of sexual assaults, how to prevent sexual harassment, or any other aspect of the job. Instead, Plaintiff broadly asserts “APD had, at all relevant times, no policies, training, procedures or supervision whatsoever calculated to prevent police sexual misconduct.” *Dkt. 17 ¶96*. The “public version” of the APD policies show the opposite. In addition to APD’s extensive and robust pre-hiring policies and procedures described above, APD policies require officers to know and comply with all laws, and specifically prohibit officers from engaging

likely violations of the constitutional rights of its citizens. *See, e.g., Roberts v. City of Shreveport*, 397 F.3d 287, 292 (5th Cir. 2005). While it would be regrettable if APD, even once, knowingly hired a sexual predator, this allegation of one isolated incident is insufficient to establish a custom or policy.

in any sexual conduct while on duty. *Ex. B* (Excerpt of APD General Orders).⁶ The notion that Austin police officers, unlike any other employees, are required to receive special training directing them not to sexually assault people is extraordinary.

As for Dodds, Plaintiff alleges no facts regarding his APD training. To prevail on a failure to train claim, a plaintiff must allege with specificity how a city's training program is inadequate. *Roberts*, 397 F.3d at 293. Plaintiff's bald, conclusory legal assertion that Dodds' training in particular was somehow inadequate will not support a claim. *See Ratliff v. Aransas Cnty.*, 948 F.3d. 281, 285 (5th Cir. 2020) (holding complaint's conclusory allegations that deficiency in training caused violation of constitutional rights does not state a claim for relief under Rule 12(b)).

In any event, courts have found that a failure to train officers not to break the law is insufficient to establish deliberate indifference on the part of a policymaker. *See Hernandez v. Borough of Palisades Park Police Dep't*, 58 F. App'x 909, 915 (3d Cir. 2003) (finding no deliberate indifference on part of policymakers in failure to train officers not to commit burglaries); *Atkins v. Cnty. of Riverside*, 151 F. App'x 501, 508 (9th Cir. 2005) (finding plaintiff did not explain how failure to train officers not to lie on a police report was "moving force" behind constitutional violations); *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 490 (11th Cir. 1997) (rejecting claim that officer's sexual molestation of arrestee resulted from deliberate indifference in training).

Furthermore, there is no alleged "pattern" of violations that would demonstrate a training deficiency at APD caused Dodds to sexually assault Plaintiff. Claims of inadequate supervision and inadequate training both generally require that the plaintiff demonstrate a pattern of similar violations. *Burge v. St. Tammany Parish*, 336 F.3d 363, 370 (5th Cir. 2003) ("Just as proof of a custom or practice requires more than a showing of isolated acts, proof of deliberate indifference, generally requires a showing of more than a single instance of the lack of training or supervision

⁶ This document is available at <https://www.austintexas.gov> > Police > General_Orders. Because the Complaint references APD's policies and procedures, it is properly considered for purposes of this motion. *See Dkt. 17, ¶96.*

causing a violation of constitutional rights”) (*citing Thompson v. Upshur Cnty.*, 245 F.3d 447, 459 (5th Cir. 2001)). This §1983 requirement was applied in *Posos v. City of San Antonio*, where a woman sued a city after a police officer sexually assaulted her. 463 F. App’x 303, 304 (5th Cir. 2012). There, the plaintiff was unable to establish that the City acted with deliberate indifference because she did not allege that other officers had engaged in similar conduct, and she did not establish that the city had actual or constructive notice of similar acts by the officer at issue. *Id.* at 305. Furthermore, evidence of decade-old past systemic issues within a police department does not necessarily support a showing of “a pattern of similar violations at the time [the plaintiff’s] own rights were violated.” *Gomez v. Galman*, 18 F.4th 769, 779-80 (5th Cir. 2021) (holding that reliance on DOJ investigation and independent report into problematic hiring policies does not create a pattern to support deliberate indifference, when the facts alleged related to the report include no discussion of similar, contemporaneous violations to the claims alleged by plaintiff). The Complaint’s references to alleged systemic issues at APD regarding the handling of sexual assault investigations and a report noting “sexism” within APD does not establish a pattern. *See id.* Most of the incidents alleged by Plaintiff occurred years before the facts underlying her claim. *See Dkt. 17, ¶¶160-168.* More importantly, these types of alleged failures are wholly dissimilar to Dodds’ alleged conduct. *See Est. of Davis*, 406 F.3d at 383 (holding prior acts must be “fairly similar to what ultimately transpired.”).

There are no facts alleged regarding Dodds’ history at APD. Although the Complaint darkly hints “Doe was not Dodds’ first victim,” *Dkt. 17 ¶59*, there is no allegation he had sexually assaulted anyone while at APD, or that APD was aware of prior sexual assaults by Dodds at any point. With no facts to support a claim that APD failed to properly train, the Complaint instead references a grab bag of past purported misdeeds by other APD officers. Other than the two alleged assaults discussed in section IV.B.1, none of these involved sexual assaults by APD officers.

3. The Complaint fails to plead a cognizable *Monell* claim for APD’s failure to supervise.

An inadequate supervision claim requires much of the same proof as a failure to train claim, including showing a failure to supervise, a causal connection between the lack of supervision and the violation of rights, and deliberate indifference to constitutional rights. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452-53 (5th Cir. 1994). Inadequate supervision claims require that the plaintiff demonstrate a pattern of similar violations. *Posos*, 463 F. App’x at 305. Here, instead of alleging any actual prior conduct by Dodds while at APD that would have demanded closer supervision, the Complaint focuses on Dodds alleged acts in the ten days *after* the assault, before Plaintiff reported it: his multiple phone calls to Plaintiff and one drive by her apartment complex. *Dkt. 17*, ¶75. How APD could have known about Plaintiff’s unreported assault during that period is not explained.⁷

Like a failure to train claim, caselaw holds that failing to supervise police officers to ensure they are not committing crimes does not establish deliberate indifference by a policymaker. Where the alleged act that caused the constitutional violation is obviously wrong, and there is no indication of a pattern of such wrongful behavior, the failure to supervise officers is not so likely to result in a violation of constitutional rights as to demonstrate deliberate indifference. *See Hernandez*, 58 F. App’x at 915 (finding no deliberate indifference for not supervising officers because “it was hardly obvious that police officers, sworn to uphold the law, would burglarize the homes of the very citizens whom they were duty-bound to protect...”); *Sewell*, 117 F.3d at 490 (rejecting plaintiff’s claim that officer’s sexual molestation of arrestee resulted from deliberate indifference in training and supervision). Plaintiff’s failure to supervise claim rests on this one, isolated incident involving what appears to be a rogue APD officer. The alleged facts do not present a situation where the need to supervise should have been obvious to policymakers based on a pattern of misconduct or officers repeatedly being put in a situation where the correct course

⁷ Although the Complaint suggests Dodds drove by Plaintiff’s apartment “multiple times,” such that his movements were suspicious, *see Dkt. 17*, ¶75, the Complaint alleges Dodds drove by Plaintiff’s residence only once. *Id.* ¶40.

of conduct may be unclear. “Where the proper response . . . is obvious to all without training or supervision, then the failure to train or supervise is generally not ‘so likely’ to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise.” *Walker v. City of New York*, 974 F.2d 293, 299-300 (2nd Cir. 1992).

Rather than allege a pattern of constitutional violations that would have alerted APD of the need to implement more extensive supervisory methods, Plaintiff rests on the premise that such a need existed in the abstract because individuals who seek law enforcement careers, and are hired, are likely to be sexual predators. As explained herein, this is an implausible inference that will not support a *Monell* claim based on alleged supervision deficiencies.

Moreover, there is no allegation that APD was aware of prior sexually inappropriate behavior by Dodds, or any other conduct that should have alerted APD to supervise him more closely.⁸ No facts reasonably suggest APD acted with deliberate indifference in connection with Dodds’ supervision. *See Limon v. City of Balcones Heights*, 485 F. Supp. 2d 751, 754 (W.D. Tex. 2007) (holding city did not act with deliberate indifference by failing to act before officer committed a second sexual assault, when city did not have notice of the first sexual assault).

One can argue what level of APD supervision would have stopped Dodds from assaulting Plaintiff. But to attribute Dodds’ actions to APD’s failure to monitor every phone call he made is an implausible liability theory. The speculation that APD could have done more falls short of the “rigorous standards of culpability and causation” that “must be applied to ensure that [the City] is not held liable solely for the actions of its employee.” *See Brown*, 520 U.S. at 405.

B. The Complaint fails to establish *Monell* liability through an official APD policy.

The Complaint also attempts to hold the City liable for Dodds’ purported actions under a theory that APD fostered an “ongoing culture of sexual misconduct” by its officers, which somehow

⁸ The Complaint alleges, “on information and belief” that Dodds had previously used his APD-issued cell phone and his APD patrol vehicle to sexually assault, harass, and intimidate others, but not that APD had any actual or constructive knowledge of these alleged past incidents that he was misusing police property. *Dkt. 17, ¶83*.

translated into an unwritten but nevertheless official custom which was the moving force of Dodds' alleged sexual assault. The Complaint lists the following so-called policies, practices, and customs:

- Failing to discipline officers for domestic violence and sexual assault;
- Wrongfully clearing or not investigating complaints of sexual assault against officers;
- Adopting a culture that tolerated sexual violence and sexist views.

Dkt. 17, ¶197. This liability theory is footed on unreasonable inferences, unsupported conclusions, and strained logic. Plaintiff's amorphous and conclusory characterization of a perceived "culture" of officially sanctioned officer rapes and cover-ups is not supported by factual allegations.

1. Two other instances of alleged sexual assaults by APD officers does not evidence a pattern or official policy.

For purposes of a *Monell* liability claim, an official policy can be established by "a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984). To establish a policy by alleging a pattern, the prior incidents must have occurred over a length and frequency to attribute knowledge of the conduct to the governing body such as to establish the conduct is accepted and expected. *Peterson*, 588 F.3d at 850. Additionally, "[a] pattern requires similarity and specificity; '[p]rior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question.'" *Id.* at 851.

There is no officially adopted APD policy Plaintiff can point to. Instead, the Complaint alleges there existed a vague, unarticulated custom at APD by virtue of a perceived persistent and widespread practice whereby officers committed sex crimes on duty because APD either endorsed, tacitly approved of, or willfully looked the other way when it happened. No alleged facts plausibly support that conclusion. The facts demonstrate the opposite: APD did not "foster" a culture of sex criminals on the police force, and disciplined those who broke the rules.

Although the Complaint alleges sexual misconduct by law enforcement officers is an extremely common complaint, the only other instance of a sexual assault by an APD officer alleged is an incident involving former APD commander Jason Dusterhoft. But Plaintiff concedes Chief Manley *fired* Dusterhoft in 2018 for “allegedly beating his then-girlfriend, including by strangling her during sex.” *Dkt. 17, ¶176*. The Complaint in ¶178 points to allegations in Dusterhoft’s lawsuit against the City as proof of APD’s culpability. But because Dusterhoft cannot be cast here as another example of an APD officer’s sexual assault going undisciplined⁹, the Complaint casts him as another victim of APD’s alleged unconstitutional policies. The circumstances of his termination do not plausibly support a *Monell* claim against the City.

As the Complaint notes, Dusterhoft was fired following APD’s 2018 internal investigation of his then-girlfriend’s complaint. *Dkt. 17, ¶176*. Chief Manley’s 2018 memorandum detailing the reasons for his decision confirms this, noting that Dusterhoft’s actions violated Texas criminal laws and APD’s Know and Comply Policy. *Ex. C, p. 31-32*.¹⁰ As noted above, APD’s “Know and Comply Policy” makes it the responsibility of all officers to “maintain a working knowledge and comply with *the laws*, ordinances, statutes and regulations, and APD written directives...” *Id., p. 32*. This policy was in effect when Dodds allegedly assaulted Plaintiff.¹¹ These facts contradict the conclusory assertion that APD “maintained a culture” of tolerating sexual violence by its officers.

To the extent Dusterhoft’s 2018 termination provides context to Dodd’s assault, the facts demonstrate complaints made to APD of sexual crimes by officers *were* taken seriously (whether the accused officer was on duty or not), such complaints *were* timely investigated and there *were* serious consequences for the accused officer if violations were found. The fact APD fired a commander in 2018 rebuts the conclusory assertion that “APD never disciplined” officers accused

⁹ The Complaint does not allege Dusterhoft assaulted his girlfriend while on duty or otherwise acted under color of state law in connection with his actions. Dusterhoft’s lawsuit make it clear he was off duty at the time. *Ex. C, p. 21*.

¹⁰ This excerpt from APD’s General Orders, which was attached as Exhibit A to the Motion to Dismiss in the Dusterhoft lawsuit, also appears as Exhibit B to this Motion, see p. 14, *supra*.

¹¹ The APD General Orders in Exhibit B note the date of the most recently issued orders as February 6, 2020.

of sexual violence. *See id.* ¶121. Such assertions, contradicted within the pleading and documents cited therein, need not be given weight for purposes of a Rule 12(b) motion. *See Washington v. Jones*, No. 21-0196, 2022 WL 468059, at *5 (W.D. La. Feb. 15, 2022) (dismissing claim based on alleged policy, noting plaintiff’s own complaint “appears to negate his argument”).

The Complaint alleges one other incident in March 2020 where an unknown woman “accused an APD officer of . . . groping her breast and vagina” without having a reason to frisk her. *Dkt. 17*, ¶124. APD did not discipline the officer, according to the Complaint. *Id.* But there is no allegation APD failed to investigate this accusation or that APD investigated it and determined it was true. The fact someone “accused” an officer who APD did not discipline does not support a reasonable inference there was any wrongdoing by the officer or APD. These allegations do not rise “above the level of mere speculation.” *See Gonzales v. Nueces Cnty.*, 227 F. Supp. 3d 698, 700 (S.D. Tex. 2017) (dismissing *Monell* unofficial policy claim where allegations of police misconduct charges “are devoid of any details to show that they share any facts that are similar to those involved here.”) (citing *Twombly*, 550 U.S. at 555). Unwarranted inferences cannot support a claim of municipal liability. *See Ferrer v. Chevron*, 484 F.3d 776, 780 (5th Cir. 2007) (holding court should not accept as true “conclusory allegations, unwarranted factual inferences, or legal conclusions”).

2. A smattering of alleged sexual harassment complaints at APD over the years does not constitute a pattern of sexual violence by APD officers sufficient to show a policy.

Allegations of sexual harassment complaints at APD in the years before Manley’s tenure do not amount to a discernible pattern of sexual violence that can plausibly be attributed to an official policy. The Complaint alleges three separate incidents. First, in 2008 APD officer Dustin Lee “sexually harassed a coworker” and then-chief Art Acevedo allowed Lee to “remain on the force.”¹² *Dkt. 17*, ¶112. The Complaint does not say Lee went undisciplined for the harassment.

¹² Eleven years later, Lee was allegedly “arrested by Round Rock Police for sexual assault of a child.” *Dkt. 17*, ¶112. There is no allegation Lee ever acted under color of law in connection with those 2019 criminal charges. The Court may not reasonably infer this was the case or that Lee’s criminal actions were driven by APD’s purported “culture.”

Second, the Complaint alleges in 2014 two APD officers were caught “whistling at a woman” and made an inappropriate remark, but Chief Acevedo did not discipline them.¹³ *Id.* ¶113-14. There is no allegation either officer ever committed any sexual violence against anyone. Third, the Complaint alleges that at some point Chief Acevedo disregarded *some* allegations by female officers that their male colleagues “assaulted them” as “just about ‘bad sex,’” *Id.* ¶115. There is no allegation APD failed to investigate these complaints or take appropriate action. Relatedly, the Complaint alleges during Acevedo’s tenure, APD’s sex crimes unit had “a wall with photos of people” determined to have falsely reported sexual violence. *Id.* ¶116.

These allegations do not demonstrate a pattern of sexual violence by APD officers sufficient to establish a custom. A pattern requires similarity, specificity, and sufficiently numerous prior incidents. *Peterson*, 588 F.3d at 851. Complaints of sexual harassment, inappropriate comments, and perceived, generalized “sexism” are simply not comparable to the sex crime Dodds allegedly committed on the job. *See Covington v. City of Madisonville*, 812 F. App’x 219, 227 (5th Cir. 2020) (holding no widespread practice established where “[n]one of the conduct alleged [] bears the necessary similarity to the purposeful...misconduct involved here.”). The prior acts must be “fairly similar to what ultimately transpired.” *Est. of Davis*, 406 F.3d at 383 (finding no pattern existed where prior acts, while demonstrating lack of judgment and perhaps illegalities, did not involve behavior related to plaintiff’s claim). Moreover, this handful of isolated incidents took place over a period of eight years (2008 to 2016) and before Manley, the policymaker named in the Complaint, became Chief. *Dkt. 17, ¶¶111-116, 198.*

3. Critiques of APD’s operations do not establish an official policy of condoning sex crimes by officers.

¹³ Plaintiff originally pleaded Chief Acevedo “did not *seriously* discipline” these officers. *Dkt. 1, ¶44.* Plaintiff’s purposeful, conclusory repackaging of the allegation is not inconsequential. Had APD taken some disciplinary action against the officers, as Plaintiff originally suggested, that would contradict the theory that APD intentionally overlooked the matter. *See Covington*, 812 F. App’x at 227 (noting “in many instances, [the] allegations reflect some disciplinary or other remedial actions being taken by the supervising police chief,” contradicting assertion that police had widespread practice of overlooking wrongdoing).

The Complaint cites a handful of reports, studies, and statistics to establish APD's purported unofficial policy. These alleged facts do not plausibly support a *Monell* claim. First, the pleading lists the number of annual complaints made against APD twenty years ago, none of which appear to involve any sexual assaults by officers, followed by the annual numbers of "code of conduct violations" alleged against officers from 2004 to 2015. *Dkt. 17, ¶¶101-104*. Unremarkably for one of the nation's fastest growing cities, *alleged* "code of conduct violations" by APD officers has increased. *Id. ¶104*. None of the alleged data demonstrates any instance where an officer committed a sexual assault on duty, or was even accused of that. The Complaint suggests on information and belief "many of these generically reported" complaints involved sexual assault by officers, but APD did not investigate or discipline the officers. *Id. ¶106*. This conclusory assertion is insufficient to state a policy claim under *Monell*.

Factual allegations "that are merely consistent with a defendant's liability . . . stop short of the line between plausibility and entitlement to relief" and are inadequate for establishing *Monell* liability. *Iqbal*, 556 U.S. at 678. The fact *some* complaints over the last twenty years *might* have involved alleged sexual assault by APD officers, and *some* of those *might* have been substantiated is nothing more than speculation. These alleged facts suggest nothing more than "a sheer possibility that the defendant has acted unlawfully," which is insufficient. *Id. (citing Twombly*, 550 U.S. at 556). Along the same lines, the Complaint alleges there were "internal reports" about "numerous accusations" of sexual violence by APD officers, but the officers were "never disciplined" and APD did not "seriously investigate" and arrest the officers. *Dkt. 17, ¶121*. This allegation—long on conclusions and short on supporting facts—does not substantiate an actual policy at APD of allowing officers to commit sexual assaults on duty.

The other reports the Complaint cites are even more attenuated. They include a 2020 outside report finding APD's chaplain "makes sexist comments," and other "sexist name calling" has been

reported at APD. *Dkt. 17*, ¶¶125-127. There is no allegation this report found a problem with APD officers sexually assaulting anyone. In the same vein, the Complaint alleges an unknown female employee recently accused a male APD officer of sexual harassment, but it fails to state how APD responded to that complaint or if it was substantiated. *Id.* ¶134. Even if it was, this allegation does not demonstrate a “custom” at APD of ignoring, or condoning, criminal acts by officers.

The Complaint also references a 2018 arrest-rate study, lists APD’s arrest rates for reported rapes from 2011 to 2018, and alleges APD’s sex crimes unit is understaffed, all without context or comparison to other cities. *Dkt. 17*, ¶¶135-147. Finally, the Complaint lists eight instances over a dozen years where APD officers purportedly mishandled, in some fashion, sexual assault allegations, including that APD officers sometimes “rolled their eyes” and “criticized victims.” *Id.* ¶¶160-168, 171-72. None involved an APD officer committing the assault, and these allegations are insufficient to establish an APD custom or policy of green-lighting sexual assaults by officers.

To survive a motion to dismiss, Plaintiff must allege enough facts “to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. The Complaint’s exhaustive critique of how APD investigated assault allegations over the past decades, ripe with conclusions and rhetoric, comes no closer to establishing *Monell* liability than the inapt comparison of the Dusterhoft matter.

4. Any alleged “official policy” was not the moving force behind Dodds’ alleged assault.

For an official policy to be the “moving force” behind a constitutional violation, there must be “a direct causal link between the municipal action and the deprivation of federal rights.” *Valle*, 613 F.3d at 542 (5th Cir. 2010) (*quoting Brown*, 520 U.S. at 404). The moving force requirement is a “high threshold” when it comes to unofficial policy claims. *See Piotrowski*, 237 F.3d at 580. For pleading purposes, this requires “more than a mere ‘but for’ coupling between cause and effect”; it must be “the actual cause of the constitutional violation.” *Valle*, 613 F.3d at 546.

Plaintiff's theory that APD's purported "culture" caused Dodds to assault her is a bridge too far. The theory that Dodds' assault was caused by APD's allegedly deficient staffing of its sex crimes unit, purported inappropriate remarks by officers, and a failure to fire nameless officers allegedly "accused" of unspecified misconduct, defies common sense. *See Iqbal*, 556 U.S. at 678.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant City of Austin respectfully requests that Plaintiff's claims against the City be dismissed, and that the City be awarded any other relief to which it may be entitled.

RESPECTFULLY SUBMITTED,

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

/s/ Paul Matula

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ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

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 8th day of July 2022.

Via CM/ECF:

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/s/ Paul Matula

PAUL MATULA

Exhibit A – Public Version of APD’s Hiring Policies



Hiring Process

This page will explain the hiring process for our Regular Academy and Transitional Officer Program. There are a number of steps which must be completed prior to receiving an offer for employment. For some candidates, the order of steps may be rearranged slightly – regardless, all steps in the hiring process must be successfully completed in order for you to be hired. Applicants who do not meet the minimum requirements will be disqualified. Please note: out of town applicants will be required to travel to Austin at least two times throughout the hiring process.

MINIMUM QUALIFICATIONS

All applicants must meet the following minimum requirements to apply for the position of police cadet:

- Must be between 20.5 and 45 years of age at time of application
- Must possess a High School Diploma or GED
- Must have a valid driver's license
- Must be a U.S. citizen (by birth or naturalized)
- Must read, write, and speak English

ALL

APPLICATION

APPLICATION REVIEW

PHASE I TESTING

BACKGROUND INVESTIGATION

PHASE II TESTING

OFFER OF EMPLOYMENT

ORIENTATION

| | |
|--------------------|---|
| Submit Application | + |
| Intake Review | + |
| Phase I Testing | - |

Phase I Testing

Applicants who pass the Intake Review process will be scheduled for Phase I Testing. An electronic Background History Statement (BHS) will be requested upon successful completion of Phase I Testing.

This portion of the process is a one day event and includes the written exam, a series of psychological questionnaires, and the physical fitness tests. Applicants will be required to bring the following documentation to Phase I Testing:

- Original/Certified Birth Certificate
- Naturalization documents, if applicable
- Social security card
- Current driver's license
- High school diploma, official high school transcripts, or GED
- Official departmental forms (link provided in testing confirmation email)

Because the physical fitness tests will be conducted on this day, applicants are encouraged to wear athletic attire and to bring drinks or snacks.

Failure to sit for the written exam or failure to earn a passing score of at least 70 will result in your disqualification from the hiring process. Applicants must review the Reading Comprehension Manual (</sites/default/files/inline-files/National-Police-Select-Test-Reading-Comprehension-Manual%20UPDATED.pdf>) prior to sitting for the exam - a number of questions on the exam will be based on this reading material. We also strongly suggest that you review the Candidate Orientation Guide (</sites/default/files/inline-files/Austin%20PD%20NPST-R%20Candidate%20Orientation%20Guide.pdf>) and take the free practice exam. This will give you a better understanding of what to expect on the day of the exam.

Physical Fitness Test

The physical fitness test is Pass/Fail and is based on a test of push-ups, sit-ups and a 1.5 mile run. These tests will assess your core strength, upper body strength, and cardiovascular endurance. Scores on these tests are graded by age and gender. You must average 70% or better on any two tests, AND the overall average must be 50% or better in all three events. Consistent preparation well in advance of testing day is the key to performing well on the PT test. After consulting with your physician, start a daily routine of doing push-ups and sit-ups--starting in small increments will help. Doing several repetitions throughout the day of 5-10 push-ups or sit-ups at a time will pay big dividends on your PT Test. As you progress, gradually add in greater numbers of push-ups/sit-ups per set. Begin a regular running routine to develop your cardiovascular endurance. Please do not wait until test day to see if you are capable of passing—you should know about how well you will perform on the test before you get here for testing.

