UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Alex Gonzales, Sr., individually as a wrongful death beneficiary of Alex Gonzales Jr., and as the Representative of the Estate of Alex Gonzales, Jr., Deceased, and Elizabeth Herrera, aka Elizabeth Gonzales, individually as a wrongful death beneficiary of Alex Gonzales Jr.	§	
Plaintiffs,	§	
v.	§	CAUSE OF ACTION NO. 1:23-cv-9
LUIS SERRATO, GABRIEL GUTIERREZ, and THE CITY OF AUSTIN	§	
Defendants.	§	

PLAINTIFFS' COMPLAINT

Plaintiffs Alex Gonzales, Sr., individually as a wrongful death beneficiary of Alex Gonzales Jr., and as the Representative of the Estate of Alex Gonzales, Jr., Deceased, and Elizabeth Herrera, aka Elizabeth Gonzales, individually as a wrongful death beneficiary of Alex Gonzales Jr. brings this 42 U.S.C. § 1983 case against Austin Police Department (APD) Officers Luis Serrato and Gabriel Gutierrez, and the City of Austin.

I. PARTIES

1. Plaintiffs Alex Gonzales, Sr., and Elizabeth Herrera, aka Elizabeth Gonzales, are residents of Bastrop County, Texas. Upon information and belief, Alex Gonzales, Jr. was a resident of Bastrop County, Texas at the time of his death and Plaintiff Alex Gonzales, Sr. filed an application for a dependent administration in the Probate Court for Bastrop County, Texas. That application is pending.

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2. Defendant Gabriel Gutierrez was at all relevant times a police officer with the Austin Police Department, and Plaintiffs sue him in his individual capacity for compensatory and punitive damages for the murder of their son, Alex Gonzales, Jr. (hereafter, "Gonzales" or Alex Gonzales, Jr.") At all relevant times, Defendant Gutierrez was acting under color of law as an Austin Police Department officer. Defendant Gutierrez may be served with process at 715 E. 8th Street, Austin, Texas, 78701.

3. Defendant Officer Luis Serrato was at all relevant times a police officer with the Austin Police Department. Plaintiffs sue Defendant Serrato in his individual capacity for compensatory and punitive damages for the murder of their son, Alex Gonzales, Jr. At all relevant times, Serrato was acting under color of law as an Austin Police Department officer. Serrato may be served with process at 715 E. 8th Street, Austin, Texas, 78701.

4. Defendant City of Austin is a municipality that operates the Austin Police Department and employed Officers Gutierrez and Serrato at all relevant times. The City's policymaker for policing matters at the time of the incident was Police Chief Bryan Manley. Chief Joseph Chacon has succeeded Chief Manley. The City may be served with process through its City Clerk, Myrna Rios, at 301 W. 2nd Street, Austin, TX 78701.

II. JURISDICTION AND VENUE

5. Plaintiffs bring this case under 42 U.S.C. § 1983, and this Court has federal question subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

6. This Court has general personal jurisdiction over Defendants because they are in or reside in Travis County, Texas which is in the Western District of Texas, Austin Division.

7. This Court has specific *in persona* jurisdiction over Defendants because this case

arises out of conduct by Defendants which occurred in Travis County, Texas, which is within the Western District of Texas, Austin Division.

8. Venue of this cause is proper in the Western District of Texas, Austin Division 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 the Western District of Texas.

III. FACTS

A. Officer Gutierrez Shot And Mortally Wounded Alex Gonzales Without Provocation Or Justification And Officer Serrato Then Shot And Killed Alex Gonzales Without Provocation Or Justification.

9. In the early morning hours of January 5, 2021, Alex Gonzales, Jr. drove his vehicle westbound on Oltorf Avenue in Austin, Texas. In the vehicle with him was his girlfriend, Jessica Arellano, and his two-month-old infant, Z.A., in the back seat.

10. Alex Gonzales, Jr. encountered Gabriel Gutierrez, an off-duty Austin Police Officer, on the road as Gutierrez drove his personal vehicle.

11. Gutierrez did not identify himself as a police officer before opening fire on Gonzales, Arellano, and their two-month-old child and Gonzales did not know and had no reason to know Gutierrez was an Austin Police Officer.

12. Upon information and belief, Gutierrez was returning from a workout session at his gym when he cut off Gonzales's vehicle with reckless disregard for the safety of the passengers, including a two-month-old child, in the Gonzales vehicle.

13. Gutierrez subsequently turned from E. Oltorf Street and headed southwest on Wickersham Lane. Gonzales also turned from E. Oltorf Street onto Wickersham Lane.