70% Chart for Each Physical Event

| Male | | | | | | |
|--------------|-------|-------|-------|-------|-------|-------|
| Age Group | 20-24 | 25-29 | 30-34 | 35-39 | 40-44 | 45-50 |
| 1.5 Mile Run | 12:45 | 12:45 | 12:45 | 12:45 | 13:04 | 14:04 |
| Push-Ups | 41 | 41 | 34 | 34 | 26 | 26 |
| Sit-Ups | 40 | 40 | 39 | 39 | 34 | 34 |

| Female | | | | | | |
|--------------|-------|-------|-------|-------|-------|-------|
| Age Group | 20-24 | 25-29 | 30-34 | 35-39 | 40-44 | 45-50 |
| 1.5 Mile Run | 14:26 | 14:36 | 15:25 | 15:48 | 17:04 | 17:45 |
| Push-Ups | 22 | 22 | 16 | 16 | 13 | 13 |
| Sit-Ups | 38 | 38 | 30 | 30 | 27 | 27 |

Candidates who pass all aspects of Phase I Testing with a score of 70 or above will move on to the Background Investigation stage of the hiring process.

Physical Readiness

In addition to the initial physical fitness test which applicants are required to pass at a 70% rate during Phase I Testing and at an 80% in the academy, police cadets are required to participate in a lot of physical training. This includes, but is not limited to: sprinting, jogging, squats, push-ups, sit-ups, carrying weight overhead, planks, and intervals. We highly recommend that potential applicants begin an exercise regimen that includes cardio exercise

prior to or at the time of application and to remain consistent with your training throughout the hiring process. An effective regimen should include High Intensity Interval Training (HIIT) or CrossFit style workouts.

Background Investigation +

Phase II Testing +

Offer for Hire +

Mandatory Orientation +

Tweets by @JoinAPD



Austin PD Recruiting

@JoinAPD

"I believe to make a difference, you have to be the difference. And I love what I do!" -Officer Terrell Ellis

Officer Ellis has been with the Austin Police Department for two years and is assigned to the evening shift on Central East Patrol (aka Charlie Sector).



Apply (<https://apdintake-austintexas.icims.com/>)

Careers (/careers)



Hiring Process

This page will explain the hiring process for our Regular Academy and Transitional Officer Program. There are a number of steps which must be completed prior to receiving an offer for employment. For some candidates, the order of steps may be rearranged slightly – regardless, all steps in the hiring process must be successfully completed in order for you to be hired. Applicants who do not meet the minimum requirements will be disqualified. Please note: out of town applicants will be required to travel to Austin at least two times throughout the hiring process.

MINIMUM QUALIFICATIONS

All applicants must meet the following minimum requirements to apply for the position of police cadet:

- Must be between 20.5 and 45 years of age at time of application
- Must possess a High School Diploma or GED
- Must have a valid driver's license
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- Must read, write, and speak English

ALL

APPLICATION

APPLICATION REVIEW

PHASE I TESTING

BACKGROUND INVESTIGATION

PHASE II TESTING

OFFER OF EMPLOYMENT

ORIENTATION

| | |
|--------------------------|---|
| Submit Application | + |
| Intake Review | + |
| Phase I Testing | + |
| Background Investigation | - |

Background Investigation

Applicants will submit an electronic Background History Statement (BHS) within 10 (ten) days of successful completion of Phase I Testing. All required documents must be submitted to the Recruiting Unit online through the iCIMS portal prior to attending Phase I Testing. In order to prepare for the amount of information required in the Background Investigation phase, it is highly recommended that applicants begin gathering this information immediately after submitting the initial application. You will be asked to provide:

- Last 10 years of chronological work and volunteer history, including phone numbers and email addresses for a supervisor and coworker at each place of employment or for each volunteer position
- Last 10 years of chronological residence history
- Last 10 years of relationship history including names, phone numbers, and email addresses for current and past relationships
- Life history of vehicle crashes, citations, and warnings
- Contact information for all immediate family members including parents, step-parents, adoptive parents, in-laws, siblings, half-siblings, step-siblings, adoptive siblings and all children
- Contact information for 5 personal references that you have known for at least 2 years

(cannot include family members, current/prior relationship, or current/prior supervisors/coworkers that are already listed in your work history section)

Documentation that must be submitted electronically through the iCIMS portal:

- Driver’s license
- Social security card
- High school diploma, official high school transcripts or GED
- Original or certified birth certificate
- Naturalization documents, if applicable
- College transcripts, if applicable
- DD214 (Member 4 or Service 2 versions only) or good standing letter from Commanding Officer if active military, if applicable
- Marriage license(s), if applicable
- Divorce decree(s) and addendum(s), if applicable
- Last 2 earnings statements from your current job or last filed tax return if unemployed
- Current or prior law enforcement: Copy of personnel file and any Internal Affairs investigations in which you have been involved. If you are unable to obtain this documentation, you must provide an addendum explaining the reason(s) why and what you did to attempt to obtain this information.
- You may be asked to supply an updated Experian credit report at some point during the background investigation

Once the applicant has provided all of the required information, uploaded copies of required documentation to the iCIMS portal, and passed Phase I Testing, a Background Investigator will conduct the investigation. Applicants are expected to communicate with their assigned investigators in a timely manner throughout this stage of the hiring process. Failure to respond with required information, or a failure to communicate in a timely manner will result in your disqualification.

| | |
|-----------------------|---|
| Phase II Testing | + |
| Offer for Hire | + |
| Mandatory Orientation | + |



Hiring Process

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ALL

APPLICATION

APPLICATION REVIEW

PHASE I TESTING

BACKGROUND INVESTIGATION

PHASE II TESTING

OFFER OF EMPLOYMENT

ORIENTATION

| | |
|--------------------------|---|
| Submit Application | + |
| Intake Review | + |
| Phase I Testing | + |
| Background Investigation | + |
| Phase II Testing | - |

Phase II Testing

Applicants who successfully complete the Background Investigation stage of the hiring process will be invited to complete Phase II Testing. This is a multi-step process that consists of online and in-person testing:

Online:

- The psychological questionnaires administered include the Minnesota Multiphasic Personality Inventory (MMPI) and the Inwald Personality Inventory (IPI). Both are designed to measure a variety of personality and psychological factors related to police work. Results will be reviewed by a psychologist and follow-up questions may be asked during the psychological interview in Phase II.

In-Person:

- Psychological interview – The psychological interview is conducted by a Department psychologist and consists of a one-on-one interview with the applicant along with a review

of the previously taken psychological questionnaires (MMPI & IPI). The psychologist will decide whether or not the candidate meets the mental and emotional fitness to function successfully as a police cadet and upon graduation, as an Austin Police Officer. Candidates should dress in business formal attire for this interview. The psychological interview and oral board interview are scheduled to occur on the same day.

- Oral board interview –The candidate will be sat in front of a panel of Austin Police officers ranging from the rank of officer to lieutenant. During the oral board, the applicant will be asked questions designed to demonstrate certain knowledge, skills and abilities considered basic for the effective performance as a police officer. Candidates should dress in business formal attire for the oral board interview.
- Polygraph examination – The candidate will receive instructions on how to prepare for the polygraph examination. A pre-polygraph questionnaire will be completed during Phase I Testing. The polygraph examiner will develop your examination from the information you give on the pre-polygraph questionnaire and from the report provided by your background investigator. The polygraph examination is approximately a 2 hour process.
- Medical assessment – Applicants who successfully complete all previous stages of the hiring process will be required to take a general fitness assessment and medical examination conducted by Austin Police Wellness staff. Each candidate's physical and medical condition will be evaluated to ensure that he/she can function safely as a police cadet. If the applicant's medical history or the physical findings by the Department physician indicate the need for further clarification the applicant will be required to submit their medical records to the Austin Police Staff Physician. Upon completion of the physical assessment, the candidate will be given directions to proceed directly to a medical facility to undergo a collection of bodily fluids and hair samples. The samples will be analyzed to detect the use of illegal drugs.

Offer for Hire

+

Mandatory Orientation

+

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Austin PD Recruiting

@JoinAPD

"I believe to make a difference, you have to be the difference. And I love what I do!" -Officer Terrell Ellis

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(512) 974-4211

APDRecruiting@austintexas.gov (<mailto:APDRecruiting@austintexas.gov>)

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Exhibit B – Excerpt of APD’s General Orders

GO
900**Austin Police Department**
General Orders

General Conduct and Responsibilities

900.1 PURPOSE AND SCOPE

It is the policy of the Austin Police Department that employees conduct themselves at all times in a manner that reflects the ethical standards consistent with APD written directives. This order shall apply to all sworn and civilian members, including volunteer, part-time, auxiliary, and non-paid civilians affiliated with the Department through a Department-sponsored program while under the direction of a Department employee.

This order is intended to guide employees in conducting themselves and their affairs, both on-duty and off-duty, in a manner that reflects the professionalism required of Department personnel. Furthermore, this order is intended for internal use only and shall not be construed to increase or establish an employee's civil or criminal liability, nor shall it be construed to create or establish a higher standard of safety or care.

900.1.1 RESPONSIBILITY TO KNOW AND COMPLY

The rules of conduct set forth in this order do not serve as an all-inclusive list of requirements, limitations, or prohibitions on employee conduct and activities; employees are required to know and comply with all Department policies, procedures, and written directives.

- (a) Employees will maintain a working knowledge and comply with the laws, ordinances, statutes, regulations, and APD written directives which pertain to their assigned duties.
- (b) Employees who do not understand their assigned duties or responsibilities will read the relevant directives and guidelines, and will consult their immediate supervisor for clarification and explanation.
- (c) A lack of knowledge of an APD written directive is not a defense to disciplinary action.

900.2 REQUIRED REPORTING OF VIOLATIONS

Employees have an obligation and responsibility to report all facts or credible information they know regarding any criminal activity by other employees or any breach of APD written directives.

- (a) Suspected Criminal Activity
 1. Employees will report any knowledge or credible information regarding criminal activity of another employee via memorandum to IA, SIU, or any supervisor in their chain-of-command.
 - (a) When a memorandum is presented to a supervisor, the supervisor will notify his chain-of-command.
 - (b) When a memorandum is presented to an assistant chief/director, it will be immediately forwarded to IA and SIU.
- (b) Suspected General Order Violations
 1. Employees will report any employee known or believed to be guilty of any violation of a rule, regulation, or order issued by the Department to their immediate supervisor.

Austin Police Department

General Orders

General Conduct and Responsibilities

1. No more than four (4) officers, uniformed or plainclothes, who are identifiable as officers by the display of badges, police radios, insignias, or any articles of clothing identifying them as police officers, will congregate in a public place except when required by official police duties or as authorized by a supervisor.
2. Except as necessary to perform assigned tasks or as authorized by a supervisor, the following restrictions apply to the number of marked APD police units parked in a parking lot or near a public place at any one time:
 - (a) No more than two (2) between the hours of 6:00 am and 10:00 pm, daily; or
 - (b) No more than four (4) between the hours of 10:00 pm and 6:00 am, daily.

900.3.3 PROHIBITED ASSOCIATIONS

- (a) Employees will not establish an external social relationship with a known victim, a known witness, or a known suspect of a crime while such case is being investigated by this Department or prosecuted as a result of such an investigation.
- (b) Employees will not establish social and/or business dealings with persons they know, or should know, are likely to adversely affect the employee's or Department's credibility. Employees will not associate with convicted felons. Provisions of this section do not apply to association based on kinship or the discharge of official duties.
- (c) Employees will not knowingly loan money, accept as pawn any item, or enter into any type of business arrangement with a suspect of a criminal violation, a person under arrest or detention, a person known to have a criminal record or unsavory reputation, or a person known to be engaged in, or planning to engage in, criminal activity.
- (d) Employees will not affiliate with any organization or body, the constitution or regulations of which would in any way prevent or hinder performing departmental duties.
- (e) Employees will not knowingly associate with any person or organization which advocates hatred, prejudice, or oppression of any person or group or which disseminates such material.
- (f) Employees will not become a member of any organization, association, movement, or group which advocates the commission of acts of force or violence to deny others their rights under the Constitution of the United States or which seeks to alter the form of government of the United States by unconstitutional means.

900.3.4 PERSONAL CONDUCT

- (a) Employees will not knowingly enter a location engaged in prostitution, illegal gambling, or any establishment wherein laws are being violated.
- (b) Supervisors will not place themselves under financial obligation to a subordinate.
- (c) **While on-duty or on the premises of City facilities, employees will not:**
 1. Use loud, indecent, profane, harsh, derogatory language, or use belittling term in any communications.

Austin Police Department

General Orders

General Conduct and Responsibilities

2. Ridicule, mock, taunt, embarrass, humiliate, or shame any person, nor do anything that might incite that person to violence.
 3. Indulge in "horseplay."
 4. Produce or display graffiti of any nature.
 5. Post or display derogatory, offensive or lewd pictures which degrade or lower the self-esteem of fellow employees and would undermine the goal of professionalism within APD.
 6. **Engage in any sexual conduct including lewd acts or solicitation for sex.**
- (d) While on-duty or wearing any item which makes one identifiable to the public as an APD employee, employees will not:
1. Sleep.
 2. Engage in gambling, including lottery games.
 3. Play games, including cards, dominoes, billiards, video or computer games, watch television or movies, or otherwise engage in entertainment, unless it is job related and has been approved by their commander/manager.
 4. Read newspapers, magazines, books, or other material, except during approved breaks.
 5. Study for promotional examinations.
 6. Take an authorized break in a sexually oriented business.
 7. Ride a personally owned motorcycle without a DOT approved motorcycle helmet.

900.3.5 USE OF BADGE OF OFFICE OR AFFILIATION WITH THE DEPARTMENT

- (a) Employees will not intentionally use their affiliation with the Department to influence another into offering a gift, gratuity, free or discounted service, reward, or special consideration. This includes:
1. For the personal benefit of self, family, friends, or associates.
 2. For the financial gain of self, family, friends, or associates.
 3. Obtaining privileges not otherwise available to them, except where necessary in the performance of their duty.
 4. Avoiding the consequences of illegal acts.
- (b) Employees will not permit the use of the name of the Austin Police Department for advertising purposes without the approval of the Chief.
- (c) Employees will not permit or authorize the use of their names, photographs, or official titles in connection with testimonials or advertisements of any commodity or commercial enterprise if such use identifies the employee as a member of the Department.

**Exhibit C – Motion to Dismiss in
Dusterhoft Lawsuit**

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

JASON DUSTERHOFT, §
§
Plaintiff, §
v. §
§
CITY OF AUSTIN, and BRIAN MANLEY, §
Individually and in His Official Capacity, §
and JUSTIN NEWSOM, Individually and §
in his Official Capacity, and TROY GAY, §
Individually and in his Official Capacity §
§
Defendants. §

Case No.: 1:20-cv-01081-RP

DEFENDANTS’ RULE 12(b)(1) & 12(b)(6) MOTION TO DISMISS

Defendants City of Austin (“City”) and Defendants Brian Manley, Justin Newsom, and Troy Gay (“Individual Defendants”) move to dismiss all of Plaintiff Jason Dusterhoft’s claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), as follows:

I. INTRODUCTION & SUMMARY OF ALLEGATIONS

Plaintiff Justin Dusterhoft is a former Commander and Assistant Chief for the City’s Police Department. He has sued the City and the Individual Defendants for alleged First Amendment retaliation under 42 U.S.C. § 1983. His allegations are relatively simple but fatally deficient.¹

Dusterhoft contends that, on July 14, 2017, he had a meeting with Chief of Police Brian Manley and Assistant City Manager Rey Arellano, during which Chief Manley demoted him from Assistant Chief to Commander. Compl. (Dkt. 1) ¶ 4.3. Upon hearing of his demotion, Dusterhoft purportedly “chose to speak up” about a variety of “criminal and serious policy violations.” *See*

¹ As they must at this procedural stage, the City and the Individual Defendants treat Dusterhoft’s non-conclusory, non-speculative factual assertions as true, even though they strenuously deny many of them.

id. ¶¶ 4.3-4.12 (alleging malfeasance by various departments and officers under Dusterhoft’s supervision and criticizing Chief Manley’s handling of incidents). According to Dusterhoft, after hearing his allegations, Chief Manley and Assistant City Manager Arellano told Dusterhoft “he would not be demoted after all.” Then, three days later, Chief Manley allegedly “changed his mind” and effectuated Dusterhoft’s demotion. *Id.* ¶¶ 4.13 & 4.15. Nothing further came of the July 2017 meeting until August 2018² – more than a year later – when Dusterhoft’s ex-girlfriend reported he had physically assaulted her. *Id.* ¶ 4.30.

As part of the ensuing assault investigation, the City’s Police Department obtained a statement from Dusterhoft’s ex-girlfriend – an action Dusterhoft characterizes as “overly forceful” and claims was “personally” directed by Chief Manley. *Id.* Chief Manley then terminated³ Dusterhoft’s employment in December 2018 – 17 months after their July 2017 conversation – based on information obtained during the assault investigation. *Id.* ¶¶ 4.32-4.33. Dusterhoft speculates – without alleging any corroborating facts – that Chief Manley must have taken these actions “for no good reason other than he wanted to retaliate against Dusterhoft for having previously brought problems within the department to his attention and to the attention of [Assistant City Manager] Arellano.” *Id.* ¶¶ 4.32-4.33.

² Dusterhoft alleges that the assault complaint and subsequent investigation occurred in 2019, although both actually occurred in 2018. Defendants believe the error was inadvertent, but, regardless, the Court may take judicial notice by referring to the disciplinary memorandum itself, which is both a matter of public record and referenced by Dusterhoft himself in his Complaint. *See* Ex. A, Dec. 20, 2018 Memo, available at <https://joplin3-austin-gov-static.s3.amazonaws.com/production/media/documents/Dusterhoft - 12.20.18 redacted 1 .pdf>; *see also Colonial Oaks Assisted Living Lafayette, L.L.C. v. Hannie Dev., Inc.*, 972 F.3d 684, 688 (5th Cir. 2020) (“[W]e may take judicial notice of matters of public record . . . when ruling upon a Rule 12(b)(6) motion.”); *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019) (noting that a Court considering a motion to dismiss may “properly consider” documents “referred to in the complaint and . . . central to the plaintiff’s claims”).

³ As a technical matter, Chief Manley indefinitely suspended Dusterhoft, but, pursuant to the Texas Local Government Code, “[a]n indefinite suspension is equivalent to dismissal from the department.” TEX. LOC. GOV’T CODE § 143.052(b).

Dusterhoft closes his Complaint with additional accusations against Assistant Chiefs of Police Troy Gay and Justin Newsom, whom he claims declined to comply with administrative subpoenas issued in the course of his post-termination arbitration proceedings. *See id.* ¶¶ 4.35-4.56. To tie Assistant Chiefs Gay and Newsom into his First Amendment retaliation claims, Dusterhoft speculates (again without alleging any corroborating facts) that Assistant Chief Gay “was aware of Dusterhoft’s previous complaints” because “he is best friends with Chief Manley[,]” and that Assistant Chief Newsom erroneously believed that Dusterhoft was responsible for an anonymous complaint another police officer filed in October 2019 – oddly, well after Dusterhoft’s employment was terminated. *See id.* ¶¶ 4.37, 4.41, & 4.54.

Through all of his speculative allegations, Dusterhoft attempts to cobble together a First Amendment retaliation claim against the City as well as the three Individual Defendants, Chief Manley and Assistant Chiefs Gay and Newsom. However, as articulated, Dusterhoft’s claims cannot survive a Rule 12 Motion to Dismiss. Succinctly stated, Dusterhoft cannot: (1) plead that he engaged in constitutionally protected speech; (2) meet the demanding threshold for asserting municipal liability; or (3) overcome the Individual Defendants’ entitlement to qualified immunity. Consequently, this Court should dismiss his lawsuit either for lack of subject-matter jurisdiction or because he fails to state a plausible claim for relief.

II. ARGUMENTS & AUTHORITIES

A. *Standard of Review.*

Dismissal is appropriate under Rule 12(b)(1) when the Court lacks statutory or constitutional power to adjudicate the claims at issue. *Geraci v. City of Austin*, 1:19-CV-00340-SH, 2020 WL 1644004, at *2 (W.D. Tex. Apr. 2, 2020) (citing *Home Builders Ass’n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998)). It is appropriate where, as here, a

plaintiff fails to plead a cognizable claim under Section 1983 and thereby fails to overcome a governmental entity's entitlement to governmental immunity. *See id.* at *4.

Dismissal is appropriate under Rule 12(b)(6) “when the plaintiff has not alleged ‘enough facts to state a claim to relief that is plausible on its face’ and has failed to ‘raise a right to relief above the speculative level.’” *Jackson v. City of Hearne, Tex.*, 959 F.3d 194, 200 (5th Cir. 2020) (citing *True v. Robles*, 571 F.3d 412, 417 (5th Cir. 2009)). As a general principle, a court must accept a complaint's allegations as true at this stage in the proceedings, but this maxim “is inapplicable to legal conclusions[,]” and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Thus, “a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Id.* at 679. Only after discarding those assertions should the court then determine whether the remaining allegations “plausibly give rise to an entitlement to relief.” *Id.*

Moreover, in lawsuits against government officials, “the plaintiff ‘must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged **and that defeat a Q[ualified] I[m]munity defense with equal specificity.**’” *Jackson*, 959 F.3d 194, 201 (5th Cir. 2020) (quoting *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012)) (emphasis added). In other words, “[t]he plaintiff has the burden of establishing a constitutional violation and overcoming a QI defense.” *Id.* (citing *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc) (per curiam)). “When the defendant asserts qualified immunity, the court can order the plaintiff to submit a reply, refuting the immunity claim “with factual detail and particularity.” *Johnson v. Halstead*, 916 F.3d 410, 416 (5th Cir. 2019) (citation omitted).

B. *Dusterhoft fails to plead facts sufficient to state a claim for violations of his First Amendment speech rights.*

As noted below, Dusterhoft’s claims against both the City and the Individual Defendants require him to adequately plead (and eventually prove) a cognizable constitutional violation. *See* Parts C & D, *infra*. However, he cannot do so, so all of his claims fail for this reason alone.

In particular, Dusterhoft contends the City “retaliated against [him] for exercising his first amendment right of free speech.” Compl. (Dkt. 1) ¶¶ 5.3. To state such a claim, Dusterhoft must allege facts sufficient to show: (1) he suffered an adverse employment action; (2) he spoke as a citizen on a matter of public concern; (3) his interest in the speech outweighed the government’s interest in efficient provision of public services; and (4) the speech precipitated the adverse employment action suffered. *Anderson v. Valdez*, 913 F.3d 472, 476-77 (5th Cir. 2019), *reh’g denied*, 916 F.3d 404 (5th Cir. 2019) (citation omitted). Dusterhoft cannot satisfy the first, second, or fourth elements as a matter of law.⁴

1. Dusterhoft did not speak as a private citizen.

It is well-settled that “[a] public employee’s speech is not protected when he speaks ‘pursuant to [his] official duties.’” *Johnson*, 916 F.3d at 422 (citation omitted) (first alteration added). As the Fifth Circuit has stated:

In determining whether an employee was speaking as part of his duties or had stepped outside that role to speak as a citizen and thus receive First Amendment protection, we consider “factors such as job descriptions, whether the employee communicated with coworkers or with supervisors, whether the speech resulted from special knowledge gained as an employee, and whether the speech was directed internally or externally.”

...

One way to determine the role of the speaker is to look to the identity of the listener. Complaints made publicly or to individuals outside the speaker’s organization suggest the employee is acting as a citizen. . . . But complaints made up the chain of command about conditions in a workplace are often held be found unprotected.

⁴ Defendants address the first element (existence of an adverse employment action) and fourth element (causal connection) in conjunction with each other. *See* Part B.2, *infra*.

Id. at 422-23 (citations omitted)). Here, Dusterhoft simply states in a conclusory fashion that “[t]he speech made the basis of Defendants’ retaliation was made by Plaintiff as a private citizen and not pursuant to his official duties as an employee of APD.” Compl. (Dkt. 1) ¶ 5.5. But this unadorned, conclusory statement – which is not entitled to the assumption of truth under the *Iqbal/Twombly* pleading standard – is belied by Dusterhoft’s other, more specific allegations.

First, by Dusterhoft’s own admission, each of the issues he raised in his July 2017 meeting with Chief Manley and Assistant City Manager Arellano concerned subjects or individuals under Dusterhoft’s supervision and that he discovered and reported in the course and scope of his work as an Assistant Chief of Police. *See id.* ¶¶ 4.4-4.13. Dusterhoft alleges, for instance:

- mismanagement at the City’s Forensic Division, which Dusterhoft supposedly discovered and initially reported “while he was still supervising the unit” at the direction of Chief Manley (*id.* ¶ 4.4);
- alleged timesheet falsification by individuals “who [Dusterhoft] supervised” and which was supposedly uncovered “through investigations directed by Dusterhoft” or conducted by Dusterhoft pursuant to Chief Manley’s direction (*id.* ¶¶ 4.5-4.7);
- mistreatment of one of Dusterhoft’s subordinates, which Dusterhoft reported because the alleged malefactor “reported directly to Chief Manley.” (*id.* ¶ 4.9).
- lenient treatment of employees whom Dusterhoft believed should have received harsher internal discipline for various infractions (*id.* ¶ 4.11-4.12).

Thus, based on Dusterhoft’s own allegations, each of these issues resulted from “special knowledge” he gained or work he performed as an Assistant Chief of Police, demonstrating that his speech was pursuant to his official duties.

Moreover, Dusterhoft raised these issues not to the general public, but to his direct supervisor, Chief Manley. *See id.* ¶¶ 4.4-4.10 (alleging issues raised to Chief Manley at some point prior to July 2017 meeting). Once Chief Manley purportedly failed to resolve the issues,⁵

⁵ Again, the City and Individual Defendants strenuously deny the substance of Dusterhoft’s allegations, including his claims that Chief Manley failed to address his complaints.

Dusterhoft escalated the issues to Assistant City Manager Arellano “so that something would be done about it.” Compl. ¶ 4.3. As Dusterhoft implicitly acknowledges, Arellano is not just any City employee: rather, he is the civil administrator who oversees the police department on behalf of the Austin City Manager. *Compare* TEX. LOC. GOV’T CODE § 143.003(2) & .013(a) (confirming police chiefs are “appointed by the municipality’s chief executive”), *with* City of Austin Charter, Art. V §§ 1-2 (confirming city manager is “chief administrative and executive officer of the city” and has power to “[a]ppoint and remove any officer or employee of the city[,]” with minor inapplicable exceptions).⁶ In other words, Dusterhoft simply reported his issues “up the chain of command” – a classic indicator of speech made pursuant to one’s official duties. *See Johnson*, 916 F.3d at 423 (collecting cases); *Davis v. McKinney*, 518 F.3d 304, 315 (5th Cir. 2008) (“Speech related to an employee’s job duties that is directed within the employee’s chain of command is not protected.”).

A similar situation occurred in *Wilson v. Tregre*, a Fifth Circuit case in which a sheriff’s deputy claimed he was terminated in retaliation for reporting what he believed to be illicit recording devices in the sheriff’s office’s interrogation rooms. *Wilson*, 787 F.3d 322, 324 (5th Cir. 2015). The plaintiff reported the devices not just to the sheriff (his direct supervisor), but also to the Internal Affairs division, the District Attorney’s office, and the state police. *Id.* Despite the fact that the plaintiff spoke to individuals outside the immediate confines of the sheriff’s office, the Fifth Circuit found that the plaintiff “was simply reporting potential criminal activity up the chain of command.” *Id.* at 325. Dusterhoft’s situation is analogous: he, too, reported his alleged issues directly up his chain of command and only to individuals with supervisory authority over the subject-matter at hand. Indeed, Dusterhoft all but admits that he spoke only to his internal chain of command by alleging elsewhere in his Complaint that “[i]t was not until [his] years later

⁶ The administrative structure of the City of Austin is a matter of public record reflected in the organizational chart attached as Exhibit B and available online at https://www.austintexas.gov/sites/default/files/files/Communications/COAOrgChart11_2020-FNL.pdf.

arbitration when these whistleblower complaints were finally brought to the public’s attention.” Compl. (Dkt. 1) ¶ 4.14.

Finally, Dusterhoft admits his conversation with Chief Manley and Assistant City Manager Arellano took place not on his personal time or in a public forum, but rather during the course of a private office meeting to discuss Dusterhoft’s rank and employment status. *Compare* Compl. (Dkt. 1) ¶ 4.3, with *Gibson v. Kilpatrick*, 773 F.3d 661, 671 (5th Cir. 2014) (finding police chief spoke pursuant to his official duties when he “did not merely make a report to [an external administrative agency] on his personal time after work[,]” but instead in conjunction with departmental investigation). In other words, all participants attended this July 2017 meeting in their official capacities with the sole purpose of conducting official police department business.⁷ This context further demonstrates that Dusterhoft spoke pursuant to his official duties.

In sum, Dusterhoft’s alleged speech to Chief Manley and Assistant City Manager Arellano bears all the hallmarks of unprotected speech made pursuant to an employee’s official duties: it concerns information Dusterhoft (1) obtained by virtue of his official position as an Assistant Chief of Police; (2) reported to Chief Manley in the regular course and scope of his work and eventually escalated only to the Assistant City Manager who oversees the police department; and (3) raised in the context of a meeting related to Dusterhoft’s employment status. *See Garcetti*, 547 U.S. at 422 (“[Plaintiff] did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case.”). Thus, for each of the reasons explained above, Dusterhoft fails to satisfy his pleading obligation on this element of his retaliation claim.

⁷ Dusterhoft implicitly acknowledges Assistant City Manager Arellano’s supervisory role by stating that, once Dusterhoft was done speaking, Arellano and Chief Manley left the room to discuss and decide whether Dusterhoft should still be demoted. *See* Compl. (Dkt. 1) ¶ 4.13.

2. *Dusterhoft cannot allege an actionable causal connection between the July 2017 meeting and any adverse employment action.*

In his Complaint, Dusterhoft alleges his July 2017 meeting with Chief Manley and Assistant City Manager Arellano led to three adverse actions: (1) the Austin Police Department’s “overly forceful” investigation of his ex-girlfriend’s assault complaint in August 2018; (2) Chief Manley’s decision to terminate Dusterhoft thereafter in December 2018; and (3) the Individual Defendants’ purported “refus[al] to comply with lawfully issued subpoenas” during Dusterhoft’s post-termination arbitration proceedings in 2019. *See* Compl. ¶¶ 4.30, 4.32, & 4.47.

As an initial matter, Dusterhoft pleads no specific facts connecting any of these three actions to his July 2017 meeting with Chief Manley and Assistant City Manager Arellano. For instance, Dusterhoft speculates that Chief Manley investigated the assault complaint and terminated Dusterhoft’s employment “for no good reason” other than a supposed desire to retaliate, but Dusterhoft does not allege any specific words, behavior, or other indicia of Chief Manley’s purported motive. *See* Compl. (Dkt. 1) ¶ 4.33. Similarly, Dusterhoft asserts, “on information and belief,” that Assistant Chief Gay “was aware of Dusterhoft’s previous complaints” merely because he “is best friends with Chief Manley.” *Id.* ¶ 4.37. But, again, Dusterhoft alleges no specific facts to support this unadorned conclusion. Dusterhoft’s allegations regarding Assistant Chief Newsom are even more threadbare since he candidly admits he “does not know if [Assistant Chief] Newsom was aware of Dusterhoft’s previous complaints.” *See id.* As for the participation of Assistant Chiefs Gay and Newsom in the August 2018 investigation and Dusterhoft’s December 2018 termination, Dusterhoft concludes simply and without any corroborating factual support that “each had input and direction on how the investigation was handled and each had input into the final decision to indefinitely suspend Dusterhoft” *Id.*

Given the bareness of these allegations, Dusterhoft cannot rely on anything other than timing to satisfy the causation element of his First Amendment retaliation claim. But, as the Fifth Circuit has recognized in similar circumstances, “there can be no claim of a constitutional violation as a matter of law” if the plaintiff alleges no facts linking an alleged protected activity to an employment action occurring over a year later. *See Burnside v. Kaelin*, 773 F.3d 624, 629 (5th Cir. 2014) (affirming 12(b) dismissal of First Amendment retaliation lawsuit because plaintiff alleged nothing other than his protected activities occurred in January 2012 and he was terminated in March 2013). The Fifth Circuit also has affirmed, numerous times, that a gap of as little as five months is too great to support an inference of retaliation. *See Benfield v. Magee*, 945 F.3d 333, 337-38 (5th Cir. 2019) (collecting cases and finding no causal connection where protected activity pre-dated alleged retaliatory action by 19 months). In short, because Dusterhoft has not pled any causal connection between the July 2017 meeting and the three alleged adverse actions that occurred well over a year later, his First Amendment retaliation claim fails for this reason alone.

Moreover, neither the August 2018 assault investigation nor the supposed non-compliance with post-termination subpoenas constitute adverse employment actions under the law. In the Fifth Circuit, it remains an open question whether a plaintiff alleging First Amendment retaliation must show an “ultimate employment action” (*i.e.*, a termination, reduction in pay, suspension, etc.), or whether the less-stringent “materially adverse” standard applies. *Johnson*, 916 F.3d at 422 n.5. However, courts have repeatedly affirmed that mere investigations do not amount to adverse employment actions unless and until they culminate in a tangible employment action. *See Washington v. City of Austin*, A-15-CA-222-SS, 2015 WL 12990135, at *5 (W.D. Tex. Oct. 7, 2015), *aff’d*, 651 F. App’x. 260 (5th Cir. 2016) (quoting *Breaux v. City of Garland*, 205 F.3d 150, 158 (5th Cir. 2000)) (“[I]nvestigating alleged violations of departmental policies and making purportedly false accusations are not adverse employment actions.”). In other words, the City’s

initial handling of Dusterhoft's ex-girlfriend's assault complaint – before the investigation culminated in the termination of his employment – is not a separate cognizable adverse employment action. As for the Individual Defendants' supposed non-compliance with post-termination administrative subpoenas, this is not a cognizable adverse employment action because it occurred after Dusterhoft had already been terminated. *Cf. Dupre v. Harris County Hosp. Dist.*, 8 F. Supp. 2d 908, 924 (S.D. Tex. 1998) (“Harris County’s failure to proceed with Dupré’s grievance did not effect a material change in the terms of Dupré’s conditions of employment, as she had already been terminated”). This leaves only Dusterhoft’s termination in December 2018 – nearly 17 months after the July 2017 meeting. As noted above, this is far too great a temporal gap to satisfy Dusterhoft’s pleadings burden regarding causation.

C. Dusterhoft cannot state a Section 1983 claim against the City because he cannot show a cognizable constitutional injury fairly traceable to an official municipal policy, practice, or custom.

To state a Section 1983 claim against a municipality like the City (or, alternatively, to overcome a municipality’s entitlement to governmental immunity), “a plaintiff must show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right.”⁸ *Jackson*, 959 F.3d at 204 (quoting *Hicks-Fields v. Harris Cty.*, 860 F.3d 803, 808 (5th Cir. 2017)); accord *Sneed*, 2020 WL 5951507, at *4. Since Dusterhoft has not alleged an actionable violation of his First Amendment rights, he is precluded at the outset from meeting this burden. *See Pharr v. Wille*, 1:14-CV-762-DAE, 2016 WL 4082740, at *16 (W.D. Tex. July 29, 2016) (“It is well established Supreme Court and Fifth Circuit law that a

⁸ A governmental entity is not subject to liability on theories of vicarious liability for the acts of its employees. *See Sneed v. Austin Indep. Sch. Dist.*, 1:19-CV-608-LY, 2020 WL 5951507, at *5 (W.D. Tex. Sept. 16, 2020). For this reason, “the unconstitutional conduct must be directly attributable to the municipality through some sort of official action or imprimatur[,]” and “isolated unconstitutional actions by municipal employees will almost never trigger liability.” *Jackson*, 959 F.3d at 204 (citing *Piotrowski v. City of Hous.*, 237 F.3d 567, 578 (5th Cir. 2001)).

municipality may not be held liable if a plaintiff’s constitutional rights were not violated.”). But even if a Dusterhoft had adequately alleged a constitutional violation, he still cannot proceed because he cannot establish (let alone plead) that the City had or has an “officially promulgated” policy of retaliating against employees who exercise First Amendment speech rights, or that any relevant policymaker was aware of such a policy. *See generally* Compl. (Dkt. 1).

Perhaps in recognition of such, Dusterhoft appears to rely on an alternative theory – that the City had a “persistent, widespread practice” of engaging in First Amendment retaliation that is “so common and well settled as to constitute a custom that fairly represents municipal policy.” *Compare id.* ¶ 5.8, with *Jackson*, 959 F.3d at 204 (citation omitted) (“‘Official policy’ includes unwritten practices that are ‘so common and well settled as to constitute a custom that fairly represents municipal policy.’”). Crucially, “[t]o proceed beyond the pleading stage, a complaint’s ‘description of a policy or custom and its relationship to the underlying constitutional violation . . . cannot be conclusory; it must contain specific facts.’” *Peña v. City of Rio Grande City*, 879 F.3d 613, 622 (5th Cir. 2018) (quoting *Spiller v. City of Tex. City Police Dep’t*, 130 F.3d 162, 167 (5th Cir. 1997)); accord *Turner v. City of Round Rock*, 1:15-CV-939-RP, 2016 WL 3282954, at *3 (W.D. Tex. June 13, 2016) (Pitman, J.). Dusterhoft’s Complaint, however, is quintessentially conclusory and fails to satisfy this minimum pleading standard.

All Dusterhoft alleges in his Complaint in support of a supposed City practice of First Amendment retaliation is:

- “Chief Manley created an atmosphere where if you were one of his buddies he would let things slide, but if you were or got on his wrong side, particularly if you chose to speak up about wrongdoing, you were punished.” Compl. (Dkt. 1) ¶ 4.2.
- “It was widely known that personal scores and grudges were committed by Chief Manley and Chief Gay which created a fear for anyone to report misconduct.” *Id.* ¶ 4.56.
- “Retaliation is so widespread at APD it constitutes a de facto City policy.” *Id.* ¶ 4.57.

- “Dusterhoft was one of the many victims of the systemic policy designed to punish whistleblowers [and] punish officers who exercise their First Amendment rights to bring to light the problems in the department” *Id.* ¶ 4.66.
- “The City of Austin has had and continues to have a persistent, widespread practice of mistreating and retaliating against whistleblowers, persons who exercise their first amendment rights and others who complain about misdeeds committed by the City and its employees, constituting a de facto policy of retaliation.” *Id.* ¶ 5.8.

These allegations are woefully insufficient. As the Fifth Circuit recently explained while affirming the dismissal of another municipal liability claim:

[T]he only “specific fact” in the complaint is the single incident in which Peña was involved. But plausibly to plead a practice “so persistent and widespread as to practically have the force of law,” a plaintiff must do more than describe the incident that gave rise to his injury. In *Spiller [v. City of Texas City Police Department]*, we rejected, as “vague and conclusory,” a claim by a black motorist, arrested without probable cause, that his arrest resulted from the police department’s general policy of “disregard[ing] . . . the rights of African American citizens” and of “engag[ing] [African Americans] without regard to probable cause to arrest.” Though Peña characterizes the relevant policy with greater particularity, her allegations are equally conclusional and utterly devoid of “factual enhancements.”

Peña, 879 F.3d at 622. Like the plaintiffs in *Peña* and *Spiller*, Dusterhoft offers nothing more than speculative conclusions without supporting “factual enhancements.” Thus, like the courts in *Peña* and *Spiller*, this Court should dismiss Dusterhoft’s complaint for failure to plead a municipal liability claim.

Notably, the Fifth Circuit has dismissed cases where the plaintiff actually alleged similar incidents involving other individuals but failed to plead contextual facts from which the court could plausibly adduce the existence of a pattern or attribute it to any relevant policymaker. *See id.* at 622 n.14 (collecting cases); *see also Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 851 (5th Cir. 2009) (affirming district court’s determination that even 27 complaints of excessive force over a four-year period did not suffice to show “a pattern . . . establishing a municipal policy” absent additional context). By contrast, Dusterhoft does not even cite any other factual circumstances other than his own. Thus, if these other situations were insufficient, Dusterhoft’s

certainly is, as well. The Court therefore should dismiss Dusterhoft's municipal liability claim due to his failure to (1) identify an official policy, practice, or custom resulting in a cognizable constitutional injury or (2) tie such a policy to any relevant policymaker.

D. Dusterhoft fails to state Section 1983 claims against the Individual Defendants in their individual capacities because he cannot overcome their entitlement to qualified immunity.

Qualified immunity protects governmental officials from liability so long as their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Carroll v. Ellington*, 800 F.3d 154, 169 (5th Cir. 2015) (quoting *Rockwell v. Brown*, 664 F.3d 985, 990 (5th Cir. 2011)) “When a defendant invokes qualified immunity, the burden shifts to the plaintiff to demonstrate the inapplicability of [this] defense.” *Id.* (quoting *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009)). “To overcome qualified immunity, a plaintiff must show two things: (1) that the allegations make out a constitutional violation and (2) that the violation of rights was clearly established at the time of the defendant's conduct.” *Johnson*, 916 F.3d at 416 (quoting *Carroll*, 800 F.3d at 169). Dusterhoft cannot satisfy either of these two elements as to any of the three Individual Defendants.

As with his claim against the City, Dusterhoft's inability to plead a cognizable violation of his First Amendment speech rights precludes him from maintaining his claims against the Individual Defendants, since identifying a constitutional violation is the first step in the qualified immunity analysis. *Compare* Part B, *supra*, with *Johnson*, 916 F.3d at 416. Moreover, Dusterhoft bears a heightened pleadings burden at this stage: Time and time again, courts have confirmed that allegations “on information and belief” – like those Dusterhoft makes against the Individual Defendants – are insufficient to satisfy this threshold prong. *See Garza v. Bolin*, CV SA-15-CA-53-OLG, 2015 WL 12866216, at *3 (W.D. Tex. July 13, 2015), *R & R adopted sub nom. Garza v. Dolin*, SA-15-CA-53-OLG, 2015 WL 12867471 (W.D. Tex. Sept. 30, 2015) (“The[] allegation

that “[u]pon information and belief” Lantz approved the termination is wholly insufficient to overcome her qualified immunity defense.”); *Carbajal v. Larpenner*, CV 16-12870, 2017 WL 3894744, at *7 (E.D. La. Sept. 6, 2017) (“Even when construed in the light most favorable to the nonmoving party, Plaintiffs’ allegations, based solely on information and belief, . . . are insufficient to overcome Agent Renfro’s assertion of the qualified immunity defense.”). Thus, this Court could dismiss Dusterhoft’s claims against the Individual Defendants on this first ground without delving any further.

But even if Dusterhoft could establish a violation of his First Amendment speech rights, he cannot point to any alleged violation that was “clearly established” within the meaning of the qualified immunity analysis. According to the U.S. Supreme Court, “[a] Government official’s conduct violates clearly established law when, at the time of the challenged conduct, “[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would [have understood] that what he is doing violates that right.’” *Al-Kidd*, 563 U.S. at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In this case, Dusterhoft cannot show that any reasonable official should have known (or even suspected) that the alleged actions taken by Chief Manley or Assistant Chiefs Gay and Newsom violated Dusterhoft’s First Amendment rights.⁹

For instance, Dusterhoft cannot show that an internal report to the Assistant City Manager who oversees the police department (*i.e.*, a report up his chain of command) constitutes protected speech outside the duties of an assistant chief of police. *See Johnson*, 916 F.3d at 423 (citing *Cutler v. Stephen F. Austin State Univ.*, 767 F.3d 462, 471-73 (5th Cir. 2014)) (“It . . . is not clearly established that an internal complaint of discrimination made only to supervisors, primarily to vindicate one’s own rights, qualifies as speech made as a ‘citizen’ rather than as an ‘employee.’”).

⁹ On the contrary, any reasonable official would have understood them not to be a violation of Dusterhoft’s rights, for the reasons set forth in Part B, *supra*.

Nor can Dusterhoft show that investigating an assault complaint or declining to participate in a post-termination arbitration hearing constitute actionable retaliatory actions. *See id.* at 422 n.5 (“It is not clearly established whether [the] “materially adverse” standard [applicable in the Title VII context] applies to retaliation for protected speech.”). And, of course, Dusterhoft cannot show that his speech during the July 2017 meeting somehow should have insulated him from the alleged adverse employment actions occurring more than 13 months later. *See Burnside*, 773 F.3d at 629. Since Dusterhoft cannot satisfy the second step of the analysis, either, the three Individual Defendants remain entitled to qualified immunity, and Dusterhoft is foreclosed, even at this early stage, from pursuing his First Amendment retaliation claims against them.

E. The Court should dismiss Dusterhoft’s Section 1983 claims against the Individual Defendants in their official capacities as duplicative of his claims against the City.

Finally, Dusterhoft also purports to sue each of the Individual Defendants “in their official capacity.” Compl. (Dkt. 1) at p.1 & ¶ 5.3. However, suits against public officers in their official capacities “generally represent only another way of pleading an action against an entity of which an officer is an agent.” *Eltalawy v. Lubbock Indep. Sch. Dist.*, 816 F. App’x 958, 962 (5th Cir. 2020) (quoting *Hafer v. Melo*, 502 U.S. 21, 25 (1991)); accord *Harmon v. Dallas Cnty, Tex.*, 927 F.3d 884, 891–92 (5th Cir. 2019), *as revised* (July 9, 2019). In cases like this one, where the municipal entity is already a defendant, the proper remedy is to dismiss the “official capacity” claims against the individual governmental officials. *See Garza v. Escobar*, 972 F.3d 721, 734 (5th Cir. 2020) (affirming district court’s dismissal of “official capacity” claims as “duplicative of the claim against [the governmental entity].”). Following this precedent, this Court should dismiss Dusterhoft’s claims against the Individual Defendants in their official capacities as duplicative of his claims against the City itself, regardless of whether the Court dismisses the City, as well.

III. CONCLUSION & PRAYER

The City of Austin, Chief Brian Manley, Assistant Chief Troy Gay, and former Assistant Chief Justin Newsom respectfully move for dismissal of Dusterhoft's Section 1983 claims against them on the grounds that he (1) has failed to plead facts sufficient to state a First Amendment retaliation claim for municipal or individual liability, (2) has failed to invoke this Court's jurisdiction or state a claim by pleading the elements of municipal liability with enough specificity to overcome the City's entitlement to governmental immunity, and (3) cannot carry his burden to overcome the Individual Defendants' entitlement to qualified immunity. In particular, Dusterhoft cannot show that he spoke to Chief Manley and Assistant City Manager Arellano "as a citizen" in July 2017, nor can he show that his "speech" during the July 2017 meeting motivated any cognizable adverse employment action more than 13 months later. These deficiencies are enough to doom both his municipal and individual liability claims on their own, but Dusterhoft also has not pled sufficient facts to establish the additional elements of those causes of action: a policy or custom attributable to a relevant policymaker (in the case of Dusterhoft's claims against the City) or actions amounting to a "clearly established" violation of Dusterhoft's constitutional rights (in the case of Dusterhoft's claims against the Individual Defendants). For these reasons, the Court should dismiss Dusterhoft's claims in full. The City and the Individual Defendants also seek any other relief, in law or in equity, to which they may be entitled.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

EXHIBIT A

December 20, 2018

Memorandum



MEMORANDUM

Austin Police Department *Office of the Chief of Police*

Received
City of Austin
2018 DEC 20 AM 11:44
Human Resources Dept

TO: Joya Hayes, Director of Civil Service

FROM: Brian Manley, Chief of Police

DATE: December 20, 2018

SUBJECT: Indefinite Suspension of Police Commander Jason Dusterhoft # 3028
Internal Affairs Control Number 2018-0837

Pursuant to the provisions of Chapter 143 of the Texas Local Government Code, Section 143.052, and Rule 10, Rules of Procedure for the Firefighters', Police Officers' and Emergency Medical Service Personnel's Civil Service Commission, I have indefinitely suspended Police Commander Jason Dusterhoft # 3028 from duty as a police officer for the City of Austin, Texas effective December 20, 2018.

I took this action because violated Civil Service Commission Rule 10.03, which sets forth the grounds for disciplinary suspensions of employees in the classified service, and states:

No employee of the classified service of the City of Austin shall engage in, or be involved in, any of the following acts or conduct, and the same shall constitute cause for suspension of an employee from the classified service of the City:

- L. Violation of any of the rules and regulations of the Fire Department or Police Department or of special orders, as applicable.

The following are specific acts committed by Commander Dusterhoft in violation of Rule 10:

The following factual recitation is based upon evidence obtained during the APD Internal Affairs Division (IA) investigation. The level of detail contained herein gives context to the sustained allegations upon which this indefinite suspension is being imposed.

On August 28, 2018, at approximately 8:34 p.m., a woman (hereafter referred to as Ms. S) who was involved in a sexual relationship with Commander Dusterhoft contacted APD Assistant Chief Frank Dixon and asked, "If a Commander beats me, do I have anything to say?" Ms. S sent Assistant Chief Dixon approximately four photographs of bruising to the underside of her chin, left hip, and buttock area. Ms. S advised Chief Dixon that the Commander in question was Commander Dusterhoft and he was responsible for those injuries. Assistant Chief Dixon referred this information to the APD Special Investigations Unit (SIU) and APD IA.

Further investigation determined that on August 24, 2018, Commander Dusterhoft allegedly assaulted Ms. S while they were at the Yellow Rose Gentlemen's Club located at 6528 N. Lamar Blvd., Austin, Texas. Specifically, Ms. S alleged that Commander Dusterhoft slapped her in the face. As will be explained in greater detail below, while a preponderance of the evidence does not support that an assault occurred at the Club, a preponderance of the evidence does support a finding that Commander Dusterhoft assaulted Ms. S on multiple other occasions at his residence during what can be described as "rough sex" during which he would strangle Ms. S with his hands with the intent and desire of her losing consciousness. Both Ms. S. and Commander Dusterhoft indicated this conduct was for Commander Dusterhoft's sexual gratification.

The investigation also determined that Commander Dusterhoft met Ms. S and her roommate (hereafter referred to as Ms. C) at the Club on or about August 24, 2018, and agreed to engage in sexual relations with both of them despite knowing that Ms. S had told him that Ms. C was a prostitute who used cocaine and Xanax. Through the course of the investigation, it was also discovered that Commander Dusterhoft was accompanied to the Club by a man who shall be identified as Mr. CL. During that same evening, Ms. C (it was her birthday) stated she would like cocaine and Mr. CL told investigators he paid \$40 of his own money to purchase cocaine for her. The cocaine was delivered to the table at which Commander Dusterhoft and his party were seated. Although there is not a preponderance of evidence to support a finding that Commander Dusterhoft was present at the time the cocaine was delivered to his table, the fact remains that he was associating with person(s) who were purchasing and using illegal drugs.