14. Gutierrez stopped his vehicle in the right lane of Wickersham Drive, in anticipation of confronting Gonzales. Gonzales pulled his vehicle alongside Gutierrez's vehicle on

Gutierrez's left.

15. Gutierrez could see into Gonzales' vehicle before he fired, so he saw that there was at least one passenger in the car besides Gonzales.

16. Within three seconds of Gonzales stopping his vehicle alongside Gutierrez's, without any warning, Gutierrez opened fire into the Gonzales vehicle

17. Gutierrez, at close range, rapidly and intentionally fired his handgun at least six times into the passenger side window of the Gonzales vehicle.

18. Gutierrez shot Gonzales in the face and hit Gonzales' passenger, Arellano, in the arm, back, and lungs.

19. Gutierrez fired upon the Gonzales vehicle without justification.

20. Gonzales's vehicle then rolled slowly forward and up onto the right-hand curb a short distance ahead of Gutierrez's vehicle.

21. The car stopped when it ran into the curb. Arellano fell from the passenger side door onto the ground, herself severely wounded by Gutierrez.

22. Gutierrez followed Gonzales' car a short distance, then exited his own vehicle with his gun drawn.

23. At no point during this series of events did Gonzales pose a threat of physical harm to Gutierrez that would justify Gutierrez's use of lethal force.

24. Gonzales had no reason to know or suspect that Gutierrez was an off-duty APD police officer.

25. Gonzales had no reason to know or suspect that Gutierrez was holding a weapon and prepared to fire on Gonzales.

26. Gutierrez had no basis to believe Gonzales or his passengers had harmed or

threatened anyone or posed a threat of serious bodily injury to anyone.

27. There was no objectively reasonable basis for Gutierrez to fear for himself or others.

28. No reasonable police officer would have used deadly force against Gonzales in these circumstances.

29. At approximately 12:33 AM, after firing at least six shots into Gonzales's vehicle and hitting both Gonzales and Arellano, Gutierrez called 911.

30. Gutierrez told the 911 dispatcher he was an APD officer.

31. Gutierrez informed the 911 dispatcher that he shot Gonzales and Gonzales had blood all over his face.

32. Gutierrez informed 911 that there was a female passenger now lying on the ground crying "My baby! my baby! my baby!"

33. Gutierrez falsely claimed to the 911 dispatcher that Gonzales had cut *him* off, rather than the other way around.

34. In response to Gutierrez's command after identifying himself as a police officer, Gonzales, gravely wounded, struggled to exit his car.

35. Gonzales staggered towards the rear of his vehicle while keeping both hands on the side of the car to maintain his balance and in clear view. He had nothing in his hands.

36. Gutierrez had reason to know there was a child in the vehicle because he reported to the 911 Dispatcher that the female passenger (Arellano) continued to cry, "My baby."

37. The 911 Dispatcher asked Gutierrez if the wounded female (Arellano) was pregnant or if there was a child present, raising the prospect that a child was in the vehicle.

38. Gutierrez responded he did not know, suggesting he had reason to believe a child

could be inside the vehicle.

39. Gutierrez knew he had just shot two people who were severely injured and their concern for a child was apparent.

40. Gutierrez made no attempt to render aid.

41. Gutierrez made no attempt to take Gonzales into custody.

42. As Gutierrez spoke to 911, he repeatedly turned his back to Gonzales and Arellano, because he did not perceive either as a threat.

43. Officer Luis Serrato and his partner Officer Brian Nenno responded and arrived at the scene. Officers Serrato and Nenno joined Gutierrez in aiming their weapons at Gonzales as he staggered to get to the passenger side of the vehicle to render aid to his passenger and the child in the rear seat of the vehicle.

44. Gutierrez informed Officers Serrato and Nenno that he had shot Gonzales.

45. Despite knowing that Gutierrez had shot both Gonzales and Arellano, neither officer Serrato nor officer Nenno attempted to render aid to Gonzales or Arellano upon arriving at the scene.

46. Officers Nenno and Serrato shouted multiple, conflicting commands such as walk, turn around, stop, and keep walking in both English and Spanish despite knowing that Gutierrez had shot Gonzales, that Gonzales was gravely wounded, that Gonzales was having difficulty standing, that Gonzales's hands were in plain sight and they could see Gonzales had no weapon.

47. Because Gonzales sustained a gunshot wound in the head at close range, his hearing and ability to process what he could hear, more likely than not, were impaired, making it unlikely that he could understand the conflicting commands of the officers, which experienced Austin Police officers knew or should have known.

48. Upon information and belief, Gonzales was suffering from shock from his gunshot wound, causing him further impairment, which experienced Austin Police Officers knew or should have known was the case and would have impaired his ability to hear, comprehend, and follow commands.

49. Gonzales had no weapon in his hands or on his person.

50. Gonzales, weak from his injury and having difficulty standing and moving, posed no threat to Officers Serrato, Nenno, or Gutierrez, and Gonzales never did anything to threaten the officers.

51. Because no one came to his, his passengers' aid, Gonzales made his way to the passenger side of the car, to reach his wounded girlfriend and check whether Gutierrez had shot his child.

52. At all times, Gonzales's hands were in plain sight of officers. The officers saw that he had no weapon and therefore posed no threat to them or anyone else.

53. The officers saw that Gonzales was attempting to check on the welfare of Arellano and had reason to believe a child was in the vehicle because Gutierrez had reported to the dispatcher that he heard the female victim crying for her baby.

54. As Gonzales reached the passenger side of the vehicle, he checked on Arellano who was lying on the ground, and the officers heard Arellano continue to cry, "My baby."

55. While Gonzales was struggling and staggering to reach his injured girlfriend, Serrato unnecessarily moved to his right into the open and away from the cover of his vehicle demonstrating he had no fear of harm, let alone serious bodily harm to himself or others.

56. Serrato moved into the open to have a clear line of fire at Gonzales.

57. Serrato showed no concern about whether the wounded *female* on the ground

(Arellano) possessed a weapon or posed any threat to Serrato since he never gave her commands or trained his weapon on her and moved into the open vis a vis her position on the ground.

58. No reasonable officer in Serrato's position would have left cover to expose himself in the open if he believed Gonzales or his wounded passenger (Arellano) posed an imminent threat of harm to him, or any others present in those circumstances.

59. Serrato trained his weapon on Gonzales, the non-White *male* of Hispanic ethnicity.

60. As a direct result of the training Serrato received from the Austin Police Department, Serrato concluded, without reasonable foundation, that the non-White male of Hispanic ethnicity, Gonzales, posed a threat even though he could see Gonzales's hands were empty, that Gonzales was having difficulty standing and struggling to move in any deliberate fashion and made no threatening move towards Serrato. No reasonable officer in Serrato's position would have used deadly force confronting Gonzales in those circumstances.

61. Gonzales slowly opened the rear passenger door to check on the welfare of his infant child in the rear seat who officers had reason to believe was present, and in harm's way.

62. Gonzales's hands remained in plain sight as he bent down to look into the rear passenger door to check on his two-month-old child.

63. Gonzales' right hand remained visible on top of the rear passenger door and his left hand was visible on the rear side of the passenger door.

64. Gonzales gently leaned below the roof line of the vehicle to look into the open door.

65. Gonzales made no sudden movements of any kind with his left hand and possessed no weapon. Importantly he did not "reach" for anything.

66. Serrato repeatedly yelled at Gonzales, "Don't reach!" even though Gonzales was not reaching for anything.

67. Serrato repeated his commands, "Don't reach!" to create a pretext to justify shooting Gonzales because he could see Gonzales was not in possession of a weapon.

68. Although Gonzales made no sudden move or turn in Serrato's direction or demonstrate any *threat* to Serrato, Serrato opened fire,

69. Facing no threat and without justification, Serrato fired at least ten times, hitting Gonzales multiple times. .

70. Serrato killed Gonzales as he stood, unarmed, checking on the welfare of his infant son.

71. At no point did Serrato see a weapon in Gonzales's possession.

72. At no point did Gonzales make any aggressive move towards Serrato or any of the other officers on the scene.

73. At no point did Gonzales take any action that provided any indication that he posed a danger or a threat to any officer or any bystander at the scene.

74. No objectively reasonable basis existed to believe that Gonzales posed a threat to harm anyone, much less an immediate threat to the officers present.

75. No reasonable police officer would have used deadly force against Gonzales in these circumstances.

B. THE CITY OF AUSTIN POLICE DEPARTMENT HAS A CUSTOM AND PRACTICE OF USING EXCESSIVE FORCE ON BLACK AND HISPANIC INDIVIDUALS.

76. The Austin Police Department has adhered to a well-documented pattern and practice of using excessive force against Black and Hispanic individuals, especially Black and Hispanic men.

77. This pattern and practice include the use of deadly excessive force disproportionately against non-White individuals.