Finally, the investigation determined that upon being notified on or about August 29, 2018, by an SIU Lieutenant that SIU had a search warrant and needed to meet with him, Commander Dusterhoft left his cell phone at his [REDACTED] house and deleted data from his cell phone that was related to the assault claim that was being investigated by SIU. The act of intentionally leaving his phone at his [REDACTED] home despite his belief the phone was the object of the search warrant, as well as the deletion of data from that phone, individually or collectively, meets the elements for an administrative violation of Texas Penal Code section 37.09, Tampering with or Fabricating Physical Evidence. Moreover, each individual and/or

collective acts were attempts to interfere with, and/or thwart, and/or obstruct a SIU and/or IA investigation, which violate(s) APD's Honesty General Order.

The Strangulation:

On September 7, 2018, IA interviewed Ms. S in regards to this investigation. Ms. S stated that she has known Commander Dusterhoft since July 12, 2018. She stated they met on a dating app called Tinder. She was not definitive as to how many times they had sex, but estimated that it was somewhere between six to ten times. Ms. S explained the intensity of sex with Commander Dusterhoft started low but increased in aggression each time and he began to leave bruises and other marks on her body, and also pulled out clumps of hair from her head. Ms. S stated that this was painful and made her scream and added that Commander Dusterhoft enjoyed hearing her scream in pain and could not achieve sexual gratification unless he was inflicting pain on her.

With regards to the strangulation, Ms. S stated that Commander Dusterhoft would strangle her by placing his hands around her neck. Commander Dusterhoft increased the intensity of those acts as well. Ms. S explained that she was originally okay with it and the strangling started the first time they had sex. Ms. S stated, "*There were, uh, it got to where he wanted to - or couldn't basically get off unless he choked me and the first couple times he did that, uh, I mean it - it wasn't comfortable but I kinda went along with it*". However, Ms. S told IA about two different encounters when Commander Dusterhoft strangled her to the point that she had to make him stop. Ms. S described the second encounter as follows:

Ms. S: *Um, yeah, when he was - when he was choking so hard and I was pushing his hands away because I said, "I said no, that's too much," because - because my - and I can't even explain that it truly felt like my ears were on fire and - and...*

Sgt. Jennings: *Mm-hm.*

Ms. S: *...it was like - like painful, like - like it felt like he's - he's pushing on - on - on the back of my skull and - and it was - it was - it hurt so much, and between that and - and my ears and I was like, "No. No. that's," and...*

Sgt. Jennings: *Did - was it to the point to where it was the same painful experience?*

Ms. S: *Not - not the - not the same because it was down lower. I - I don't know - I don't know what his deal was with the - right - right at the base of my skull, but no, then he just grab me and finished.*

Ms. S: *"He wanted to choke me out and for me to - to come [sic] to with him, as he said, fucking me, but he said, "You keep fighting me on this," excuse me, and I was like, "Well, I don't know what - I mean, it - it - it scare me a li- like I - like, I'm not gonna let somebody choke me to where I go unconscious."*

Prior to her outcry to Chief Dixon, on August 12 and 13, 2018, Ms. S made multiple outcries regarding the strangulation offense to multiple people and even shared photo(s) of marks to her neck. She also stated and produced text messages stating the following theme in her initial outcries to several friends:

"I took pics in case I ended up dead. I truly was scared about that"

"I just wanted to make sure people know I didn't kill myself"

"If I die tonight and it doesn't – and they're saying it was not a homicide, it – I didn't hurt myself, it was [Commander Dusterhoft] Jason"

In a similar vein, she sent Commander Dusterhoft the following text message on August 13, 2018:

"You scared me the other night" (When asked by IA about this text message, Commander Dusterhoft said he thought this message was part of song lyrics that Ms. S was sending him.)

Commander Dusterhoft's statement regarding the strangulation-based allegations

Commander Dusterhoft corroborated Ms. S's statement that they had sex at least six times and *"it was based around consensual sex that was rough."* He confirmed on or about July 15, 2018, was the first time Ms. S came over to his place and when they first had sex. He stated that he left some marks on her buttocks and that she sent him photographs telling him that he had done a good job marking his territory.

IA then asked Commander Dusterhoft if he ever slapped Ms. S in the face. He responded that he thinks he may have slapped her twice, but it was not hard and did not leave marks. IA asked if he ever slapped Ms. S's breasts. He replied that he pinched her breasts, but did not recall leaving marks. He went on to say Ms. S used clamps and those could have left the bruising, but later on in the interview he stated he did grab her breasts and that may have left bruising. IA spoke to him about pulling Ms. S's hair. He stated he did pull her hair and did pull some of her hair out on one occasion.

More relevantly, Commander Dusterhoft confirmed he participated in the following text exchange(s) with Ms. S:

Cmdr. Dusterhoft: *"I love my hands around your neck"*

Ms. S: *"Yes! So controlling, It turned me on even more"*

Cmdr. Dusterhoft: *"Oh I know you like that!"* (with an evil smiley face)

Ms. S: *"I do too! And when you put your hands around my throat!"*
What you do- what do you want me to do to you that I'm not?"

Cmdr. Dusterhoft: *"Let me choke you out all the way. I love seeing you come back two seconds later and waking up to fucking me."*

Ms. S: *“Do it!”* (with an evil emoji)

Cmdr. Dusterhoft: *“I will.”*

Ms. S. *“What are you going to do to make it up to me?”*

Cmdr. Dusterhoft: *“Make you come [sic] really hard after you wake up from – from me choking you.”*

He also confirmed he sent the following text to Ms. S after one of their encounters:

Cmdr. Dusterhoft: *“I keep thinking of the second time I came [sic]. Seeing you in pain totally did it.”*

While he confirmed Ms. S sent him the following text on August 13, 2018, after one of their sexual encounters (he was unsure if this coincided with the time he tried the hardest to “choke” her to unconsciousness):

Ms. S *“You scared me the other night”*

After being confronted by IA with these texts and photos of bruising to Ms. S’s body, Commander Dusterhoft was left with no choice but to confirm, that he would place his hands around Ms. S’s neck and squeeze to the point that he wanted her to become unconscious. Commander Dusterhoft stated that he *“choked”* Ms. S three to four times out of the six times they had sex for sexual gratification. Commander Dusterhoft stated that he would either choke her with one hand or two depending on what they were doing. He stated that he would apply pressure to her carotid artery and not her trachea because he did not want to hurt her. Commander Dusterhoft stated and demonstrated to IA that you can do real damage if you apply pressure to the trachea and not the carotid artery. He went on to say that he was conscious and aware not to apply pressure to the trachea and stated that there is a difference between choking and strangling. Commander Dusterhoft concluded when you are performing a sexual act by putting your hands around someone’s neck, it is choking, but when you are trying to kill somebody, it is strangling.

Commander Dusterhoft’s belief that his actions constitute lawful, consensual *“choking”* during a sexual encounter is wrong from both a legal and medical standpoint. Legal and medical literature states that “Choking” is an internal blocking of the airway by an obstruction, such as food. In contrast, “strangulation” is a form of asphyxiation characterized by the closure or restriction of the airway or vessels in the neck by external pressure. The key words to focus on are “external” and “neck.” The closure of a single structure of the neck that supplies oxygen to the brain is all that is required to kill a person. If a person loses consciousness because the brain has been starved of oxygen then there can be permanent brain damage, which may include difficulty in concentration and loss of short-term memory capacity. Death from strangulation can occur in as little as two minutes. In instances where there is no loss of consciousness, it is possible that arteries/veins in the neck can tear internally, causing blood clots. These clots left alone and without immediate medical treatment can lead to stroke and death even weeks later.

While Commander Dusterhoft stated he made sure he was “*choking*” Ms. S in a safe manner, he stated that at times when he was strangling her, he had been drinking and while he cannot remember his exact state of intoxication, he stated he would not have felt comfortable driving in those instances. At a minimum, Commander Dusterhoft engaged in reckless conduct when he repeatedly strangled Ms. S to the point that it was his intent and desire that she become unconscious. Therefore, at a minimum from an administrative perspective, he violated any one and/or all of the following Penal Code Sections by at least a preponderance of the evidence

*For clarification purposes, the only assaultive conduct for which Commander Dusterhoft is being disciplined is the strangulation since Ms. S could legally consent to the other assaultive behavior.

Texas Penal Code Title 5. Offenses Against The Person

Chapter 22: Assaultive Offense:

Sec. 22.01. ASSAULT. (a) A person commits an offense if the person:

- (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
- (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
- (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

(b) An offense under Subsection (a) (1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

(2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if:

(B) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth;

Sec. 71.0021 (b)

(b) For purposes of this title, “dating relationship” means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature.

Sec. 22.02. AGGRAVATED ASSAULT.

- (a) A person commits an offense if the person commits assault as defined in Sec. 22.01 and the person:
 - (1) causes serious bodily injury to another, including the person's spouse; or
- (b) An offense under this section is a felony of the second degree, except that the offense is a felony of the first degree if:

The definition of "Serious Bodily Injury" in the Texas Penal Code can be found in:

Sec. 1.07(a) (46).

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Sec. 22.05. DEADLY CONDUCT.

- (a) A person commits an offense if he recklessly engages in conduct that places another in imminent danger of serious bodily injury.
- (e) An offense under Subsection (a) is a Class A misdemeanor. An offense under Subsection (b) is a felony of the third degree.

Commander Dusterhoft contends the strangulation was consensual, and therefore, he claims that he did not commit an assault: Penal Code Section 22.06 (Consent as Defense to Assaultive Conduct):

Sec. 22.06. CONSENT AS DEFENSE TO ASSAULTIVE CONDUCT.

- (a) The victim's effective consent or the actor's reasonable belief that the victim consented to the actor's conduct is a defense to prosecution under Section 22.01 (Assault), 22.02 (Aggravated Assault), or 22.05 (Deadly Conduct) if:
 - (1) the conduct did not threaten or inflict serious bodily injury; or
 - (2) the victim knew the conduct was a risk of:
 - (A) his occupation;
 - (B) recognized medical treatment; or
 - (C) a scientific experiment conducted by recognized methods.

Commander Dusterhoft's reliance on the consent argument is legally incorrect. None of the noted exceptions apply. Since strangulation is conduct that can threaten to inflict serious bodily injury, including brain damage, damage to the trachea, and even death, Ms. S could not lawfully consent to being strangled. By his own unknowing statements, Commander Dusterhoft committed, at a minimum, multiple Class A misdemeanors and at a maximum multiple second and/or third-degree felonies. The fact that the District Attorney's Office has not chosen to prosecute Commander Dusterhoft for assault is irrelevant in determining whether he committed an administrative violation of the Penal Code. It is important to note that due to the fact that Commander Dusterhoft was compelled to provide his phone after being ordered to do so by an Assistant Chief, and was compelled to provide a statement to IA, the DA could not use this evidence against him criminally and therefore did not have access to it.

Moreover, Commander Dusterhoft was adamant in suggesting to IA that Ms. S and Ms. C's testimony should be given little to no weight. Even if I give no weight or consideration to the assertions from Ms. S and Ms. C that Commander Dusterhoft disputes, particularly regarding the strangulation, Commander Dusterhoft's own statements, along with the evidence regarding the strangulation-based allegation(s) are more than sufficient grounds for an indefinite suspension.

Remarkably, Commander Dusterhoft indicated he was under the influence of alcohol during some and/or all of the sexual encounters, while he contended Ms. S was sober during each of the encounters. Yet, Commander Dusterhoft attacked Ms. S's credibility while being interviewed by IA by calling her an "*alcoholic on probation*" and someone who was "*severely depressed*," which may cast doubt on the "*consent*" given by Ms. S and her sobriety could have put her in a better condition to recall the disputed events. Even if I disregard Commander Dusterhoft statement that Ms. S. was "*severely depressed*", and that she gave him consent to do everything he testified to doing, that consent under the law as cited above does not absolve Commander Dusterhoft of the fact that at a minimum, a preponderance of the evidence supports an administrative finding of criminal misconduct on multiple occasions.

Associating with Persons who Bring Discredit upon the APD:

On the night they went to the Club, Commander Dusterhoft advised that he was text messaging Ms. S and she wanted him to come over to her home. Commander Dusterhoft stated Ms. S told him it was her roommate's birthday (Ms. C) and Ms. C wanted to have birthday sex with her. Commander Dusterhoft stated Ms. S asked him if he wanted to join in and he replied, "*Hell Yes.*" Commander Dusterhoft stated after he told her, "*Hell Yes*" he asked Ms. S to send him a photograph of Ms. C, which she did. Ms. S then told Commander Dusterhoft, "*Great. She's the prostitute.*" IA asked Commander Dusterhoft what he knew about Ms. C prior to that evening, and he stated that Ms. S told him she found cocaine on her steering wheel once and that Ms. C used Xanax and Lithium. He also advised she called Ms. C a prostitute. Commander Dusterhoft stated Ms. S told him that both her roommates were a disaster and "*one is so fucked up all the time, if it's not drunk its Xanax.*" Despite knowing that Ms. C used illegal drugs and was allegedly a prostitute, Commander Dusterhoft

was willing to engage in a sexual encounter with her and/or be seen in a public place with her.

Moreover, because it was Ms. C's birthday, she wanted to obtain cocaine while she was at the Club. Commander Dusterhofs acquaintance, Mr. CL, told investigators that he got up from the table and paid someone at the Club \$40 for the cocaine, which was delivered to Commander Dusterhofs table.

Sgt. Jennings: *But you are saying that Birthday Girl told you that she wanted some cocaine?*

Mr. CL: *Yes.*

Sgt. Jennings: *You took \$40 of your own money and went and gave...*

Mr. CL: *Yes.*

Sgt. Jennings: *...it to somebody, whoever that person is, pointed out which table it was and that somebody delivered a 40-bag of cocaine to them?*

Mr. CL: *That's what I said.*

Mr. CL explained that when he got back to the booth, Ms. C had a baggie of cocaine. He described it as a white powdery substance that he believed to be cocaine and it was in a small zip lock baggy. He stated he did not actually see the women (there was another woman present besides Ms. C) snort or ingest the cocaine, but believed they did. He stated they offered it to him and he declined. Mr. CL stated he believed this was one of the times Commander Dusterhofs was out at the "smoke room" and he believes that Commander Dusterhofs was not aware this took place. Mr. CL said he did not disclose to Commander Dusterhofs that he purchased the drugs or that the women had used cocaine.

As noted earlier, although there is not a preponderance of evidence to support a finding that Commander Dusterhofs was aware that Mr. CL procured the cocaine or that it was delivered to his table, Commander Dusterhofs stated that Mr. CL is an honest person and would take him at his word, thereby lending credibility to Ms. C and Mr. CL's claim that cocaine was delivered to the table. Moreover, Commander Dusterhofs indicated Ms. S told him day(s) later about the drug usage by Ms. C on the evening in question. Commander Dusterhofs indicated that had he been aware of the drug(s), he would have left the gathering, and seemed to scoff at the notion that illegal activity would occur at this particular Club. Not only was his associate, Mr. CL, comfortable facilitating Ms. C drugs that night, but Mr. CL, along with Commander Dusterhofs friend, the manager of the Club, along with Ms. S and Ms. C all knew that Commander Dusterhofs was a high ranking member of APD. The fact that Commander Dusterhofs met with and/or associated with an individual(s) who use illegal drugs as well as an individual (Mr. CL) who purchased those drugs, brings discredit upon the APD.

When IA asked Commander Dusterhoft about Ms. S's roommates, including Ms. C, he unknowingly acknowledged that he violated APD's prohibited association policy and assumed the risk of bringing discredit to himself and upon APD when he stated in regards to Ms. S's roommates: *"So, obviously, not people I necessarily wanna hang out with."*

The Search Warrant for the Cell Phone:

On or about August 29, 2018, APD SIU went to Commander Dusterhoft's residence to execute a search warrant for his cell phone arising from the initial complaint by Ms. S to Assistant Chief Dixon. The search warrant encompassed the search of Commander Dusterhoft's person, residence, and City of Austin work vehicle. Upon SIU's arrival, Commander Dusterhoft was not home. At 9:40 p.m., SIU Lt. Kurt Thomas called Commander Dusterhoft inquiring to his whereabouts. Commander Dusterhoft was at his [REDACTED] residence about one mile away. Lt. Thomas informed Commander Dusterhoft that he had a search warrant and needed to meet with him.

At approximately 10:57 p.m., Commander Dusterhoft arrived at his residence with his attorney at which time the search warrant was executed. Commander Dusterhoft was then searched as were his residence and work vehicle. The cell phone was not located because Commander Dusterhoft left it at his [REDACTED] residence but did not tell Lt. Thomas that is where the phone was. When the phone was not located, after approximately 45 minutes of searching his home, Commander Dusterhoft was then asked by SIU to direct him to the phone, which he declined to do. Commander Dusterhoft was then issued an order by an Assistant Chief to produce the phone, which he ultimately did.

The investigation determined that after being called by Lt. Thomas, Commander Dusterhoft called a neighbor to verify that SIU was indeed at his home. He then intentionally and knowingly deleted data from the phone, including pictures, and videos that were evidence of his sexual relationship with Ms. S. Commander Dusterhoft confirmed that he deleted multiple Apps, including Snap, Bumble, What's App, Tinder along with sexual videos, including videos of him and Ms. S and other items that would embarrass him if they got out.

Commander Dusterhoft gave IA what appeared to be portions of two videos of Ms. S and him having sex. These videos were not on his phone and had been deleted by him after Lt. Thomas made contact with him. Commander Dusterhoft stated that he was able to retrieve these particular videos from his "iCloud." The videos displayed Commander Dusterhoft and Ms. S having sexual intercourse and showed Commander Dusterhoft strangling Ms. S with his left hand leaving red marks to the right of her neck. The videos displayed Commander Dusterhoft pulling Ms. S's hair and pinching her nipples making her scream. The videos also showed Commander Dusterhoft slapping Ms. S's face on the left side two times with his right hand. They also show that Ms. S was a willing participant, and she did not object to any of the actions taken by Commander Dusterhoft. Clearly these videos were relevant to the pending SIU and/or IA investigations and should not have been deleted.

Commander Dusterhoft stated he did not delete anything work related. Commander Dusterhoft stated he was not definitively aware his phone was the subject of a search warrant when he deleted the items. When questioned by Internal Affairs as to why he deleted these

items, Commander Dusterhoft stated based upon his experiences he knew the Police Department would likely want to search and/or seize his phone and he wanted to delete any personal information that would be embarrassing, specifically pictures and texts of a sexual nature: *Um, I deleted several sexual things from my phone because I do not want any of those to be seen, from several women.*"

Commander Dusterhoft stated that he believed the reason Lt. Thomas was at this residence was in relation to an investigation that APD management was undertaking in regard to overtime sheets and sick time usage. Commander Dusterhoft claims he had no knowledge of the SIU investigation involving his alleged assault against Ms. S., and therefore, he did not tamper with evidence or interfere with or obstruct the pending SIU and/or IA investigations of Ms. S's allegations.

While I do not dispute that Commander Dusterhoft was not aware at that time of the complaint filed by Ms. S, that fact actually hurts him rather than exonerates him. Since Commander Dusterhoft was speculating about what Lt. Thomas wanted, it was improper and a violation of policy for him to leave the phone at his [REDACTED] house and/or selectively delete data without knowing if it was or was not related to an ongoing SIU and/or IA investigation. It turns out the deleted data was highly relevant to the SIU and/or IA investigations. Leaving the cell phone at his [REDACTED] house and/or deleting data from his phone thwarted, interfered with, and/or influenced the criminal and/or administrative investigations. Although Commander Dusterhoft was adamant that he did nothing wrong, he unknowingly admits that he initially was uncooperative and did initially thwart and/or interfere with the SIU and/or IA investigation(s) in the following statement: *"Um, but once I found what it was about I cooperated 100%."*

Honesty:

Commander Dusterhoft's actions in knowingly and intentionally leaving his cell phone at his [REDACTED] house, and/or knowingly and intentionally deleting data from his cell phone after he was notified by Lt. Thomas that he had a search warrant and needed to meet with him is considered an act of dishonesty. While Commander Dusterhoft's claim that he might not have known that the investigation involved his sexual relationship with Ms. S and an alleged assault, he should not have deleted any information from the phone once he was notified by Lt. Thomas that APD had a search warrant and he (Commander Dusterhoft) believed the Police Department might search his phone.

Moreover, Commander Dusterhoft's initial actions (including leaving the phone at his [REDACTED] house and deleting data), his refusal to cooperate with SIU before he arrived at his home, after he arrived at his home, and after SIU searched his home and vehicle for approximately 45 minutes, was an attempt to conceal, divert, or mitigate his true culpability in a situation, and/or an effort to thwart, and/or influence, and/or interfere with an internal and/or criminal investigation.

Conclusion:

The IA investigation yielded conflicting evidence. But even putting aside that conflicting evidence, Commander Dusterhoft's statements alone give me ample reasons to indefinitely suspend him. There are a multitude of individual reasons to indefinitely suspend Commander Dusterhoft based upon his knowing and/or unknowing admissions. I would have made the decision to indefinitely suspend him for any of the following reasons, independent of each other:

- 1) First, his admission that he purposefully left his cell phone at his [REDACTED] home under the reasonable belief that the phone was the likely target of the search warrant meets the elements of an administrative violation of Texas Penal Code section 37.09 Tampering with or Fabricating Physical Evidence and/or was a violation of APD's Honesty General Order (900.3.1) which says: Employees will not attempt to conceal, divert, or mitigate their true culpability in a situation, nor will they engage in efforts to thwart, influence, or interfere with an internal or criminal investigation (The fact that the District Attorney's Office has not chosen to prosecute Commander Dusterhoft for Tampering with or Fabricating Physical evidence is irrelevant in determining whether he committed an administrative violation of the Penal Code).
- 2) Second, his admission that he purposefully deleted items off of his phone, not knowing what the search warrant was for also meets the elements of an administrative violation of Texas Penal Code section 37.09 Tampering with or Fabricating Physical Evidence and/or was a violation of APD General Order 900.3.1, which says: Employees will not attempt to conceal, divert, or mitigate their true culpability in a situation, nor will they engage in efforts to thwart, influence, or interfere with an internal or criminal investigation.
- 3) Third, his admission that he tried to "choke" Ms. S to a state of unconsciousness on at least three occasions during consensual sexual encounters violates APD's Know and Comply Policy (900.1.1) by violating one or more of the following sections of the Texas Penal Code, which are a misdemeanor, felony of the second, and/or felony of the third degree: Assault 22.01, Aggravated Assault 22.02, and/or Deadly Conduct 22.05).
- 4) Fourth, his conduct violates APD General Orders on Acts Bringing Discredit upon the Department (900.3.2). Commander Dusterhoft brought discredit to APD in a multitude of ways. He did in the eyes of Ms. S and all of the people with whom she shared information/photos of her neck injuries with, making them aware of the assaultive conduct of a member of the APD. He did so by socializing with Ms. C and/or Mr. CL, in spite of being generally forewarned about Ms. C's drug use and/or past criminal behavior. Commander Dusterhoft also did so when he called a neighbor to gather information regarding SIU's presence at his home, while he remained at his [REDACTED] residence. He also did so by purposefully leaving his phone at his [REDACTED] home/garage that same evening and deleting data from the phone.

By these actions, Commander Dusterhoft violated Rule 10.03(L) by violating the following rules and regulations of the Austin Police Department:

➤ **Austin Police Department Policy 900.1.1: General Conduct and Responsibilities: Responsibility to Know and Comply**

900.1.1 Responsibility to Know and Comply

The rules of conduct set forth in this policy do not serve as an all-inclusive list of requirements, limitations, or prohibitions on employee conduct and activities; employees are required to know and comply with all Department policies, procedures, and written directives.

- (a) Employees will maintain a working knowledge and comply with the laws, ordinances, statutes, regulations, and APD written directives which pertain to their assigned duties.
- (b) Employees who do not understand their assigned duties or responsibilities will read the relevant directives and guidelines, and will consult their immediate supervisor for clarification and explanation.
- (c) A lack of knowledge of an APD written directive is not a defense to disciplinary action.

To Wit: Texas Penal Code:

Sec 22.01 ASSAULT. (a) A person commits an offense if the person:

- (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
 - (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
 - (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.
- (b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:
- (2) a person whose relationship to or association with the defendant is
 - (3) described by Section 71.0021(b), 71.003, or 71.005, Family Code, if:
- (B) the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth;

Sec. 71.0021 (b)

- (b) For purposes of this title, “dating relationship” means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature.

Sec. 22.02. AGGRAVATED ASSAULT.

- (c) A person commits an offense if the person commits assault as defined in Sec. 22.01 and the person:
 - (1) causes serious bodily injury to another, including the person's spouse; or
- (d) An offense under this section is a felony of the second degree, except that the offense is a felony of the first degree if:

Sec. 22.05. DEADLY CONDUCT.

- (b) A person commits an offense if he recklessly engages in conduct that places another in imminent danger of serious bodily injury.
- (e) An offense under Subsection (a) is a Class A misdemeanor. An offense under Subsection (b) is a felony of the third degree.