78. This pattern and practice include the failure to discipline officers for excessive force especially when it occurs against non-White individuals, which occurs with alarming frequency.

79. As a result of its failure to discipline officers for excessive force, the Austin Police Department adopts a *de facto* policy that such excessive force against non-White individuals is acceptable.

80. This pattern and practice include the training of Austin Police officers to approach their role with a militaristic warrior mindset that trains officers to perceive non-White men as immediate threats they must neutralized before they can harm an officer.

81. As a result of this pattern and practice, Austin Police officers use excessive force with alarming frequency against non-White men in adversarial encounters despite that such encounters do not pose a threat of serious bodily harm.

82. This pattern and practice include a policy not to remedy its pattern of excessive and disproportionate force.

83. As a result of this pattern and practice, Austin Police officers believe there is no accountability for the use of excessive force against non-White individuals.

84. The following eighteen incidents evidencing a pattern and practice in which APD officers used excessive deadly force against non-White individuals are a mere sample of the cases of excessive force used by APD officers:

a. **Daniel Rocha** – On **June 9, 2005**, then-Officer Julie Schroeder engaged in a struggle with Daniel Rocha, who was trying to flee arrest. When Rocha turned away from her, Schroeder shot him in the back, killing him. This Court denied summary judgment on

July 6, 2007, in a suit brought by Rocha's family. The lawsuit settled for $1,000,000. Although it publicly defended the officer's conduct, APD has since admitted Schroeder's use of force was unreasonable.

b. **Kevin Brown** – On **June 3, 2007**, APD Sgt. Michael Olsen fatally shot Kevin Brown, after Olsen chased Brown alone into a field. Olsen shot Brown multiple times including while Brown lay on the ground. Olsen rushed into the confrontation without a plan and then claimed that Brown was reaching for a weapon, even though Brown dropped his weapon moments earlier (and dozens of feet from where Olsen shot him). APD, through its former Chief of Police Art Acevedo, acknowledged that Olsen's use of force was unreasonable, and paid Brown's family a settlement of $1,000,000.

c. **Sir Smith** – On **May 11, 2009**, then-APD-Officer Leonardo Quintana shot Sir Smith after approaching his car while Smith, unarmed, slept. Quintana and another APD officer came up on the car from behind and could tell through the car windows that both occupants were asleep. Instead of making a plan and communicating with his partner, Quintana opened fire on the car, shooting through the car's rear windows. Smith, unarmed and suddenly under fire, awoke from sleeping and tried to escape by running from the car, but Quintana shot him after he exited the car. APD disciplined Quintana only for failing to activate his squad car's video camera, though an independent investigation by the City's Office of the Police Monitor sharply criticized APD's investigation. Upon information and belief, APD did not discipline Quintana, and the City defended the officer's conduct, although the City settled the lawsuit with Smith as well as the other individual Quintana killed.

d. **Carlos Chacon** – On **April 29, 2011**, APD Officers Eric Copeland and Russell Rose violently assaulted Carlos Chacon. Chacon had called the police to report he was the victim of a robbery. The officers alleged that Chacon failed to comply quickly enough with their orders to lay on the ground and began electrocuting him with their TASER while punching his body. Neither officer intervened to stop the other from assaulting Chacon. A jury awarded Chacon significant damages based on the officers' excessive force.

e. **Byron Carter** – On **May 30, 2011**, Officer Nathan Wagner fatally shot Byron Carter, Jr., who was only 20 years old. Carter was in a vehicle driven by a 16-year-old child, L.W., while exiting a tight parallel parking space after 11:00 pm. Unbeknownst to Carter and L.W., Wagner and his partner were nearby on foot, and had been following Carter and L.W. surreptitiously without suspicion of any crime. L.W. heard Carter say, "go," in a fearful tone, so he accelerated out of the parking space. Wagner claimed that the car sped towards him and his fellow officer, and that he (incorrectly and implausibly) believed it struck his partner and was dragging him beneath the vehicle. As a result, Wagner fired his weapon five times into the driver's side doors as the car drove away. Wagner's shots wounded L.W. and killed Carter. Wagner's partner did nothing to intervene and stop the shooting, even as the car drove away. In ensuing excessive force litigation, The District Court for the United States Western District of Texas, Judge Lee Yeakel, denied summary judgment to Wagner on May 20, 2013. Although APD failed to discipline either officer, then-Police Monitor Margo Frasier and a Citizen Review Panel told the then-chief that the shooting was unjustified. Like here, the APD officer shot the passenger who posed no danger to anyone—yet APD condoned this deadly and unnecessary act despite the Austin

Police Monitor, a former Sheriff of Travis County and police practices expert, who informed APD the actions were unreasonable after her review of the totality of the circumstances.

f. **Ahmede Bradley** – On **April 5, 2012**, Officer Copeland (the same officer who abused Chacon, discussed above) shot and killed Ahmede Bradley during a traffic stop. Copeland had not been re-trained or disciplined in any meaningful way after brutally beating Chacon. Bradley initially fled the stop, then pulled over again, exited his vehicle, and ran away on foot. Copeland angrily gave chase on foot and shouted that he would kill Bradley. Copeland electrocuted Bradley with a TASER, then kicked and struck Bradley before fatally shooting Bradley three times. This Court denied summary judgment on January 6, 2016. Then-Police Monitor Frasier, the former Sheriff of Travis County, told the then-chief that the shooting was unjustified, particularly because Bradley was trying to escape so that he was not an immediate threat requiring deadly force.

g. **Pete Hernandez** – On **June 7, 2012**, APD Officer Jesus Sanchez used excessive force to tackle Pete Hernandez, whose only "crime" was exiting a Wal-Mart store. As Hernandez walked through the parking lot, an APD police officer suddenly yelled from behind him to "stay," and then, "get on the ground." Confused, Hernandez stopped—he testified that all he heard was to "Move out of the way," not "get on the ground"—and, less than four seconds after the first command, Sanchez executed a flying tackle into Hernandez, slamming him into the ground. Investigation revealed a third APD officer ordered police to "grab" Hernandez because he was allegedly walking toward a stolen truck occupied by another person. The ordering officer had incorrectly assumed Hernandez was an accomplice merely because he was walking through the parking lot, and because he was

Hispanic. And Sanchez had, in turn, assumed that the order to "grab" Hernandez justified a flying tackle. None of the APD officers present intervened to stop Sanchez's use of excessive force. Even though they injured and abused an innocent person, the City found Sanchez did not violate any policies. But a jury found Sanchez used excessive force, awarding Hernandez $877,000 on February 8, 2016 (later reduced on remittitur). While the City later agreed to a settlement of $915,000, no one from APD's leadership apologized to the plaintiff and the City defended the conduct throughout the litigation.

h. **Larry Jackson, Jr.** – On **July 29, 2013**, APD Det. Charles Kleinert fatally shot Larry Jackson, Jr. Kleinert chased Jackson on foot from a bank fraud call, and even requisitioned a civilian vehicle to continue the chase before cornering Jackson alone under a bridge. Kleinert fired his gun at point blank range after engaging in a fistfight with Jackson. Jackson was unarmed. Kleinert resigned in lieu of discipline, but APD acknowledges his use of force was unjustified and the City settled the family's civil claim for a total of $1,850,000.

i. **Jawhari Smith** – In **March 2014**, APD Sgt. Greg White shot Jawhari Smith after confronting Smith when Smith was holding a small BB gun. Smith honestly and immediately told White that the "pistol" was just a BB gun and immediately held it up in his right hand over his head, *according to White*. Both Smith and a bystander reported Smith then quickly dropped the BB gun on the ground. White shot Smith, though his patrol car audio recording shows White gave Smith less than two seconds to comply with his commands to drop the BB-gun. APD did not discipline White, but the City paid Smith a settlement.

j. **David Joseph** – On **February 8, 2016**, APD Officer Geoffrey Freeman shot a naked and unarmed 17-year-old African American youth who was running at him in the midst of a severe mental health crisis. Although the City and APD leadership acknowledged that the force was excessive, the City through its legal department defended the shooting and denied it was unreasonable. Nevertheless, the City paid a settlement of $3,250,000.

k. **Jason Roque** – On **May 2, 2017**, APD Officer James Harvel shot at Jason Roque—who had been threatening to shoot himself in the head, but never threatened anyone else—three times, including twice after Roque dropped his BB-gun and was stumbling away from the police. Though four other APD officers were on the scene, none of them did anything to prevent Harvel from continuing to fire on Roque. APD did not discipline Harvel or any of the four officers. In ensuing litigation by Roque's survivors, the District Court for the United States Western District of Texas, Judge Lee Yeakel, denied summary judgment to Officer Harvel on March 23, 2020. The Fifth Circuit Court of Appeals affirmed Judge Yeakel's order in a published opinion, 993 F.3d 325, on April 1, 2021. While the matter subsequently settled for $2,250,000, APD never disciplined or retrained Officer Harvel despite video evidence showing him shooting an unarmed, injured young man in the middle of the street.