Sec. 1.07(a) (46).

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Sec. 22.06. CONSENT AS DEFENSE TO ASSAULTIVE CONDUCT.

- (a) The victim's effective consent or the actor's reasonable belief that the victim consented to the actor's conduct is a defense to prosecution under Section 22.01 (Assault), 22.02 (Aggravated Assault), or 22.05 (Deadly Conduct) if:
 - (1) the conduct did not threaten or inflict serious bodily injury; or
 - (2) the victim knew the conduct was a risk of:
 - (A) his occupation;
 - (B) recognized medical treatment; or
 - (C) a scientific experiment conducted by recognized methods.

Sec. 37.09. TAMPERING WITH OR FABRICATING PHYSICAL EVIDENCE.

- (a) A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he:

- (1) alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or
- (c) An offense under Subsection (a) or Subsection (d)(1) is a felony of the third degree, unless the thing altered, destroyed, or concealed is a human corpse, in which case the offense is a felony of the second degree. An offense under Subsection (d)(2) is a Class A misdemeanor. (c-1) It is a defense to prosecution under Subsection (a) or (d)(1) that the record, document, or thing was visual material prohibited under Section 43.261 that was destroyed as described by Subsection (f)(3)(B) of that section.
- (d) A person commits an offense if the person:
 - (1) knowing that an offense has been committed, alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to the offense

➤ **Austin Police Department Policy 900.3.1: General Conduct and Responsibilities: Honesty**

900.3.1 Honesty

Honesty is of the utmost importance in the police profession. Employees are expected to be truthful at all times in the performance of their duties.

- (a) Employees will speak the truth at all times and reflect the truth in all reports and written communications. Any statement or omission of pertinent or material information which intentionally misrepresents facts or misleads others through an official statement will be considered a false official statement. The following are examples of an "official statement":
 - 2. Verbal or written statements made by an officer in connection with their official duties to:
 - (a) An investigator conducting an administrative or criminal investigation of the officer or another person's conduct.
- (c) Employees will not attempt to conceal, divert, or mitigate their true culpability in a situation, nor will they engage in efforts to thwart, influence, or interfere with an internal or criminal investigation.

➤ **Austin Police Department Policy 900.3.2: General Conduct and Responsibilities: Acts Bringing Discredit Upon the Department**

900.3.2 Acts Bringing Discredit Upon the Department

Since the conduct of personnel both on-duty or off-duty may reflect directly upon the Department, employees must conduct themselves at all times in a manner which does not bring reproach, discredit, or embarrassment to the Department or to the City.

- (a) Employees will not commit any act which tends to destroy public confidence in, and respect for, the Department or which is prejudicial to the good order, efficiency, or discipline of the Department.

➤ **Austin Police Department Policy 900.3.3: Prohibited Associations**

(b) Employees will not establish social and/or business dealings with persons they know, or should know, are likely to adversely affect the employee's or Department's credibility. Employees will not associate with convicted felons. Provisions of this section do not apply to association based on kinship or the discharge of official duties.

By copy of this memo, Commander Dusterhoft is hereby advised of this indefinite suspension and that the suspension may be appealed to the Civil Service Commission by filing with the Director of Civil Service, within ten (10) days after receipt of a copy of this memo, a proper notice of appeal in accordance with Section 143.010 of the Texas Local Government Code.

By copy of this memo and as required by Section 143.057 of the Texas Local Government Code, Commander Dusterhoft is hereby advised that such section and the Agreement Between the City of Austin and the Austin Police Association provide for an appeal to an independent third-party hearing examiner, in accordance with the provisions of such Agreement. If appeal is made to a hearing examiner, all rights of appeal to a District Court are waived, except as provided by Subsection (j) of Section 143.057 of the Texas Local Government Code. That section states that the State District Court may hear appeals of an award of a hearing examiner only on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction, or that the order was procured by fraud, collusion or other unlawful means. In order to appeal to a hearing examiner, the original notice of appeal submitted to the Director of Civil Service must state that appeal is made to a hearing examiner.



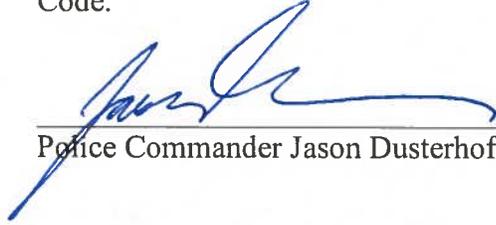
 BRIAN MANLEY, Chief of Police

12-20-18

 Date

TO WHOM IT MAY CONCERN:

I hereby acknowledge receipt of the above and foregoing memorandum of indefinite suspension and I have been advised that if I desire to appeal that I have ten (10) calendar days from the date of this receipt to file written notice of appeal with the Director of Civil Service in accordance with the provisions of Chapter 143 of the Texas Local Government Code.



Police Commander Jason Dusterhoft # 3208

12/20/18

Date

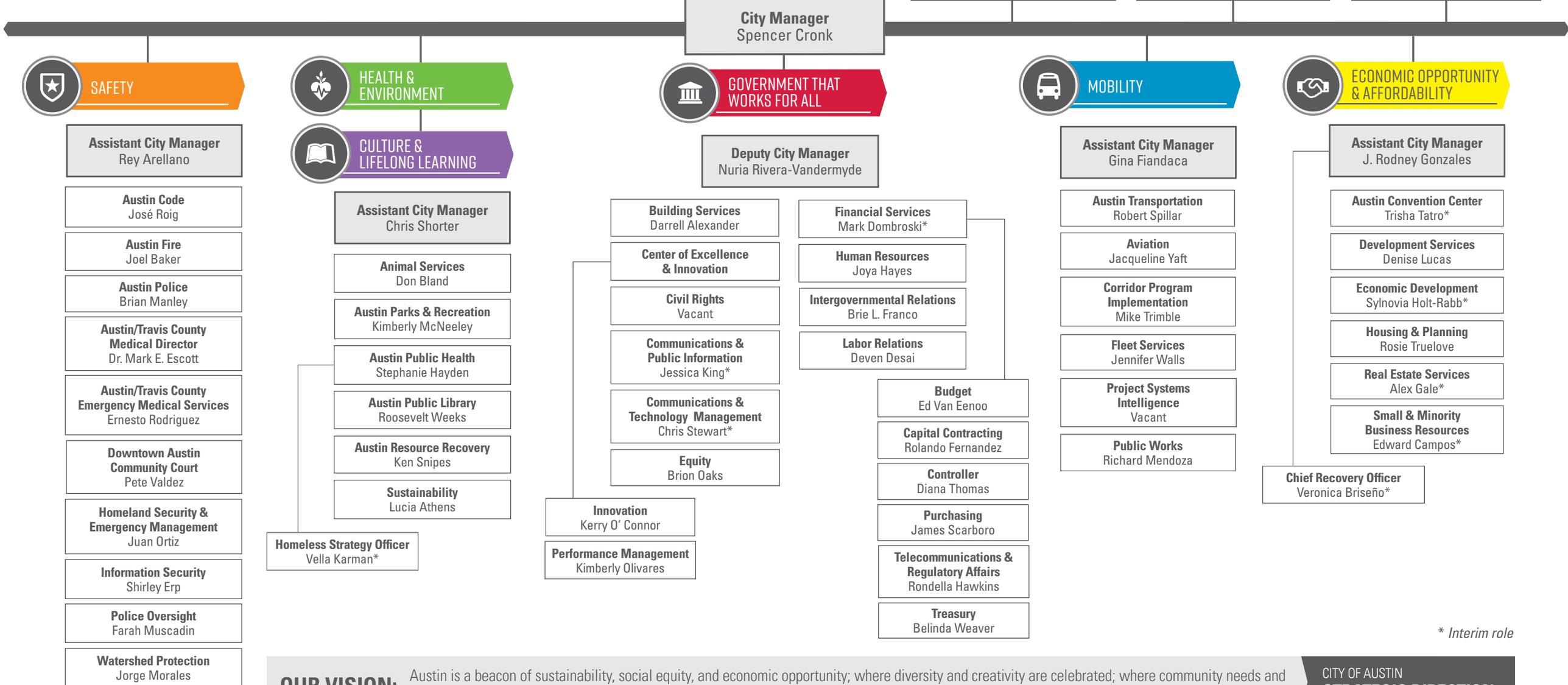
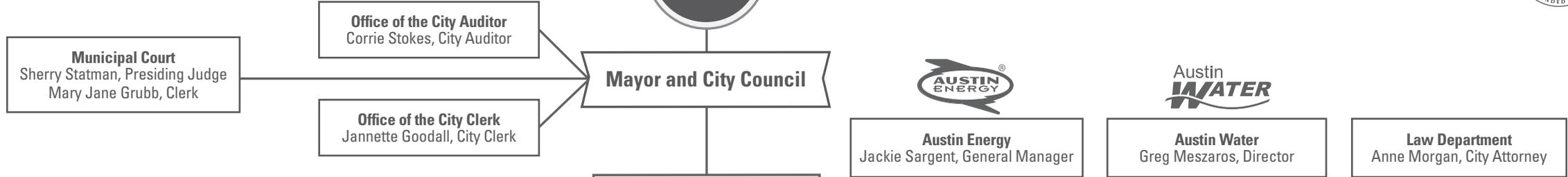
EXHIBIT B

City of Austin

Organizational Chart



CITY OF AUSTIN RESIDENTS



* Interim role

OUR VISION: Austin is a beacon of sustainability, social equity, and economic opportunity; where diversity and creativity are celebrated; where community needs and values are recognized; where leadership comes from its community members; and where the necessities of life are affordable and accessible to all.

CITY OF AUSTIN
STRATEGIC DIRECTION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN, et al.,

Defendants.

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CAUSE OF ACTION:
1:22-cv-00299

PLAINTIFF’S RESPONSE TO DEFENDANT’S SECOND MOTION TO DISMISS

The Court should deny Defendant City of Austin’s Rule 12 motion to dismiss. Doc. 21.

I. SUMMARY OF ARGUMENT

The City’s motion should be denied for four reasons.

First, the Court has subject matter jurisdiction over this 42 U.S.C. § 1983 case.

Second, the Court should disregard and strike the City’s exhibits, which the City improperly uses to (try to) dispute facts, as the complaint does not incorporate them by reference.

Third, Plaintiff Jane Doe states a *Monell* claim: The City’s deliberately indifferent policy failures alleged in the complaint were a moving force of prior APD officers’ sexual assaults, as well as Defendant APD Officer Walter Dodds’ abuse of his position to sexually assault Plaintiff. The City fails to present any questions of law that can be disposed of by a Rule 12(b)(6) motion; instead, its arguments rest upon improperly disputing allegations and misreading the complaint.

Finally, in the alternative, the motion to dismiss is premature. Plaintiff needs the opportunity for discovery regarding the *Monell* allegations, the history of sexual misconduct by APD officers, and the City’s relevant policies and practices, which are not known to Plaintiff.

Accordingly, the Court should deny the City’s motion.

II. FACTUAL BACKGROUND

This 42 U.S.C. § 1983 case arises from Dodds’ sexual assault of Plaintiff. Doc. 17.

Plaintiff alleges that Dodds used his position, tools, and authority as a police officer to sexually assault her under color of law—just hours after he met her on duty during a response to a 911 call to her residence—then harass her while on duty in the ensuing days to try to prevent her from reporting the crime. *See* Doc. 17, pp. 2–5, 25–27, ¶¶ 8–46, 182–192.

Plaintiff further alleges that the City of Austin had deliberately indifferent hiring, supervision, policies, and training with respect to preventing officers from sexually assaulting people, despite knowing that these deficiencies would cause constitutional violations—and had done so in the past. *See* Doc. 17, pp. 5–13, 27–18, ¶¶ 47–98, 197–198. The City of Austin further fostered a culture of sexual misconduct and longstanding failures to investigate sexual violence. *Id.* at 13–25, 17–18, ¶¶ 99–181, 197–198. All of these inadequacies were a moving force of Dodds’ attack on Plaintiff. *Id.* at 8–9, 11, 13, 25, 29, ¶¶ 71–72, 85–86, 97–98, 180, 199.

III. ARGUMENT

The Court should deny the City’s motion to dismiss Plaintiff’s claims for four reasons.

A. The Court has jurisdiction and the City’s Rule 12(b)(1) motion is erroneous.

28 U.S.C. §§ 1331 and 1343 provide this Court subject matter jurisdiction, as Plaintiff asserts 42 U.S.C. § 1983 claims. The City is not entitled to immunity of any kind, as “municipalities have no immunity from damages liability flowing from their constitutional violations.” *Owen v. City of Indep., Mo.*, 445 U.S. 622, 657 (1980). Thus, the City’s motion should be assessed solely under Rule 12(b)(6), not under Rule 12(b)(1), for two reasons.

First, a “municipality’s ‘governmental’ immunity is obviously abrogated by the sovereign’s enactment of a statute making it amenable to suit. Section 1983 was just such a

statute.” *Owen*, 445 U.S. at 647. *Geraci v. City of Austin* incorrectly applied Texas law of governmental immunity in a § 1983 case, as it was led astray¹ by cases which merely stand for the unremarkable proposition that the Texas *state law* defense of governmental immunity applies to Texas *state law* claims in federal court. 1:19-CV-340-SH, 2020 WL 1644004, at *2 (W.D. Tex. Apr. 2, 2020).² Nowhere does *Geraci*—or the City—explain how to leap from state law defenses to defiance of the Supreme Court’s conclusion about federal law in *Owen*.

Second, “when a defendant’s challenge to the court’s jurisdiction is also a challenge to the existence of a federal cause of action, the proper procedure for the district court is to find that jurisdiction exists and to deal with the objection as a direct attack on the merits of the plaintiff’s case.” *Daniel v. Ferguson*, 839 F.2d 1124, 1127 (5th Cir. 1988) (quoting *Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1346–47 (5th Cir. 1985)) (collecting Fifth Circuit cases). Thus, “[a]lthough [the defendant] moved to dismiss under both Rule 12 (b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim,” the Court should still address the City’s motion only “under the Rule 12(b)(6) standard because the arguments for immunity are attacks on the existence of a federal cause of action.” *Morrison v. Walker*, 704 F. App’x 369, 372 (5th Cir. 2017) (collecting Fifth Circuit cases). Again, none of this Fifth Circuit authority is addressed in *Geraci* or the City’s motion.

Owen and *Daniel v. Ferguson* are binding precedent, *Geraci* notwithstanding. The City fails to address the correct standard, much less cite any binding precedent which supports their position, so their jurisdiction argument should be denied and their motion should not be considered

¹ Notably, *Geraci* was decided based upon the City of Austin’s motion against a *pro se* plaintiff.

² See *Powers v. Northside Indep. Sch. Dist.*, 662 F. App’x 306, 308 (5th Cir. 2016) (Texas Whistleblower Act); *Morgan v. Plano Indep. Sch. Dist.*, 724 F.3d 579, 582 (5th Cir. 2013) (Texas Religious Freedom Restoration Act); *Bonillas v. Harlandale Indep. Sch. Dist.*, 832 F. Supp. 2d 729, 735 (W.D. Tex. 2011) (Texas Whistleblower Act).

under Rule 12(b)(1). In any event, as discussed below, *infra* pp. 6–20, Plaintiff has stated a claim, so the motion should be denied even under the incorrect standard articulated by *Geraci*.

B. The Court should strike and disregard the City’s exhibits—or, alternatively, deny the City’s motion under Rule 56(d).

The City improperly asks the Court to consider five documents (including a *different* motion to dismiss signed by the City) attached to its Rule 12(b)(6) motion. Nowhere has Plaintiff incorporated any of the City’s exhibits into her pleadings, so the Court should strike and disregard the exhibits or, alternatively, conclude that Plaintiff has not had adequate discovery so the City’s motion should be denied under Rule 56(d).

Courts may generally not consider information or documents “outside the complaint” when deciding a Rule 12(b)(6) motion.³ The only relevant⁴ exception is when those documents are attached to the complaint or when they are incorporated by reference—which means they are both “referred to in the plaintiff’s complaint and are central to the plaintiff’s claim.” *Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003). The City attaches five exhibits, but none meet either of the two elements required for incorporation by reference.

³ See *Smith v. JPMorgan Chase Bank, N.A.*, 699 F. App’x 393, 394 (5th Cir. 2017) (“A district court may not generally ‘go outside the complaint’ in determining whether to grant a motion to dismiss.”); *Edionwe v. Bailey*, 860 F.3d 287, 293 n.1 (5th Cir. 2017) (“[W]e typically may not consider materials or documents outside of the complaint in addressing a motion to dismiss.”) (quoting with approval *A2D Techs. Inc. v. MJ Sys., Inc.*, 269 Fed. App’x 537, 541 (5th Cir. 2008)); *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (“Because the court reviews only the well-pleaded facts in the complaint, it may not consider new factual allegations made outside the complaint, including those made on appeal.”); *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 289 (5th Cir. 2006) (“It is well-established that, in deciding whether to grant a motion to dismiss, a district court may not ‘go outside the complaint.’”).

⁴ The City cursorily refers to the doctrine of judicial notice, another exception, but obviously each of the City’s self-serving exhibits is a “subject of reasonable dispute.” See, e.g., *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 830 (5th Cir. 1998).

First, Plaintiff’s allegations relied on by the City are not sufficient to “refer[] to” the City’s exhibits. While the complaint characterizes deficiencies in the “public version of APD policy,” this language does not rely on, quote from, or identify any specific webpage⁵ or excerpt from APD’s general orders. *See* Doc. 17, p. 7, ¶ 64. Likewise, while the complaint describes the facts disputed in an ongoing lawsuit concerning Dusterhoft, it never mentions the City’s motion to dismiss that lawsuit⁶ or any APD memo about Dusterhoft. *See* Doc. 17, pp. 24–25, ¶¶ 176–179. And nothing about the complaint even conceivably refers to the APD organizational chart. While the City (incorrectly) argues that these exhibits cast doubt on Plaintiff’s allegations, the Fifth Circuit has expressly rejected the idea that a document can be incorporated into a complaint for this reason. *See Rodriguez v. Rutter*, 310 Fed. App’x 623, 626 (5th Cir. 2009) (reversing district court that considered video evidence that contradicted the facts alleged in the complaint).

Second, the City’s exhibits are not even remotely “central” to the complaint. *See, e.g., Scanlan*, 343 F.3d at 536 (reversing because district court relied upon an incident report that was mentioned in the complaint, but appeared to be “more central to the [defendant’s] defenses” than the complaint). The mention of a “public version of APD policy” is just one paragraph. Doc. 17, p. 7, ¶ 64. The Dusterhoft controversy is discussed in only four paragraphs. Doc. 17, pp. 24–25, ¶¶ 176–179. Plaintiff’s 200-paragraph complaint does not revolve around these five paragraphs— or any of the City’s exhibits.

Accordingly, the City’s extraneous exhibits are not appropriate for a Rule 12(b)(6) motion. The Court should either strike and disregard the attachments or deny the City’s motion entirely

⁵ The City misleadingly labels the recruiting webpage “hiring policies,” but one page from one part of the City’s vast online presence is not necessarily a policy, and nothing about the webpage— absent the City’s representation in its motion—purports to be official policy.

⁶ In any event, the motion has dubious evidentiary value and no persuasive value, as it was denied. *See Dusterhoft v. City of Austin*, No. 1:20-cv-1081, Doc. 23, 31 (W.D. Tex.).

pursuant to Rule 56(d) after converting it to a summary judgment motion. Discovery has not begun and obviously Plaintiff is unable to respond to the merits of a summary judgment motion.

C. Plaintiff states a claim against the City for its deliberately indifferent official policies.

Plaintiff's complaint states a claim against the City, so the Court should deny the City's motion to dismiss.

In evaluating a motion to dismiss for failure to state a claim, the Court "construe[s] facts in the light most favorable to the nonmoving party, as a motion to dismiss under 12(b)(6) is viewed with disfavor and is rarely granted." *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (internal quotation marks omitted). "[T]he complaint need not articulate detailed factual allegations," but they must be plausible. *Richardson v. Axion Logistics, L.L.C.*, 780 F.3d 304, 306 (5th Cir. 2015) (internal quotation marks omitted). "A complaint is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

A civil rights plaintiff cannot plead, and is not required to plead, facts "peculiarly within the knowledge of defendants." *Schultea v. Wood*, 47 F.3d 1427, 1434 (5th Cir. 1995). Moreover, "in the context of municipal liability ... it is exceedingly rare that a plaintiff will have access to (or personal knowledge of) specific details regarding the existence or absence of internal policies or training procedures prior to discovery." *Bright v. City of Killeen, Texas*, No. 6:20-CV-431, 2021 WL 1226560, at *4 (W.D. Tex. Mar. 31, 2021) (Albright, J.) (internal quotation marks omitted). Thus, "plaintiffs need not specifically state what the municipal policy is and can rely on minimal factual allegations at this stage in the litigation." *Sanchez v. Gomez*, 283 F. Supp. 3d 524, 532

(W.D. Tex. 2017) (Martinez, J.) (internal quotation marks and revisions omitted);⁷ *see also Reyes v. City of Austin, Inc.*, No. 1:21-CV-00992-LY-SH, 2022 WL 789333, at *4 (W.D. Tex. Mar. 15, 2022) (Hightower, Mag. J.) (allegation that “about 10 [or] so” similar wrongful arrests had occurred was sufficient for municipal liability pleading).

A municipality is liable for its employees’ episodic acts and omissions where there is deliberate indifference by the policymaker to “(1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose ‘moving force’ is that policy (or custom).” *Jauch v. Choctaw Cnty, Miss.*, 874 F.3d 425, 435 (5th Cir. 2017). “Official municipal policy includes the decisions of a government’s lawmakers, the acts of its policymaking officials, and practices so persistent as to practically have the force of law.” *Hicks-Fields v. Harris Cty., Tex.*, 860 F.3d 803, 808 (5th Cir. 2017). Policies, conditions, and customs with a “mutually enforcing effect” should be considered together. *See Wilson v. Seiter*, 501 U.S. 294, 304 (1991); *Sanchez v. Young Cty., Texas*, 956 F.3d 785, 796 (5th Cir. 2020). Here, Plaintiff alleges five categories of policy-level deficiencies that, both separately and in combination, trigger municipal liability.

1. The City was deliberately indifferent in hiring Dodds as an officer.

Plaintiff alleges the City was deliberately indifferent by hiring Dodds as an officer without pre-employment procedures that meet minimum police standards, or, alternatively, despite knowing Dodds was a sexual predator. Doc. 17, pp. 5–9, 27–29, ¶¶ 47–72, 197(b–c), 198–199.

⁷ *See Bright*, No. 6:20-CV-431, 2021 WL 1226560, at *4; *Edmiston v. Culberson Cnty., Texas*, No. EP-21-CV-132-KC, 2022 WL 452483, at *14 (W.D. Tex. Jan. 13, 2022) (Cardone, J.); *King v. City of Austin, Texas*, No. A-16-CA-1020-SS, 2017 WL 1097110, at *6 (W.D. Tex. Mar. 21, 2017) (Sparks, J.); *Crisp v. Dutton*, No. A-15-CV-0431-LY-ML, 2015 WL 7076483, *8 (W.D. Tex. Nov. 12, 2015) (Lane, Mag. J.);

A municipality is liable for hiring a person if “[d]eliberate indifference’ exists where adequate scrutiny ... would lead a reasonable supervisor to conclude that the plainly obvious consequences of the decision to hire would be the deprivation of a third party's constitutional rights.” *Gros v. City of Grand Prairie*, 209 F.3d 431, 433-4 (5th Cir. 2000).

Here, a reasonable policymaker would conclude that the power, access, and equipment afforded to police—in the absence of adequate safeguards—entices the type of predatory person who would abuse their position to engage in sexual violence, just as happened here. Doc. 17, pp. 5–6, ¶¶ 47–48. This problem has long been well-known to competent police chiefs, including APD’s police chief, both because it is obvious and because sexual misconduct is the second-most common source of complaints about police, while—despite their expertise in law enforcement, and therefore in evading law enforcement—over one hundred police officers are caught engaging in sexual violence annually in the United States. *Id.* at 6, ¶¶ 49–52. APD is no exception—while it obscures that data from the public, it receives many credible complaints of sexual misconduct and sexual violence by its officers every year. *Id.* at 13–14, 16–17, ¶¶ 100–106, 120–122.

APD, however, acts with deliberate indifference to that risk by refusing to implement necessary standards to prevent hiring sexual predators—including basic steps such as collecting records releases to get complete records from prior employers, full review of the officers’ social media presence, interviewing current and former romantic or sexual partners, and screening for psychological indicators of a sexual predator. Doc. 17, pp. 7–8, 27, ¶¶ 61–70, 197. APD’s police chief knew these failures would result in hiring sexual predators, but failed to correct them. *Id.* at 8, 28, ¶¶ 70, 198. APD’s chief continued to do nothing despite learning APD had hired sexual predators in the past and learning of sexual assaults by APD officers. *Id.* at 8, 10, 13, 14–18, 24, 27–28, ¶¶ 70, 82, 98, 101–107, 112, 115, 119–121, 123, 133, 173–175, 197(b, d, g–m), 198.

As a direct result, APD hired Dodds and many other sexual predators. Doc. 17, pp. 8, 25, 27, 29, ¶¶ 71, 181, 197(a), 199. Dodds was a sexual predator who had previously abused his badge to engage in sexual assault at the time he was hired. *Id.* at p. 7, ¶¶ 59–60.⁸ Hiring Dodds, in turn, foreseeably gave him the power, tools, and access he would use to attack Plaintiff, amongst others, so the City’s deliberate indifference was the moving force of the constitutional violation, satisfying the elements of municipal liability.

The Court should reject the City’s contrary arguments for four reasons.

First, the main thrust of the City’s argument defies the appropriate standard at the Rule 12(b)(6) stage, where factual details are not required. *See, e.g., Richardson*, 780 F.3d at 306. Contrary to this standard, the City asks the Court to disbelieve factual content or demand more “context” before considering allegations. Doc. 21, pp. 7–9. If the City wants to know why Plaintiff specifically alleges “Dodds’ background is also consistent with the profile of a serial sexual predator,” then its remedy is to engage in discovery about that factual contention. Doc. 21, p. 8. If the City believes different statistical “context” would undermine the significance of the alleged risk of sexual violence by police, then it can provide that context for the jury. *Id.* at 7. If the City wants to disprove the allegation that its hiring procedures defy “minimum police standards,” then its remedy is to present contrary evidence at trial—or at least wait until discovery is complete to file a summary judgment motion. *Id.* at 7–8. The City attempts to couch all of these inapposite arguments as undermining “plausibility,” but really it simply asks the Court to draw inferences against the factual content of Plaintiff’s allegations, contrary to Rule 12 and binding precedent.

⁸ This allegation is plausible because most rapists, by the time they are caught, have sexually assaulted someone before—and, of course, when the crime is a premeditated burglary and rape of an unrelated person, as occurred here, the assailant is particularly likely to be a practiced sexual predator. Doc. 17, pp. 6–7, ¶¶ 55–58.

Second, as discussed above, the City’s website and other exhibits should not be considered at this stage. *See supra* pp. 4–6. Regardless, the website fails to refute Plaintiff’s allegations.⁹

Third, the City mistakenly denies the *existence* of allegations that are, in fact, in the complaint.¹⁰ Without these omissions, the City’s criticisms fall apart.

Fourth, the City also improperly challenges Plaintiff’s allegation of a pattern, complaining that Plaintiff’s allegations that its deficient hiring procedures had failed in the past, and been known to the police chief to fail, are not “credible.” Doc. 21, p. 9. Again, this is not a Rule 12 argument. Tellingly, the only case the City cites for this proposition is an appeal from a grant of summary judgment. *Id.* (citing *Doe v. Edgewood Indep. Sch. Dist.*, 964 F.3d 351, 367 (5th Cir. 2020)). The Fifth Circuit “ha[s] criticized defendants for arguing that cases dismissed on summary judgment supported dismissal of their cases at the pleadings stage.” *Converse v. City of Kemah*, 961 F.3d 771, 776 n.3 (5th Cir. June 12, 2020).¹¹ The Fifth Circuit only requires Plaintiff to plead based on her own knowledge, and of course Plaintiff does not know details of the alleged patterns of misconduct that the City deliberately keeps secret. *See* Doc. 17, pp. 13–15, ¶¶ 100–106, 110; *Schultea*, 47 F.3d at 1434. That is why judges in this district repeatedly allow similar *Monell* claims to proceed to discovery. *See supra* p. 7, n.7 and accompanying text. Thus, the City’s attack applies the wrong standard, defies common sense, defies authority, and should be rejected.

⁹ The City’s recruiting website says nothing about whether the City’s hiring policy requires investigating the risk of a potential police officer being a sexual predator—much less whether such a risk, if detected, would cause APD not to hire the officer. Thus, the City’s website does not refute Plaintiff’s allegations about APD hiring. *See* Doc. 17, pp. 6–8, 27, ¶¶ 53, 61–69, 197(b–c).

¹⁰ The City incorrectly claims there is no allegation that APD had “actual or constructive knowledge that [Dodds] had sexually assaulted others in prior jobs,” contrary to paragraph 72. *Compare* Doc. 21, p. 9, *with* Doc. 17, p. 9. The City also incorrectly claims “there is no allegation Dodds committed any other sexual assaults while working for APD,” contrary to paragraphs 83 and 93. *Compare* Doc. 21, p. 9, *with* Doc. 17, pp. 10, 12.

¹¹ *See also* *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 629 n.8 (5th Cir. 2018); *Drake v. City of Haltom City*, 106 F. App’x 897, 900 (5th Cir. 2004).

Accordingly, the complaint articulates a knowingly deficient hiring policy and practice, which caused APD to hire sexual predators as police officers in the past, that was the moving force of hiring Dodds and his constitutional violation in this case. The City was deliberately indifferent to the fact that Dodds was a sexual predator when it hired him—or to the risk that he would be, because the City knew it was failing to investigate. Therefore, Plaintiff states a *Monell* claim for deliberately indifferent hiring and the City’s motion should be denied.

2. *The City was deliberately indifferent in supervising Dodds.*

Plaintiff independently states a claim arising from the City’s deliberately indifferent failure to supervise Dodds and other officers for telltale signs of abusive and predatory behavior.

If a policymaker “demonstrate[s] deliberate indifference to the offensive acts by failing to take action that was obviously necessary to prevent or stop ... abuse[s],” the municipality is liable. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 456–57 (5th Cir. 1994) (en banc). The Fifth Circuit “ha[s] never required that a supervisory official be warned of the precise act that the subordinate official subsequently commits.” *Smith v. Brenoettsy*, 158 F.3d 908, 912 (5th Cir. 1998).

As described above, the City’s policymaker knew more needed to be done to stop sexual assault by APD officers, as that was an obvious risk and ongoing problem at APD. Doc. 17, pp. 8, 10, 13, 14–18, 24, 27–28, ¶¶ 70, 82, 98, 101–107, 112, 115, 119–121, 123, 133, 173–175, 197(b, d, g–m), 198. In addition to the hiring phase, APD’s police chief knew—and it was obvious—that officers need to be supervised to watch for red flags after onboarding, lest APD “permit sexual predators to act with impunity within a police force.” *Id.* at 10, ¶¶ 79–80. These include unwarranted calls and visits to victims, witnesses, and suspects; possessing sexual material on duty; using government equipment for inappropriate contact; and attempting to initiate sexual contact with anyone involved in an ongoing law enforcement investigation. *Id.* at 9, ¶ 74. These

methods were feasible, as APD monitors patrol car movements and police-issued cell phone usage. *Id.* at 9, ¶¶ 75–77. But APD acted with deliberate indifference by failing to require or implement any of the above supervision. *Id.* at 10, ¶¶ 81–82.

This failure to supervise was a moving force of the constitutional violations here because Dodds exhibited these red flags and would have been caught earlier—as he repeatedly, suspiciously used his police vehicle and police-issued phone to assault others and before he assaulted Plaintiff. Doc. 17, pp. 3–5, 10, ¶¶ 22–26, 36–40, 83–85. Alternatively, Dodds *was* caught earlier, but APD chose to leave him on the force anyway. *Id.* at 11, ¶ 86. In either case, the City knew that its conduct would result in constitutional violations, but continued failing to supervise officers like Dodds, and this was the moving force of Dodds’ assault here.

Again, the City’s contrary argument focuses solely on disputing the facts, rather than taking them as true, and should be rejected for two reasons.

First, the City relies heavily on blatant mischaracterizations of the failure to supervise allegations.¹² Without acknowledging the allegations, the City’s motion has no articulable basis.

Second, the City also repeats its strategy of simply disagreeing with the allegations of a pattern of similar sexual assaults by Dodds and other APD officers, which is erroneous for the

¹² The City falsely claims that Plaintiff does “not explain” how APD could have known about the assault before she reported it, contrary to paragraphs 22, 25–26, and 40–42, which all explain that Dodds repeatedly contacted Plaintiff on his APD phone and drove his police cruiser to her apartment when he had no reason to do so. *Compare* Doc. 21, p. 13, *with* Doc. 17, pp. 3–5. The City falsely claims that Plaintiff fails to allege “any actual prior conduct by Dodds while at APD,” contrary to paragraph 93. *Compare* Doc. 21, p. 13, *with* Doc. 17, p. 12. The City falsely claims “the Complaint alleges Dodds drove by Plaintiff’s residence only once,” contrary to paragraphs 11, 26, and 40. *Compare* Doc. 21, p. 13, n.7, *with* Doc. 17, pp. 2, 4, 5. The City further falsely claims “there is no allegation that APD was aware of prior sexually inappropriate behavior by Dodds,” contrary to paragraph 86. *Compare* Doc. 21, p. 14, *with* Doc. 17, p. 11. The City falsely claims Plaintiff’s theory is that APD must “monitor every phone call,” contrary to the actual allegation which is that supervisors must merely “watch for obvious signs,” including unwarranted contacts with witnesses like Plaintiff. *Compare* Doc. 21, p. 14, *with* Doc. 17, p. 9, ¶ 74.

same reasons discussed above. *See supra* pp. 10–11. It is simply not true that Plaintiff’s claim “rests on this one, isolated incident:” the supervision allegations describe a series of obvious missteps which the chief actually knew posed a risk and which were never fixed despite causing a pattern of known misconduct by APD officers. *Contra* Doc. 21, p. 13.

As the City’s entire argument requires a departure from Rule 12, and Plaintiff’s failure to supervise allegations independently state a *Monell* claim, the City’s motion should be denied.

3. *The City was deliberately indifferent in its policies and training on sexual misconduct.*

Plaintiff’s complaint further states a claim by alleging APD failed to implement policies and training to prevent officers from engaging in sexual contact with civilians involved in an ongoing law enforcement investigation and to require officers to report such sexual misconduct.

As described above, the City’s policymaker knew more needed to be done to stop sexual assault by APD officers, as that was an obvious risk and ongoing problem at APD. Doc. 17, pp. 8, 10, 13, 14–18, 24, 27–28, ¶¶ 70, 82, 98, 101–107, 112, 115, 119–121, 123, 133, 173–175, 197(b, d, g–m), 198. In addition to its deficiencies in hiring and direct supervision discussed above, APD’s police chief knew that APD’s formal policies and training were inadequate and would cause sexual assaults by officers to continue. *See* Doc. 17, pp. 12, 27–28, ¶¶ 89–92, 94, 197(a, f), 198.

Specifically, APD did not train against or require officers to report sex-related misconduct by other officers, sexual relationships with witnesses or other contacts during police investigations, and the types of unwarranted or inappropriate contacts with victims, witnesses, or other civilians discussed as red flags in the supervision section. Doc. 17, pp. 11, 27–28, ¶¶ 87, 197(a, f); *see supra* pp. 11–13. APD’s police chief knew these failures departed from obvious, bare minimum police standards. *Id.* at 12–13, 28, ¶¶ 89–92, 96, 198. Alternatively, any such policies were routinely ignored in a custom of violating minimum standards. *Id.* at 13, ¶ 98.

The failure to enact these policies and training was a moving force of the constitutional violation because Dodds’ supervisors and peers would have detected his prior sexual assaults and suspicious behavior with Plaintiff—so he would have been expelled before he sexually assaulted Plaintiff if APD had adequate policies and training. Doc. 17, pp. 12–13, 29, ¶¶ 94, 97, 199.

The Fifth Circuit has held that a similar complaint states a claim by alleging a city’s failure to train and supervise jail officers had the obvious result of one of those officers engaging in sexual assault. *See Drake*, 106 Fed. App’x at 899 (reversing dismissal of *Monell* claims). Instead of assuming the allegations are true and arguing about whether they state a claim, the City again disputes the factual content of Plaintiff’s complaint, so its arguments should be rejected for four reasons.

First, the City relies on an excerpt from APD’s general orders which commands officers to obey the law and not have or solicit sex while on duty. *See* Doc. 21, pp. 10, 36–38. As discussed above, *see supra* pp. 4–6, this exhibit cannot be considered as part of a Rule 12 motion and should be stricken. Regardless, it supports, rather than refuting, Plaintiff’s allegations, as it does not include the policies or training Plaintiff claims APD lacked at the time.¹³

Second, the City mistakenly suggests that Plaintiff’s theory boils down to the lack of “special training directing [officers] not to sexually assault people”—but that is not the allegation. *Contra* Doc. 21, p. 11. Minimum police standards require officers to be trained against and required to watch for red flags from their colleagues and subordinates. Doc. 17, pp. 11–12, ¶¶ 87,

¹³ Soliciting a distraught witness, then breaking into her home and raping her, is not “on-duty or on the premises of City facilities” if Dodds clocked out or went on break first, so it is not covered by what appears to be the only APD policy on sexual misconduct with civilians. Doc. 21, p. 37. Even if Dodds was “on-duty,” neither that policy nor the general prohibition on breaking the law requires officers to watch for, report, or act on the aforementioned obvious signs of sexual predators in the police force. Thus, the general order provides no policy and no training whatsoever on the issue at hand—consistent with Plaintiff’s allegations.

89. Moreover, one of those prohibitions must be *any* sexual contact, even lawful contact, between an officer and a civilian involved in an ongoing police investigation—not just sexual assault and not just on duty. *Id.* The reasons for this are both common sense and well-pleaded: even if sexual contact with a police officer could be fully consensual during an ongoing police investigation (which is dubious), it should not matter whether the officer is “on duty” or “off,” and ambiguity about consent would impair administration of a policy against nonconsensual contacts—colleagues and supervisors would not know who to report. *Id.* at p. 11, ¶ 88.

Third, the City again denies the allegations of a pattern, amongst other mistaken assertions about the complaint’s policy and training allegations,¹⁴ but this is wrong and contrary to the standard of review for Rule 12 motions as discussed above. *See supra* pp. 10–11.

Finally, regardless of whether Plaintiff alleges a prior pattern (although she does), the City’s failure to train and enact a policy satisfies the single incident exception addressed by the Supreme Court in *City of Canton, Ohio v. Harris*. 489 U.S. 378, 390, n.10 (1989). A police department with officers who have *no* training and *no* policy on preventing their colleagues from abusing their power (particularly for sexual gratification) is obviously deficient, just as a police department with *no* training on the use of force would be. *Compare id.* with Doc. 17, pp. 12, 27–28, ¶¶ 89, 91, 197(a, f). Just as policymakers “know to a moral certainty that their police officers will be required to arrest fleeing felons,” the APD chief knew that his deputies would be placed in recurring situations where their colleagues or subordinates would be tempted to—and would—abuse their police authority, training, and equipment. *Id.*; Doc. 17, pp. 12, 28, ¶¶ 90, 198. Accordingly, the need for training and a policy on how to recognize and react to these red flags

¹⁴ The City again mistakenly claims “there is no allegation [Dodds] had sexually assaulted anyone while at APD, or that APD was aware of prior sexual assaults by Dodds at any point,” contrary to paragraphs 83, 86, and 93. *Compare* Doc. 21, p. 12, *with* Doc. 17, pp. 10–11, 12.

was “so obvious that the failure to train is deliberate[ly] indifferen[t] to constitutional rights.” *Brown v. Bryan Cty. Okla.*, 219 F.3d 450, 460 (5th Cir. 2000).¹⁵

Accordingly, Plaintiff states a claim arising from the City’s deliberate indifference in failing to enact necessary policies and training and the City’s motion should be denied.

4. *The City fostered a culture of sexual misconduct by APD officers.*

Plaintiff also states a claim arising from a custom of APD officers engaging in sexual violence, arising from the City’s indifference, tolerance, and efforts to sweep any such misconduct under the rug rather than expose, discipline, and expel offenders from the force.

“[T]he existence of a persistent pattern of illegal conduct, tolerated by municipal policymakers, tends to show that the subject conduct does not represent an unauthorized departure from lawful policy but instead represents the realization of an *unlawful* policy.” *Milam v. City of San Antonio, Tex.*, 113 Fed. App’x 622, 625 (5th Cir. 2004) (emphasis in original); *see also Barkley v. Dillard Dep’t Stores, Inc.*, 277 Fed. App’x 406, 413 (5th Cir. 2008) (noting that where “officers received no reprimands or discharges from the city” for “flagrant” violations, the court may infer “there must have been a preexisting disposition and policy of reckless disregard”).

For decades, APD has annually reported hundreds of complaints using generic language that encompasses allegations of sexual misconduct and sexual assault. Doc. 17, pp. 13–14, ¶¶ 100–106. Outside of APD, sexual misconduct by law enforcement is the second-most common source of complaints. *Id.* at 13, ¶ 99. And APD is not uniquely immune to sexual impropriety: to the contrary, the City’s own study into APD found that it retained a culture of sexism into 2020, based

¹⁵ *See also Benjamin v. Baytown Police Dep’t*, No. 4:17-CV-01198, 2018 WL 1033255, at *2 (S.D. Tex. Feb. 21, 2018) (denying motion to dismiss where plaintiff alleged a lack of training for officers regarding hearing aids lead officers to remove his hearing aids during booking, then to use excessive force while in jail because he appeared noncompliant with commands he could not hear).

on widespread reports across APD of sexist comments, name calling, and sex-related derogatory terms. *Id.* at 17, ¶¶ 125–127. A culture of sexist attitudes, in turn, fosters sexual assaults and attracts sexual predators—indeed, it is widely accepted that to screen for sexual predators, police departments should try to uncover any sexist bias. *Id.* at 17–18, ¶¶ 128–130. Thus, Plaintiff alleges that many of the thousands of complaints APD has received (but obscured with vague reporting practices) are about sexual misconduct, including sexual assault. *Id.* at 14, ¶ 106.

Despite this mountain of complaints, APD only disciplined a single officer for sexual misconduct in an eighteen-year period. *Id.* at 15, ¶ 108. The extreme disparity in complaints versus actual discipline supports an inference that APD is not interested in stopping this behavior. And the rare cases of specific complaints that pierced APD’s veil of secrecy further support this inference, as in each incident APD failed to discipline egregious, credible misconduct—a sergeant that the police chief found engaged in sexual harassment, two officers who threatened a passing woman with rape on video, an officer who grabbed a woman then groped her breast and vagina, and several officers who raped their female APD colleagues. *Id.* at 15–17, ¶¶ 112–115, 124. While these serious incidents alone, in light of APD’s failure to address them, suffice for a pattern,¹⁶ Plaintiff alleges more. Beyond those specific incidents, there has been a decades-long pattern of numerous, credible reports of sexual assault by APD officers that are known to the police chief, but have been intentionally ignored and suppressed by APD. *Id.* at 15–16, ¶¶ 107, 110, 119–123.

The City argues that Plaintiff does not allege the details of enough of these prior incidents of sexual assault, but this argument fails at the Rule 12 stage. It is of course plausible that Plaintiff

¹⁶ See *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984) (en banc) (“Where the violations are flagrant or severe, the fact finder will likely require a shorter pattern of the conduct to be satisfied that diligent governing body members would necessarily have learned of the objectionable practice and acceded to its continuation.”).

would not know the details of sexual assaults that APD suppressed. Thus, Plaintiff’s allegation that those assaults nonetheless occurred is plausible, and the City’s effort to rely on Rule 56 decisions is improper—details about a pattern will be required, but only once Plaintiff has an opportunity to learn those details. *See supra* pp. 10–11. Thus, courts in this district have repeatedly allowed *Monell* claims to proceed due the Plaintiff’s lack of knowledge—even complaints that are far more barebones than Plaintiff’s here. *See supra* p. 7, n.7, and accompanying text.

Accordingly, Plaintiff alleges that APD has failed to correct a longstanding pattern of sexual assaults by its officers—instead choosing to tolerate and suppress knowledge of that pattern. This allegation, if true, “arguably shows acquiescence to the misconduct such that a jury could conclude that it represent[ed] official policy,” and therefore suffices to state a claim for *Monell* liability. *Sanchez v. Young Cty., Texas*, 956 F.3d 785, 793 (5th Cir. 2020).

5. *APD’s failure to investigate sex crimes reflects a pattern and practice of failing to take sexual misconduct seriously amongst its ranks.*

Finally, Plaintiff states a claim because APD compounded its other policy failures by undermining its investigations into sex crimes in general, going back over a decade at the time Dodds sexually assaulted Plaintiff. Doc. 17, pp. 18–24, ¶¶ 138–180.

In raw numbers, APD’s arrest statistics for crimes of sexual violence were alarmingly anemic for years—with less than 10% of rape complaints leading to an arrest. Doc. 17, pp. 18–19, ¶¶ 137–150. Moreover, APD undermined sexual assault investigations with misogynistic bias, underfunding, and anti-victim misconceptions—as the complaint describes both generally and with specific, high-profile examples. *Id.* at 19–25, ¶¶ 151–180. Instead of fixing these problems, APD covered them up with tactics like “exceptionally clearing” sexual assault cases that did not merit that disposition. *Id.* at 19–20, ¶¶ 152–157. Each of these three issues—poor arrest

performance, biased investigations, and wrongful exceptional clearance—was specifically known to policymakers well before Dodds sexually assaulted Plaintiff. *Id.* at 20–25, ¶¶ 155, 156, 176.

In addition to the pattern presented by the statistics and City leaders’ admissions, “dishonesty and an apparent cover-up is ‘typical of extended or pervasive misconduct,’” so the wrongful exceptional clearance practice independently shows these practices were sufficiently pervasive to be official policy. *Id.* at 8–9, ¶¶ 72–74; *Sanchez*, 956 F.3d at 793; *see also Williams v. Treen*, 671 F.2d 892, 899 (5th Cir. 1982) (“If an official’s conduct contravenes his own state’s explicit and clearly established regulations, a subjective belief in the lawfulness of his action is per se unreasonable.”). This chronic deficiency in sex crime investigations was a moving force of the constitutional violation, as it emboldened predators within APD like Dodds, causing his sexual assault on Plaintiff. Doc. 17, pp. 25, ¶ 180.

Tellingly, the City again fails to assess whether these allegations state a claim, instead merely asking the Court to disbelieve them. For example, the City outrageously demands that Plaintiff’s complaint provide “comparison to other cities” before the Court consider the arrest rate statistics—even though the mayor admitted they reflect a grave problem. *Compare* Doc. 21, p. 20, *with* Doc. 17, p. 19 § 149. It bears repeating that “context,” “factual basis,” “substant[ion],” and “evidence”—all requirements the City tries to impose on Plaintiff before discovery—are categorically not “a short and plain statement of the claim.” *Compare* Doc. 21, pp. 6, 8–9, 12, 15–16, 19–20, *with* FED. R. CIV. P. 8. The Court should reject the City’s erroneous efforts to second-guess dozens of factual allegations, as this approach violates binding precedent as discussed above. *See, e.g., Richardson*, 780 F.3d at 306; *supra* pp. 10–11. Courts in this district have repeatedly rejected the same argument in *Monell* cases. *See supra* p. 7, n.7 and accompanying text.

Accordingly, Plaintiff’s complaint states a claim and the City’s motion should be denied.

D. In the alternative, the Court should permit discovery and an opportunity to amend the Complaint before granting a Rule 12 motion.

Although Plaintiff believes the motion should be denied on its merits, if the Court would grant any part of the City's motion, then Plaintiff requests in the alternative that the Court grant Plaintiff leave to amend after the benefit of limited discovery.

"The court should freely give leave [to amend pleadings] when justice so requires." FED. R. CIV. P. 15(a)(2).

This case involves internal policies, procedures, and conduct of the City of Austin, as well as detailed history regarding both Dodds specifically and APD broadly which are not available to Plaintiff before bringing suit. *See* TEX. GOV'T CODE § 552.108 (excepting many law-enforcement records from public disclosure). If the Court needs additional information on the subjects the City attacks—such as more specificity regarding APD training or prior alleged similar misconduct—Plaintiff should not be expected to plead even more details prior to discovery. All of those subjects are only known to Defendants and other law enforcement agencies, at least until Plaintiff has had the opportunity to investigate through discovery. *See supra* p. 7, n.7 and accompanying text.

Thus, at a minimum, the Court should deny the City's motion without prejudice until Plaintiff has had the opportunity to conduct discovery—specifically, written discovery to the Defendants (and any other agencies or municipalities with knowledge of Dodds' background¹⁷); taking the deposition of Defendant Dodds; taking the deposition of the police chief; and taking the deposition of a representative of the City under Rule 30(b)(6)—and Plaintiff has had the opportunity to amend the complaint.

Dated: August 5, 2022.

¹⁷ Dodds spent several years as an officer at other police agencies before he was hired by APD, and presumably his conduct at those agencies was known to APD when they hired him.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

By my signature above, I certify that a true and correct copy of the foregoing has been served on all counsel of record through the Electronic Case Files System of the Western District of Texas.

By /s/ Jeff Edwards
Jeff Edwards

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

JANE DOE,
Plaintiff,

v.

CITY OF AUSTIN and WALTER
DODDS,
Defendants.

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CIVIL ACTION NO. 1:22-cv-00299-RP

**DEFENDANT CITY OF AUSTIN’S REPLY TO PLAINTIFF’S
RESPONSE TO DEFENDANT’S MOTION TO STAY
DISCOVERY AND DEFER ENTRY OF A SCHEDULING ORDER**

Defendant City of Austin (“City”), files this Reply to Plaintiff’s Response to Defendant’s Motion to Stay Discovery and Defer Entry of a Scheduling Order. *Dkt. 29*. The City would show the following:

A. If Plaintiff’s *Monell* claims are dismissed, no “substantial discovery requests to the City” are necessary, which weighs in favor of a stay.

In opposing the need for the stay requested by the City, Plaintiff argues it serves no real purpose because even if her *Monell* claims are dismissed, the City will still be subjected to “substantial discovery requests” from Plaintiff on her remaining claim against Dodds. *Dkt. 29, P. 5*. That argument fails. Plaintiff doesn’t specify what “substantial discovery” from the City would be needed to substantiate her claim that Dodds assaulted her, thus violating her Constitutional rights. Her §1983 claim against Dodds has little if anything to do with APD policies, other instances of alleged wrong-doing by other officers at other times, or the purported officially-sanctioned “culture” of sexual predators gone wild at APD. All of these are topics regarding which Plaintiff has threatened over and over to conduct extensive discovery on the City. Yet those issues have no bearing on Plaintiff’s claim against Dodds individually.

What Plaintiff is suggesting is that a mountain of discovery will be served on the City, *regardless* of whether the City remains a defendant in the case. That objective does not ring true. If the City is not a party and the *Monell* claims are dismissed, Plaintiff's discovery regarding its claim against Dodds will be, necessarily, much more limited. And for good reason. The claim that Dodds assaulted Plaintiff in violation of her Constitutional rights presents a straightforward question: what happened on the evening of April 18, 2020? Insofar as Plaintiff's §1983 claim against Dodds is concerned, burdensome and harassing discovery against a non-party like the City would be of no utility in establishing Dodds' individual liability. Plaintiff's threat of "substantial discovery" on the City looks different if the claims against the City are dismissed. The requested stay serves a salutary purpose by permitting the court to determine, up front, what the claims are and who the proper parties are in this case.

B. Discovery between Plaintiff and the City cannot "proceed normally" if Dodds' motion to stay discovery is granted.

In explaining why the disposition of Dodds' pending discovery motion has no bearing on the City's Motion to Stay Discovery, Plaintiff argues discovery will "proceed normally" even if this court determines no discovery can be sought from Dodds pending his possible criminal indictment. Plaintiff does not explain how exempting one defendant from discovery would work going forward. Clearly, it wouldn't.

Plaintiff's *Monell* claims against the City are directly derivative of her alleged assault by Dodds in 2020. For the City to defend against Plaintiff's *Monell* claims, it must obtain evidence from Dodds regarding what he did, and did not do, in connection with that alleged assault. Judging from the complaint, the only two individuals present were Dodds and Plaintiff. To conduct discovery only on Plaintiff's side of the story, and not Dodds', would be inadequate, inequitable and inconsistent with the purpose of civil discovery. For Plaintiff to suggest the City can conduct

adequate discovery to defend against the *Monell* claims without the benefit of *any* discovery from Dodds, is a short-sighted, tactical argument, not effective civil litigation.

C. A word on Plaintiff's "justice delayed" argument.

Plaintiff argues that abating discovery until the City's Motion to Dismiss is decided will prejudice her because "justice delayed is justice denied" and civil rights cases must be conducted "swiftly." The delay in this litigation is the result of Plaintiff waiting nearly two years before filing suit. It is not the consequence of anything the City did, or that it has done since this lawsuit was commenced.

The alleged assault by Dodds happened April 18, 2020. Plaintiff then waited until the last few days of the two-year limitations period before filing suit on March 30, 2022. Even then, Plaintiff amended her complaint twice to more clearly specify exactly what facts underlie her *Monell* claims against the City. *That* is the reason the City's Motion to Dismiss remains pending today, more than two years after the events that gave rise to the claims. Plaintiff's apprehension that the City has, or will, destroy documents that are actually critical to her case before the Motion to Dismiss can be determined is not legitimate.¹ Not surprisingly, the City has taken no action in the intervening years to destroy any of the Department's employment-related documents for Dodds, whose career as an APD officer was brief: August 2017 to August 2020. Plaintiff's suggestion that Dodd's APD file is littered with documented instances of his prior misconduct and sexual predation of other females is rank speculation, unsupported by any facts. Plaintiff's argument that it cannot know whether such facts exist *until* it obtains Dodds' files from APD turns the pleading rules for *Monell* claims such as these on their head.

¹ Although Plaintiff's Response refers to a five-year retention period for general liability claims against the City, she fails to identify any instance of alleged officer misconduct in the Complaint that did or could have given rise to general liability claims being filed against the City, nor any such related documents that are around four years old and thus potentially subject to destruction during the short stay that the City requests.

The City's Motion to Stay Discovery does not ask this court to allow Plaintiff's case "to sit idle . . . for an unspecified period of time without any justification" as alleged in her Response. The City's pending Motion to Dismiss was filed July 11. Plaintiff responded August 8, after leave for additional time to prepare a brief was granted. The City intends to reply to the response on or before August 19. The City has done nothing to stall or delay this case. Presumably, this court will formally address the arguments presented in the City's Motion to Dismiss Plaintiff's live complaint in a timely manner and without unduly prejudicing any party.

PRAYER

WHEREFORE, the City respectfully requests that the Court grant the Motion to Stay Discovery and Defer Entry of Scheduling Order.

RESPECTFULLY SUBMITTED,

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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 15th day of August, 2022.

Via CM/ECF:

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PAUL MATULA

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

JANE DOE,
Plaintiff,

v.

CITY OF AUSTIN and WALTER
DODDS,
Defendants.

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CIVIL ACTION NO. 1:22-cv-00299-RP

**DEFENDANT CITY OF AUSTIN’S REPLY TO PLAINTIFF’S
RESPONSE TO DEFENDANT’S SECOND MOTION TO DISMISS**

Defendant City of Austin (the “City”), files this Reply to Plaintiff’s Response to Defendant’s Second Amended Motion to Dismiss. *Dkt. 27*. The City would show the following:

I. Overview

The terms “predator” or “predatory” appears thirty times in Plaintiff’s complaint. This inflammatory rhetoric sounds dramatic but is not connected to the actual facts pleaded and the *Monell* theories of liability asserted against the police department. The only actual “predator” Plaintiff names is Dodds. The Complaint’s allegations do not support a *Monell* claim. Plaintiff’s speculation that there *must* be other predators does not meet the pleading requirements for such claims. In short, Plaintiff’s theory against the City amounts to impermissible *respondeat superior* liability. The claims must be dismissed.

II. APD’s recruitment policies and a pleading from Dusterhoft’s lawsuit are appropriate considerations for determining the City’s Rule 12(b) motion.¹

The documents attached to the City’s motion and referred to therein are what they appear to be: APD’s pre-employment procedures and the Department’s 2018 memo terminating officer Dusterhoft, the latter of which was part of a pleading in Dusterhoft’s lawsuit. These publicly-available documents are part of the record because these matters are referenced in Plaintiff’s complaint. APD’s hiring policies and Dusterhoft’s termination are central to Plaintiff’s *Monell* claims. It is entirely appropriate that these documents be considered.

As courts have noted, for a Rule 12(b) motion it is permissible for a defendant to submit documents referenced in a complaint because “in so attaching, the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated.” *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000); *see also Carter v. Target Corp.*, 541 F. App’x 413, 417-18 (5th Cir. 2013)(plaintiff’s EEOC discrimination charges, attached to the defendant’s Rule 12(b) motion but not the complaint, were considered in determining whether “the allegations contained in those complaints alleged a colorable violation of Title VII.”); *see also In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007)(insurance contracts referred to in complaint alleging coverage dispute were properly considered in assessing motion to dismiss even though they were not attached to plaintiff’s pleading). This is fitting where conclusory allegations and unwarranted

¹ Plaintiff asserts in her Response that the City should not have moved to dismiss under 12(b)(1), but only under 12(b)(6) and that the Court has jurisdiction. The City asserts that the Court does not have jurisdiction because Plaintiff has failed to plead a cognizable claim. Plaintiff argues that this type of jurisdictional argument is properly handled under 12(b)(6). *Dkt. 27 at 3*. The effect of whether this case is dismissed for lack of jurisdiction under 12(b)(1) or 12(b)(6) is minimal. Regardless, the City is still asserting jurisdictional arguments, as the City is arguing Plaintiff’s *Monell* claims are “wholly insubstantial.” *See Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1347 (5th Cir. 1985) (stating that a § 1983 claim that is clearly immaterial, frivolous, or wholly insubstantial may strip a court of jurisdiction).

deductions of fact are contradicted by facts disclosed in the exhibits to the motion to dismiss. *See Carter*, 541 F. App'x at 417.

The City did not attach items to its motion that were not referred to in the complaint, such as the affidavits and a DVD police video in the case cited by Plaintiff, *Rodriguez v. Rutter*, 310 F. App'x 623, 626 (5th Cir. 2009). Nor were the exhibits cited in the motion merely as links to documents that could be found on the internet, as in *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003). Here, the actual APD public recruitment policies were attached. *Dkt. 21, Ex. A*. Plaintiff does not deny that the “public version of APD’s [hiring] policy,” APD policies, and the allegations in Dusterhoft’s lawsuit regarding his termination are referenced in her Complaint.

Rather, Plaintiff argues those matters were not *sufficiently* discussed in her Complaint. Plaintiff concedes Dusterhoft’s termination and lawsuit were mentioned in four paragraphs of her complaint and “the public version of APD’s policy” was also referenced. *Dkt. 27 at 5*. Apart from Dodds, Dusterhoft is the only other APD officer named in the Complaint who allegedly committed sexual assault. The Complaint contends paradoxically that the Dusterhoft episode “proves the rule” regarding APD’s pervasive sex criminal culture, but his termination shows the opposite. *Dkt. 17, ¶¶176-179*. Allegations in Dusterhoft’s “ongoing lawsuit” are specifically referenced in the complaint. *Id. ¶178*. The termination memo establishes APD fired Dusterhoft for assaulting his girlfriend. *Dkt. 21, Ex. C, Pp. 20-36*. Thus, the Department’s discipline of Dusterhoft is central to Plaintiff’s claim.

The Complaint directly refers to APD’s publicly-available hiring policies and lists additional “minimum standards” necessary in order to weed out “sexual predators” from other applicants. *Dkt. 17, ¶¶64-67*. APD’s publicly-available recruiting policies are far more thorough than Plaintiff’s conclusory assertion suggests and include some of the very protocols Plaintiff

alleges were left out. *See Dkt. 21 at 7-8*. The actual policies are central to the issue of the alleged Constitutional insufficiency. For this Court to blindly accept Plaintiff's conclusory characterizations and ignore the actual policies runs afoul of Rule 12(b).

III. Plaintiff's Complaint does not allege a *Monell* claim related to APD's hiring policies, supervision, or training.

Plaintiff's Response mischaracterizes the factual allegations in the Complaint to paper over the lack of a plausible causation theory. In fact, Plaintiff alleges a *respondeat superior* theory of liability in contravention of *Monell*, essentially arguing the City is vicariously liable for Dodds' crimes because it hired him and failed to restrain him from sexually assaulting Plaintiff.

Even if the City were "deliberately indifferent" to the "fact" that Dodds was a sexual predator and somehow erred in hiring him and/or not firing him before the alleged assault, that does not establish liability under *Monell*. That is because such alleged facts do not establish a "custom or policy" at APD that reflected a deliberate indifference that constitutional violations were going to occur. Plaintiff has not alleged facts showing a pattern of hiring or retaining known sexual predators. Instead, Plaintiff villainizes police officers in general—and APD in particular—as "serial sexual predators." Plaintiff asserts in conclusory fashion that the risk of officers committing sexual assault is "obvious" but the facts alleged fail to establish a pattern of similar incidents necessary to establish *Monell* liability. Plaintiff's allegation that police officers, by nature, tend to be "serial sexual predators" who require 24-hour supervision and special training to deter their law-breaking is provocative rhetoric but not the makings of a *Monell* claim.

A. Plaintiff failed to state a claim of deliberate indifference in hiring Dodds.

For the reasons explained on pages 2-3, the City's publicly available hiring policies are properly considered by the Court because they show APD utilizes the very pre-employment procedures Plaintiff claims are the standard to weed out applicants who might commit

constitutional violations like those alleged against Dodds. Plaintiff relies on *Gros v. City of Grand Prairie*, 209 F.3d 431, 433-34 (5th Cir. 2000), to support her hiring claim, but that case involved the standard for supervisor liability, not municipal liability under § 1983. Even so, APD’s publicly-available documents show the City applies “adequate scrutiny” in its hiring process that rebuts the existence of deliberate indifference. *See Gros*, 209 F.3d at 433. Importantly, even if the City were negligent in hiring Dodds, “a showing of simply or even heightened negligence will not suffice” for *Monell* liability. *Id.*

Plaintiff hopes the Court will accept her characterizations and refuse to actually consider the publicly-available documents referenced in her Complaint. The documents show APD’s policies include things deemed “minimum standards.” *Compare Dkt. 27 at 8 with Dkt. 21, Ex. A at 6-7, 9-10.* Plaintiff’s arguments that APD’s chief “knew [of] these failures... but failed to correct them,” and “continued to do nothing” fall apart. *See Dkt. 27 at 8.* Nor do the facts alleged support the conclusion that APD hired “many other sexual predators.” *Dkt. 27 at 9.*

Contrary to Plaintiff’s contention, the City properly asserts the Rule 12(b)(6) standard and its purpose. Rule 12(b)(6) serves the salutary purpose of permitting the court to determine at the pleading stage whether the costly and time-consuming effort of defending a claim is warranted by determining the viability of a claim. A federal pleading must contain “something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Conclusory assertions *are not* facts and are not entitled to be assumed true. *Iqbal*, 556 U.S. at 681. When a government entity is defending a *Monell* claim, Rule 12(b)(6) calls for the court to determine whether plaintiff’s complaint sufficiently alleged facts to show: (1) an official government policy; (2) promulgated by the municipal policy maker; (3) was the moving force behind the violation of a constitutional right.

See Gomez v. Galman, 18 F.4th 769, 777 (5th Cir. 2021). These requirements are not meaningless. Nor is it more judicially efficient to defer the determination until after discovery is over.

Disparate, one-sided national statistics, even coupled with one alleged incident, are not sufficient to establish these elements. *McKee v. City of Rockwall*, 877 F.2d 409, 415 (5th Cir. 1989) (disregarding statistics that “even on their face,” did not “permit one to infer a ...policy” alleged by plaintiff); *see also Ayon v. Austin Indep. Sch. Dist.*, 1:19-CV-586-RP, 2020 WL 1536383, at *3 (W.D. Tex. Mar. 31, 2020)(noting in connection with a Rule 12(b)(6) motion on a *Monell* claim, that “isolated unconstitutional actions by [school district] employees will almost never trigger liability” against government.”). Likewise, liability theories based on presumed criminal behavior (he did it once therefore he’s *probably* done it before) is merely rank speculation.

B. Plaintiff has not established a pattern for purposes of failure to supervise Dodds.

Plaintiff claims “the City’s policymaker knew more needed to be done to stop sexual assault by APD officers, as that was an obvious risk and ongoing problem at APD,” followed by a string of references. *Dkt. 27 at 11*. Missing in those referenced pages are actual allegations supporting the conclusion. Almost none of the allegations in the Complaint involve sexual assaults by APD officers. Those that do, namely regarding Dusterhoft, establish APD’s then-chief fired the officer for his alleged conduct. *See Dkt. 17, ¶176*. The allegation that during former police chief Acevedo’s tenure (which ended before Dodds was hired) some female officers alleged male APD officers assaulted them does not lead to the conclusion that “it was obvious [] that officers need to be supervised to watch for red flags after onboarding.” *Dkt. 27 at 11*.

The Response conclusorily asserts that the alleged facts “describe a series of obvious missteps which the chief actually knew posed a risk and which were never fixed despite causing a pattern of known misconduct by APD officers.” *Id. at 13*. Missing from the Complaint are facts

establishing such a pattern. The Complaint references the alleged sexual assault by Dodds, a vague allegation that he sexually assaulted others at some point, the Dusterhoft episode, a purported “groping”, and vague allegations by female officers that male colleagues assaulted them at some point. These disparate incidents do not establish a pattern of “known misconduct” that would have alerted the City of the need to specifically supervise officers to stop their sex crimes. The so-called “minimum police standards” cited in the Complaint, *see Dkt. 17, ¶74*, would not have prevented Dodds’ alleged assault. Instead, the Complaint focuses on Dodds’ purported misconduct *after* he allegedly assaulted Plaintiff. *See Dkt. 17, ¶¶36-43* (alleging Dodds called Plaintiff and drove by her apartment). Thus, whatever APD allegedly did or did not do in supervising Dodds, it was not the “moving force” of the alleged constitutional violations.

C. Despite Plaintiff’s recharacterization of its failure to train theory, Plaintiff does not allege a viable claim under *Monell*.

Plaintiff’s Response reframes the Complaint’s failure-to-train theory as a failure to train officers to *report* potential instances of sexual assault. *See Dkt. 27 at 14-15*. The Court may not consider these characterizations of the facts as allegations. *See Thomas v. City of Galveston*, 800 F. Supp. 2d 826, 838 (S.D. Tex. 2011) (refusing to draw broad inferences proposed in plaintiff’s response to motion to dismiss where complaint lacked those specific allegations) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984)) (“[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss”).

Such repackaging of the facts aside, Plaintiff has not alleged a viable claim. The live Complaint barely mentions training. *See Dkt. 17, ¶96* (alleging APD had no training to prevent police sexual misconduct); *id. ¶197(a)* (asserting “failure to train officers about detecting, preventing, and prohibiting sexual harassment and sexual assault”). The Response describes an entirely different theory than the one in the complaint, with loads of references to allegations

unrelated to training. *See Dkt. 27 at 13-15*. The actual Complaint instead focuses on the implausible theory that police officers tend to be sexual predators who require 24-hour supervision and training to prevent them from raping citizens while on duty. Plaintiff’s failure-to-train theory morphs into a critique of police officers who do not know how to detect and report sex crimes by other officers. But there is no alleged fact to support the theory that Dodds’ assault was caused by other officers not reporting him. There is no allegation other APD officers knew Dodds was, or might be, a sexual predator. Plaintiff’s reframed claim cannot support a plausible theory on failure to train.

Plaintiff’s failure-to-train theory does not satisfy the single-incident exception set forth in *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989). A lack of training on the use of force is distinguishable from a lack of training on preventing sexual assault. That is because police officers are expected to use force in the course of their duties necessitating specific training in that regard. One may not reasonably infer police officers are inclined to commit sexual assault on duty. Sexual assault is a crime. Without any training, everyone, including police officers, knows this. It is not enough to show that better or more training could have prevented the particular injury-causing injury in this case. *Id.* at 391.

IV. Plaintiff cannot establish a pattern of sexual misconduct necessary to plead an unofficial policy under *Monell*.

As discussed in the City’s Motion, “[a] pattern requires similarity and specificity; [p]rior indications cannot simply be for any and all ‘bad’ or unwise acts, but rather must point to the specific violation in question.” *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 851 (5th Cir. 2009). Plaintiff’s complaint alleges only two specific instances of sexual assault.² Apart from

² Plaintiff’s live Complaint alleges two specific allegations of sexual assault by other APD officers—one involving Dusterhoft and one involving an unnamed officer in March 2020. These two instances fail to plausibly demonstrate APD fostered “a culture of sexual misconduct.” Dusterhoft was fired due to his actions and as for the unnamed officer, Plaintiff failed to plead any facts as to whether this incident was investigated and substantiated, and then, if so, fails to plead facts that no disciplinary action was taken by APD. Two instances over at least decade does not establish a

these, Plaintiff alleges a variety of dissimilar or vague incidents which do not plausibly rise to the level of an unofficial policy. Plaintiff cannot explain how dissimilar incidents or pure speculation plausibly establish a pattern. Instead, Plaintiff argues strained, unlikely inferences to satisfy pleading requirements.

First, Plaintiff alleges instances of what generally can be deemed “sexism” at APD. Plaintiff’s argument is that alleged comments and perceived attitudes evidence a policy of green-lighting sexual predation by officers. But a pattern requires that the incidents be similar and alleged specifically. *Peterson*, 588 F.3d at 851. It does not encompass all bad or unwise acts. *Id.* Sexism and sexist comments in the workplace are inappropriate. But they are simply not comparable to the criminal act attributed to Dodds.

Second, the alleged “mountain of complaints” of sexual misconduct by APD officers are for alleged “code of conduct” violations, not sex crimes. *Dkt. 17, ¶¶100-104*. Plaintiff’s suggestion that some of these complaints must involve sexual misconduct is simply implausible speculation. *Id.* at ¶106. Plaintiff’s Response argues “there has been a decade long pattern of numerous, credible reports of sexual assault by APD officers” that were intentionally ignored. *Dkt. 27 at 17*. The pleading describes only one incident of reported sexual assault where no officer discipline resulted.³ *Dkt. 17, ¶124*. The problem is not the lack of *enough* details of these supposed reports of sexual assault, but *no details* to support Plaintiff’s speculative conclusions.⁴

“pattern.” *Peterson*, 588 F.3d at 851 (allegation of 27 complaints of excessive force over three years was insufficient to establish a pattern of excessive force).

³ This is the same allegation involving the unnamed officer in March 2020 referenced in Footnote 2. The allegation is not that this incident was ignored by APD, but instead, that it did not result in discipline.

⁴ Plaintiff’s complaint includes a few other specific instances she alleges claims show a pattern of APD ignoring sexual misconduct. But these three instances involved sexual harassment, inappropriate comments, and the alleged disregard of some unspecified assault complaints by female officers.

V. Plaintiff's allegations related to mishandled criminal investigations cannot establish a pattern of endorsing sexual misconduct by APD officers.

Plaintiff's argument that statistics show a policy of APD not "taking sexual misconduct seriously" relies on rhetoric, not plausible inferences. Charges that APD did not investigate some reported sex crimes vigorously enough are not sufficiently similar to allegations of sexual assault by officers. As demonstrated in the *Roberts* case, allegations that an officer displayed his firearm during a traffic stop were not sufficiently similar to use of force during a traffic stop. *Roberts v. City of Shreveport*, 397 F.3d 287, 294 (5th Cir. 2005). Allegations that APD mishandled criminal investigations cannot establish a pattern at APD of disregarding sexual violence charges against its officers.

VI. Deferring the Rule 12(b) motion until after Plaintiff conducts discovery is unwarranted and inequitable.

Allowing "limited discovery" that *might* uncover information to support a *Monell* claim is unnecessary. Plaintiff amended her complaint twice. She already has the audits, studies, and reports detailed in her Complaint. Rather than identify narrowly tailored discovery topics, Plaintiff leaves it up to the Court to guess what vital information Plaintiff needs to allege a valid *Monell* claim. The Response refers merely to "written discovery to the Defendants (and any other agencies or municipalities with knowledge of Dodds' background)" and depositions of Dodds, the police chief, and designated City representatives. This is not "limited discovery." Plaintiff wants leave to complete all her discovery before this Court determines whether an actual *Monell* claim has been pleaded. This approach to discovery turns Rule 12(b) pleading requirements upside down. Leave should be denied.

PRAYER

WHEREFORE, the City respectfully requests that the Court grant Defendant's Motion to Dismiss.

RESPECTFULLY SUBMITTED,

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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 19th day of August, 2022.

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PAUL MATULA

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

JANE DOE,
Plaintiff

v.

**THE CITY OF AUSTIN and
WALTER DODDS,**
Defendants

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Case No. 1:22-cv-00299-RP

ORDER

Before the Court are Defendant Walter Dodds’ Motion to Stay Discovery Pending Criminal Proceedings, filed May 18, 2022 (Dkt. 11); Defendant City of Austin’s Motion to Stay Discovery and Defer Entry of a Scheduling Order, filed August 3, 2022 (Dkt. 25); and the related response and reply briefs.¹

It appears that Defendant Dodds was indicted on August 30, 2022 in *State of Texas v. Dodds*, Case No. D-1-DC-20-301555 (460th Dist. Ct. Travis Cnty., Tex. Sept. 10, 2020), after briefing of the pending motions was complete.² The Court therefore **ORDERS** Dodds to file a report on the current status of the relevant pending criminal proceedings on or before **September 9, 2022**.

SIGNED on September 2, 2022.



SUSAN HIGHTOWER
UNITED STATES MAGISTRATE JUDGE

¹ On July 13, 2022 and August 24, 2022, the District Court by Text Orders referred the motions to the undersigned Magistrate Judge for disposition, pursuant to 28 U.S.C. § 636(b)(1)(A), Federal Rule of Civil Procedure 72, and Rule 1(c) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

² See <https://www.traviscountytexas.gov/district-clerk/online-case-information>.

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

JANE DOE,
Plaintiff

v.

**THE CITY OF AUSTIN and
WALTER DODDS,**
Defendants

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Case No. 1:22-cv-00299-RP

**ORDER AND REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

**TO: THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE**

Before the Court are Defendant Walter Dodds’ Motion to Stay Discovery Pending Criminal Proceedings, filed May 18, 2022 (Dkt. 11); Defendant City of Austin’s Motion to Stay Discovery and Defer Entry of a Scheduling Order, filed August 3, 2022 (Dkt. 25); and the related response and reply briefs. On July 13, 2022 and August 24, 2022, the District Court by Text Orders referred the motions to the undersigned Magistrate Judge for disposition, pursuant to 28 U.S.C. § 636(b)(1)(A), Federal Rule of Civil Procedure 72, and Rule 1(c) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

I. Background

On the evening of April 18, 2020, Plaintiff Jane Doe¹ and her boyfriend, A.G., had an argument “during which A.G. had a breakdown, put a belt around his throat, and tightened it to threaten suicide.” Second Amended Complaint, Dkt. 17 ¶ 8. Doe’s mother, who was in a nearby apartment, called 911. *Id.* ¶ 10. At 6:13 p.m., Defendant Walter Dodds, then an officer with the Austin Police

¹ Plaintiff “files under a pseudonym to protect her privacy and safety.” Second Amended Complaint, Dkt. 17 ¶ 1.

Department (APD), arrived at Doe's apartment. *Id.* ¶¶ 11-12. After interviewing both A.G. and Doe, Dodds determined that A.G. needed to be hospitalized for his own protection. *Id.* ¶¶ 12-13. During Doe's interview, Dodds asked for Doe's phone number and told her that "he would be calling her to tell her where A.G. was being taken." *Id.* ¶ 15. Doe alleges that at the end of the interview, Dodds asked Doe about locking the door to her apartment and said: "What if someone sneaks in there? You don't want to be sleeping with some dude in there with you." *Id.* ¶¶ 16-17. Dodds then accompanied A.G. to the hospital and completed the required documentation for A.G.'s emergency detention. *Id.* ¶ 18.

Doe alleges that at 6:54 p.m., Dodds called her from his APD-issued cell phone and told her which hospital A.G. had been taken to, "but then began to ask if he could come over" and "asked her if Doe would take off his uniform for him." *Id.* ¶¶ 20-21. Doe alleges that she did not consent to either request and ended the call. *Id.* Doe alleges that Dodds called Doe several more times between 6:54 p.m. and 9:09 p.m., but she did pick up any of his calls. *Id.* ¶ 22. Doe then fell asleep in her bedroom. *Id.* ¶ 23.

Sometime after she fell asleep, Doe alleges that Dodds returned to her apartment in his APD uniform and knocked on the door. *Id.* ¶ 24. Doe's minor nephew answered the door. *Id.* ¶ 27. Doe alleges that Dodds "walked by Doe's nephew, directly into Doe's bedroom, and shut the door behind him." *Id.* ¶ 28. Doe alleges that Dodds then proceeded to rape her as follows:

Doe awoke to Officer Dodds in her bedroom penetrating her vagina with his penis. Doe was shocked, frightened, and confused about what was going on and never consented to any contact of any kind from Officer Dodds. Officer Dodds then flipped her onto her stomach and forced his penis into her vagina two more times.²

Id. ¶¶ 31-33.

² Doe alleges that APD investigators conducted a DNA test on her bed sheets which matched Dodds' DNA. Dkt. 17 ¶ 35.

Over the next several days, Doe alleges that Dodds repeatedly called her from his APD-issued cell phone and drove by her apartment. *Id.* ¶¶ 36-40. On April 29, 2020, Doe called 911 to report the sexual assault. *Id.* ¶ 44.

Dodds was arrested on September 10, 2020, on charges of sexual assault in violation of Texas Penal Code § 22.011 and official oppression in violation of Texas Penal Code § 39.03. *Id.* ¶ 45; *State of Texas v. Dodds*, Case Nos. D-1-DC-20-301555, D-1-DC-20-900094 (460th Dist. Ct. Travis Cnty., Tex. Sept. 10, 2020). Dodds' criminal cases remain pending in Travis County, where he was indicted on August 30, 2022 for sexual assault, burglary of a habitation with intent to commit a sex offense, and official oppression.³

On March 30, 2022, Doe filed this civil rights lawsuit under 42 U.S.C. § 1983 against the City of Austin and Dodds in his individual capacity. Doe alleges that Dodds violated her substantive due process right to bodily integrity under the Fourteenth Amendment by sexually assaulting her. Doe further alleges that Dodds violated her Fourth Amendment rights when he unlawfully entered her home, seized her by using excessive force, and restrained her freedom. Doe asserts that the City is liable for Dodds' conduct, based on its hiring policies and failure to train, supervise, investigate, and discipline its officers. Doe also alleges that the City has "a culture of tolerance for sexual violence, unjustified skepticism of reports of sexual violence, and sexist views which contributed to further sexual violence by officers." Dkt. 17 ¶ 197(j).

On July 11, 2022, the City filed a Motion to Dismiss under Rules 12(b)(1) and 12(b)(6), arguing that Doe's Second Amended Complaint failed to allege sufficient facts to establish that

³ The Court takes judicial notice of the state court docket under Federal Rule of Evidence 201. *Stiel v. Heritage Numismatic Auctions, Inc.*, 816 F. App'x 888, 892 (5th Cir. 2020) (holding that district court may take judicial notice of state court docket). See <https://www.traviscountytexas.gov/district-clerk/online-case-information>.

the City is liable under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978).⁴ The Motion to Dismiss remains pending before the District Court.

In his Motion to Stay, Dodds asks the Court to stay discovery pending resolution of his criminal proceedings. In its Motion to Stay, the City asks the Court to stay discovery and defer entering a scheduling order until the District Court has ruled on its Motion to Dismiss. Doe opposes both Motions.

II. Legal Standards

A district court has “broad discretion to stay proceedings as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”). “Although a court is afforded broad discretion when deciding discovery matters, the court abuses its discretion when its decision is based on an erroneous view of the law.” *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 743 n.10 (5th Cir. 2019).

Under Rule 26(c), a district court may stay discovery on a showing of “good cause.” Good cause exists “when the party from whom discovery is sought shows that it would suffer ‘annoyance, embarrassment, oppression or undue burden or expense’ absent a stay.” *U.S. ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, 571 F. Supp. 2d 766, 767 (W.D. Tex. 2008) (quoting

⁴ In *Monell*, the Supreme Court held that “a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.” 436 U.S. at 694. Therefore, to establish municipal liability under Section 1983, a plaintiff must show (1) an official policy or custom, of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose “moving force” is that policy or custom. *Newbury v. City of Windcrest, Tex.*, 991 F.3d 672, 680 (5th Cir. 2021) (quoting *Pineda v. City of Hous.*, 291 F.3d 325, 328 (5th Cir. 2002)).

FED. R. CIV. P. 26(c)(1)). “Rule 26(c)’s requirement of a showing of good cause to support the issuance of a protective order indicates that the burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.” *In re Terra Int’l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998) (cleaned up).

The court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined. *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987). For example, district courts properly defer discovery while deciding threshold issues of subject matter jurisdiction, such as whether the defendants are proper parties to the action. *Id.* Stays of discovery also are justified pending resolution of certain immunity issues, such as whether a defendant is entitled to absolute, sovereign, or qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that “discovery should not be allowed” until threshold qualified immunity question was resolved); *Williamson v. U.S. Dep’t of Agric.*, 815 F.2d 368, 383 (5th Cir. 1987) (“The district court acted properly in staying discovery in this case pending resolution of the immunity issues.”).

A district court also may stay a civil action when a defendant in the case is facing criminal charges. *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983) (“Certainly, a district court may stay a civil proceeding during the pendency of a parallel criminal proceeding.”); *U.S. ex rel. Gonzalez*, 571 F. Supp. 2d at 761 (“When a defendant in a civil case is facing criminal charges, a district court may, in its discretion, stay the civil action.”). “Such a stay contemplates ‘special circumstances’ and the need to avoid ‘substantial and irreparable prejudice.’” *Little Al*, 712 F.2d at 136 (quoting *SEC v. First Fin. Grp. of Tex., Inc.*, 659 F.2d 660, 668 (5th Cir. 1981)). In determining whether civil discovery should be allowed to proceed in light of an impending

criminal case, the Fifth Circuit Court of Appeals directs trial courts “to employ judicial discretion and procedural flexibility to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other.” *In re Grand Jury Subpoena*, 866 F.3d 231, 234 (5th Cir. 2017) (quoting *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962)).

Formal criminal proceedings are not a requirement to the proper issuance of a stay. *In re Grand Jury*, 866 F.3d at 234; *see also Campbell*, 307 F.2d at 487 (noting that trial judge should not “ignore the effect discovery would have on a criminal proceeding that is pending or just about to be brought”). Courts have stayed civil discovery to preserve a defendant’s Fifth Amendment right against self-incrimination and to resolve the conflict he would face between asserting this right and defending the civil action, to prevent extending criminal discovery beyond the limits of the Federal Rule of Criminal Procedure 16(b), exposing the defense’s theory to the prosecution in advance of trial, or otherwise prejudicing the criminal case. *Id.*; *First Fin.*, 659 F.2d at 668; *Campbell*, 307 F.2d at 487; *Bean v. Alcorta*, 220 F. Supp. 3d 772, 775 (W.D. Tex. 2016).

III. Dodds’ Motion to Stay

Dodds moves to stay discovery pending resolution of his criminal proceedings. Dodds argues that that if a stay is not granted,

Defendant’s exercise of his Fifth Amendment right could be offered as evidence against him in this suit, and the jury could be permitted to draw an adverse inference when rendering its verdict. If he instead testifies in a deposition during this case without a stay of discovery being granted, his upcoming grand jury presentation and potential criminal trial defense could be harmed. Without a stay, Defendant will be forced to provide testimony for his actions leading up to and during the alleged sexual assault and official oppression. Defendant would be compelled to choose between pursuing a meritorious civil defense or handicapping his criminal defense.

Dkt. 11 at 4.

Doe argues that the Court should deny the Motion to Stay because (1) “Dodds cannot show any overlap between his anticipated charges and the City’s policy, training, and supervision at issue in this case”; (2) “a stay of discovery, particularly to the City, would unfairly prejudice Plaintiff due to the passage of time—including particularly the expiration of the City’s record retention periods—whereas proceeding with discovery as to the City would not unfairly harm Dodds”; and (3) “the Court and the public have an interest in proceeding with this case, as the case involves the City’s failure to prevent Dodds’ egregious misconduct.” Dkt. 15 at 1.⁵

To assess whether special circumstances justify a stay, courts within the Fifth Circuit consider the following six factors: (1) the extent to which the issues in the criminal and civil cases overlap; (2) the status of the criminal case; (3) the private interests of the plaintiffs in proceeding expeditiously; (4) the burden on the defendants; (5) the interest of the courts; and (6) the public interest. *Bean*, 220 F. Supp. 3d at 775. The Court addresses each in turn.

A. Whether Issues in the Criminal and Civil Cases Sufficiently Overlap

The extent to which issues in the criminal case overlap with those presented in the civil case generally is regarded as “the most important factor in the analysis.” *Slack v. City of San Antonio, Texas*, No. SA-18-CV-1117-FB, 2019 WL 11097069, at *2 (W.D. Tex. May 28, 2019). “Where there is significant overlap, self-incrimination is more likely and thus weighs in favor of a stay. On the other hand, if there is no overlap, there would be no danger of self-incrimination and accordingly no need for a stay.” *Bean*, 220 F. Supp. 3d at 776 (cleaned up).

⁵ As demonstrated by these arguments, Doe has interpreted Dodds’ Motion to Stay Discovery as request to stay discovery as to both Dodds and the City. The Court reads Dodds’ Motion as a request to stay discovery only directed at him, and not the City. The fact that the City has filed its own Motion to Stay based on different grounds appears to support the Court’s conclusion. Accordingly, the Court addresses each Motion to Stay separately.

The same underlying incident forms the basis of this lawsuit and the criminal charges against Dodds: his alleged sexual assault of Doe. To prove that Dodds committed the felony offense of sexual assault, Travis County must prove that Dodds “intentionally or knowingly . . . cause[d] the penetration of the anus or sexual organ of another person by any means, without that person’s consent.” TEX. PENAL CODE ANN. § 22.011 (West 2021). Doe alleges that “Officer Dodds, while acting under color of law, violated Plaintiff Doe’s substantive due process right to bodily integrity by penetrating her with his penis.” Dkt. 17 at ¶ 183. Because there is significant overlap between the issues presented in this case and Dodds’ criminal proceedings, “there is a significant danger of self-incrimination,” weighing strongly in favor of staying the case. *Bean*, 220 F. Supp. 3d at 776.

Doe’s *Monell* claim against the City also substantially overlaps with the official oppression charge against Dodds. As stated above, to establish municipal liability under Section 1983 under *Monell* and its progeny, a plaintiff must show that (1) an official policy or custom (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right. *Newbury*, 991 F.3d at 680. To prove that Dodds committed official oppression, Travis County must establish that Dodds, acting under color of his office or employment:

- (1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful;
- (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful; or
- (3) intentionally subjects another to sexual harassment.

TEX. PENAL CODE ANN. § 39.03 (West 2019). Although the City is not a party to the criminal proceedings, the Court finds that Dodds’ oppression charge substantially overlaps with Doe’s *Monell* claims against the City. *See Slack*, 2019 WL 11097069, at *2 (“The significant overlap presented in this case weighs in favor of a stay and the fact the City of San Antonio is not involved

in the criminal review/investigation does not change that result.”); *Jackson v. Pamerleau*, No. 5:15-CV-524-DAE, 2016 WL 393552, at *6 (W.D. Tex. Feb. 2, 2016) (finding substantial overlap between criminal murder prosecution against police officer and civil rights lawsuit against county where criminal prosecution arose from same facts presented in civil case).

Because there is sufficient overlap between issues in the criminal and civil cases, the Court finds that the first and most important factor weighs strongly in favor of staying this case.

B. Status of the Criminal Case

Doe argues that the second factor weighs against a stay because Dodds has yet to be indicted. As stated above, after these motions were fully briefed, Dodds was indicted on charges of sexual assault, burglary of a habitation with intent to commit a sex offense, and official oppression. “A stay of a civil case is most appropriate where a party to the civil case has already been indicted for the same conduct.” *Bean*, 220 F. Supp. 3d at 776. In view of Dodds’ arrest, indictment, and pending charges, the Court finds that the second factor weighs in favor of a stay.

C. Whether Plaintiff’s Private Interests Outweigh the Prejudice Caused by a Delay

The Court next weighs “the private interests of the plaintiff in proceeding expeditiously against the prejudice that will be caused by the delay that will result from the stay.” *Sec. & Exch. Comm’n. v. Mutuals.com, Inc.*, No. 3:03-CV-2912-D, 2004 WL 1629929, at *3 (N.D. Tex. July 20, 2004). When evaluating the third factor, courts “may require a plaintiff to establish more prejudice than simply a delay in its right to expeditiously pursue his claim.” *Bean*, 220 F. Supp. 3d at 776.

Although it is clear that Doe’s interest in proceeding expeditiously will not be advanced by a stay, she has not alleged that she will suffer any prejudice other than delay in her right to pursue her claim. Doe alleges that the City has deleted evidence in a past civil case and potentially could do so in this case, but that argument is speculative. In addition, Doe identifies no discovery that is available now but would be unavailable later should a stay be granted; nor has she alleged that any

witnesses will be unable to testify if a stay is granted. Because Doe is “unlikely to face any significant prejudice if a stay is granted,” the third factor favors granting a stay. *Id.* at 777.

D. Dodds’ Private Interest

The Court next considers Dodds’ private interest in securing the stay and the burden that would result if the stay were denied. “A defendant facing simultaneous civil and criminal proceedings may be burdened by the choice between invoking his Fifth Amendment rights and jeopardizing his defense in the civil suit, where an adverse inference may be drawn from the defendant’s silence.” *Brown v. Kenner Police Dep’t*, No. CV-17-3445, 2017 WL 5157563, at *2 (E.D. La. Nov. 7, 2017) (cleaned up).

Absent a stay, Dodd would face a conflict between asserting his Fifth Amendment rights and fulfilling his legal obligations as a witness in this action. *See id.* (“The police officers involved in Mr. Brown’s shooting have an interest in protecting their Fifth Amendment right against self-incrimination while they are facing possible criminal charges.”); *Walker v. Wilburn*, No. 3:13-CV-4896-D, 2015 WL 5873392, at *4 (N.D. Tex. Oct. 5, 2015) (stating that a defendant in civil proceeding who invokes Fifth Amendment as a result of overlapping criminal investigation risks adverse inference arising from his assertion of privilege). Accordingly, the fourth factor weighs in favor of a stay.

E. Court’s Interests

The Court’s interest does not favor either party. “On the one hand, the courts have a strong interest in moving matters expeditiously through the judicial system. On the other hand, granting a stay serves the interests of the courts, because conducting the criminal proceedings first advances judicial economy.” *Walker*, 2015 WL 5873392, at * 9. The fifth factor is neutral.

F. Public Interest

Finally, the public interest must be considered in determining whether to grant a stay. Criminal prosecutions often take priority over civil actions “due to the significant public interest in law enforcement.” *In re Grand Jury*, 866 F.3d at 234. And, while “the public certainly has an interest in the prompt resolution of the instant civil case, it also has an interest in protecting the constitutional rights of criminal defendants.” *Meyers v. Pamerleau*, No. 5:15-CV-524-DAE, 2016 WL 393552, at *7 (W.D. Tex. Feb. 1, 2016). Because denying the stay risks violating Dodds’ constitutional rights, this factor weighs in favor of a stay. *Id.*

In sum, the undersigned finds that five of the six relevant factors weigh in favor of a stay, while the remaining factor is neutral. For these reasons, Dodds’ Motion to Stay Discovery is granted.

IV. The City’s Motion to Stay

The City argues that the Court should stay discovery pending resolution of its Motion to Dismiss because its Motion raises immunity and “serious questions about the Court’s jurisdiction to hear this case.” Dkt. 25 at 6-7.

While it is proper to stay discovery pending resolution of threshold immunity and subject matter jurisdiction issues,⁶ the City does not actually assert a jurisdictional or immunity argument in its Motion to Dismiss. Instead, the City argues that Doe’s constitutional claims under *Monell* fail because she has not pled facts sufficient to show that the alleged constitutional violations were caused by a policy or practice of the City, that is, that the City had a policy or practice of failing to adequately hire, train, or supervise its officers. Dkt. 21 at 5-21. The City contends that this argument concerns whether the Court has “subject matter jurisdiction” and the City is entitled to “governmental immunity.”

⁶ See *Harlow*, 457 U.S. at 818; *Williamson*, 815 F.2d at 383.

The City conflates the doctrines of immunity and subject matter jurisdiction with a failure to state a plausible claim for relief under *Monell*. The City's assertion that it does not have a policy or custom of failing to adequately hire, train, or supervise its officers does not constitute "an immunity from suit," but instead is a "mere defense to liability." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 43 (1995) (finding that county's assertion that sheriff was not a policymaker was not immunity from suit but instead defense to liability); *see also Novoselsky v. Brown*, 822 F.3d 342, 357 (7th Cir. 2016) (noting that "a *Monell* defense is a 'mere defense to liability,' not immunity from suit") (quoting *Swint*, 514 U.S. at 43); *Wisoff v. City of Schenectady, N.Y.*, 568 F. App'x 28, 30 n.2 (2d Cir. 2014) (noting that city moved to dismiss plaintiff's *Monell* claim under "the wrong Rule" where it invoked Rule 12(b)(1) but "its motion was entirely premised on plaintiff's failure to allege the existence of a municipal policy, practice, or custom that caused the alleged violation of his constitutional rights"); *Trent v. Wade*, No. 3:12-CV-01244-P, 2013 WL 12176988, at *1 n.2 (N.D. Tex. Oct. 15, 2013) (finding that defendants "conflated sovereign immunity with *Monell* liability" in stating that they asserted sovereign immunity in their motion for summary judgment, when "they in fact argued that Plaintiffs had not sufficiently demonstrated that the City was liable under a theory of *Monell* liability"); *see also* Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 789 (2021) (noting that "*Monell* standards are not jurisdictional in any sense"). The doctrines of sovereign and qualified immunity, furthermore, do not apply to municipalities. *Williams v. City of Yazoo, Miss.*, 41 F.4th 416, 421 (5th Cir. 2022).

Because the City's only argument in its Motion to Dismiss is that Doe fails to state a plausible claim for relief under *Monell* and a "mere failure to state a claim does not defeat the Court's jurisdiction," the City has not asserted a threshold jurisdictional or immunity argument that would

justify a stay of discovery. *Foster v. Seaside Healthcare*, No. 3:21-CV-03985, 2022 WL 2824671, at *3 (W.D. La. May 27, 2022), *R. & R. adopted*, 2022 WL 2818779 (W.D. La. July 19, 2022); *see also Bell v. Hood*, 327 U.S. 678, 682 (1946):

Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.

Nevertheless, the Court finds that a stay of discovery against the City is appropriate because Doe's *Monell* claims against the City are inextricably intertwined with her claims against Dodds. Her claims against the City are predicated on constitutional violations allegedly committed by Dodds. To defend against Doe's allegations that the City's policies and procedures was the moving force behind Dodds' constitutional violations, the City will need discovery from Dodds and likely must depose him. Conversely, in order for Doe to prove that the City is liable under *Monell*, she must first demonstrate that Dodds committed a constitutional violation, and that the constitutional violation was caused by the City's policies.

Because the Court has granted a stay of discovery as to Dodds, neither party will be able to obtain the necessary discovery to prove or disprove their claims and defenses. Accordingly, the Court finds that a stay of all discovery directed at both the City and Dodds is appropriate pending the outcome of Dodds' criminal proceedings. *See Trent v. Wade*, No. 3:12-CV-01244-P, 2013 WL 12176988, at *3 (N.D. Tex. Oct. 15, 2013) (granting stay against city "given the close connection of the claims against the City and the claims against [individual officers]").

The Fifth Circuit's decision in *Carswell v. Camp*, 37 F.4th 1062 (5th Cir. 2022), supports this conclusion. In *Carswell*, the district court declined to rule on the qualified immunity defense at the motion to dismiss stage and entered a scheduling order permitting certain discovery of the

individual defendants in their capacity as witnesses to the actions of other defendants not asserting qualified immunity. The Fifth Circuit held that the district court abused its discretion by deferring its ruling on individual officers' entitlement to qualified immunity. *Id.* at 1068. The court rejected the plaintiff's argument that the scheduling order was proper because it stayed discovery as to issues of qualified immunity while allowing discovery on the *Monell* claims, reasoning that "bifurcation of discovery would radically complicate the case" and impose unreasonable burdens on the defendants. *Id.* at 1068-69.

For these reasons, the Court finds that good cause exists to stay all discovery in this case pending completion of Dodds' criminal proceedings.

V. Order

Based on the foregoing, the Court **GRANTS** Defendant Walter Dodds' Motion to Stay Discovery Pending Criminal Proceedings (Dkt. 11) and Defendant City of Austin's Motion to Stay Discovery and Defer Entry of a Scheduling Order (Dkt. 25). The Court temporarily **STAYS** all discovery directed at Defendants Walter Dodds and the City of Austin pending completion of Defendant Walter Dodds' criminal proceedings in state district court.

VI. Recommendation

"Where a suit is stayed during the pendency of a criminal proceeding, an administrative closure is appropriate." *Meyers*, 2016 WL 393552, at *8 (citing *Mire v. Full Spectrum Lending Inc.*, 389 F.3d 163, 167 (5th Cir. 2004)). Accordingly, the undersigned Magistrate Judge **RECOMMENDS** that the District Court order the Clerk to administratively close this case. A case that is administratively closed "may be reopened upon request of the parties or on the court's own motion." *Mire*, 389 F.3d at 167.

It is **FURTHER ORDERED** that this case is **REMOVED** from the Magistrate Court's docket and **RETURNED** to the docket of the Honorable Robert Pitman.

VII. Warnings

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except on grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED on September 14, 2022.



SUSAN HIGHTOWER
UNITED STATES MAGISTRATE JUDGE

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

JANE DOE,

Plaintiff,

v.

CITY OF AUSTIN and WALTER DODDS

Defendants.

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1:22-CV-299-RP

ORDER

Before the Court is the report and recommendation from United States Magistrate Judge Susan Hightower recommending an administrative closure of this case. (Dkt. 34). Pursuant to 28 U.S.C. § 636(b) and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Judge Hightower issued her report and recommendation on September 14, 2022. (*Id.*)¹ As of the date of this order, no party has filed objections to the report and recommendation.

Pursuant to 28 U.S.C. § 636(b), a party may serve and file specific, written objections to a magistrate judge’s proposed findings and recommendations within fourteen days after being served with a copy of the report and recommendation and, in doing so, secure de novo review by the district court. When no objections are timely filed, a district court can review the magistrate’s report and recommendation for clear error. *See* Fed. R. Civ. P. 72 advisory committee’s note (“When no timely objection is filed, the [district] court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.”).

¹ Judge Hightower’s order also addressed the Defendants’ separate motions to stay discovery. (Dkt. 34). As these motions are non-dispositive pre-trial matters, they are issued as orders, not as recommendations. *See* 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72.

Because no party has filed timely objections, the Court reviews the report and recommendation for clear error. Having done so and finding no clear error, the Court accepts and adopts the report and recommendation as its own order.

Accordingly, the Court **ORDERS** that the Report and Recommendation of the United States Magistrate Judge, (Dkt. 34), is **ADOPTED**.

IT IS ORDERED that the Clerk of the Court administratively close this case. A case that is administratively closed “may be reopened upon request of the parties or on the court's own motion.” *Mire v. Full Spectrum Lending Inc.*, 389 F.3d 163, 167 (5th Cir. 2004).

SIGNED on October 6, 2022.



ROBERT PITMAN
UNITED STATES DISTRICT JUDGE