l. **Landon Nobles** – On **May 7, 2017**, APD officers shot Landon Nobles in the back multiple times. APD Officers Richard Egal and Maxwell Johnson shot Nobles even though Nobles had no weapon and presented no danger. Rather than discipline them, the City has attempted to justify the wrongful shooting. A jury found the shooting unjustified and awarded $67 million to the family and estate. And when the City moved to reduce the award and overturn the verdict, Judge Mark Lane reduced the award to approximately

$8 million but affirmed the jury's verdict that the shooting was unreasonable under the circumstances. Upon information and belief, APD has not disciplined any of the officers involved in the shooting .

m. **A.J. Griffin –** On **August 19, 2018,** A.J. Griffin, a Black 21-year-old, was performing at a Rap show on Sixth Street in Austin, Texas. An altercation broke out that spilled into the alley behind the club. A person involved in the altercation fired a handgun. A.J. Griffin also possessed a handgun but did not fire. He ran from the alley carrying the handgun away from the shooting. A line of eight officers, alerted that he was running toward the opening of the alley to a cross street, awaited him at the opening of the alley to the right side. As he exited the alley at a full run, he turned to his left, all the officers yelled a cacophony of conflicting commands at the same time to "stop," "drop your weapon," "get on the ground," and other commands instructing him to surrender. Before he could react, within 3 seconds of the commands, police opened fire even though he was running away from them. When officers shot him, he immediately fell headfirst to the ground and the weapon slid out of his hand and across the street. Officers continued to fire, firing a total of forty-three times, hitting A.J. thirty times, including twenty or more times as he lay gravely wounded and unarmed in the street. He died at the scene. Upon information and belief, APD did not discipline any officers for excessive firing even though one officer reported he did not fire because he did not think Griffin was a threat. Judge Yeakel denied the City's motion to dismiss the claims against it, even though he granted the motion to dismiss the claims against the individual officers under Qualified Immunity because A.J. had a gun in his hand.

n. **Javier Ambler** – On **March 28, 2019**, APD Officer Michael Nissen arrived at the scene of a car wreck caused by Williamson County Sheriff's deputies who had chased the driver, Ambler, into Austin for allegedly failing to dim his headlights and not pulling over. As Nissen arrived, the deputies already had Ambler at gun point and had tasered him multiple times. The officers ordered Ambler, who was unarmed and visibly obese, to lay on the ground on his stomach. Ambler warned the officers, "I have congestive heart failure" and "I can't breathe" as they tried to force him to lie flat. Ambler told the officers he was trying to comply, but the officers insisted he flatten further despite his obvious inability to do so due to his obesity, and despite his repeated cries that "I can't breathe" and "I'm not resisting." Instead of stopping this, Nissen helped the deputies worsen Ambler's plight by pulling one of his arms further behind his back. The officers then shocked Ambler with the TASER again and put a knee into his back to press him further into the pavement before handcuffing him behind his back. Ambler stopped breathing following the excessive use of force Nissen participated in and easily could have stopped. As a result, Ambler died.

o. **Michael Ramos –** On **April 24, 2020**, APD Officer Christopher Taylor shot and killed an unarmed Michael Ramos. Taylor and other APD officers pulled up to Ramos and a passenger sitting in his vehicle. They ordered Ramos to exit his vehicle at gunpoint. Ramos complied, begged them not to shoot, asked what was going on, and said he was not armed. When Ramos continued to stand with his hands up and complain that he had done nothing wrong, another APD officer, Mitchell Pieper, shot him with a "less lethal" weapon. In response, Ramos ducked back into the car and attempted to drive away from the police. As the vehicle moved away from the officers, Christopher Taylor shot into the

cabin with a firearm, killing Ramos. A Travis County grand jury indicted Taylor for murder, but despite that APD has not disciplined Taylor. This lack of discipline is even more disturbing as APD Chiefs Brian Manley and Joseph Chacon, upon information and belief, consider the shooting to have been a violation of APD policies.

p. **2020 Black Lives Matter Demonstrations—On May 30-31, 2020 (Memorial Day Weekend)** – Dozens of APD officers used deadly force to shoot non-violent demonstrators with kinetic projectiles fired from shotguns and 40 mm launchers. As a direct consequence, APD officers shot scores of people without justification as they protested police excessive force against non-White individuals. Scores of protestors suffered serious brain, head, and other serious and permanent physical injuries. Among others, these include the unjustifiable shootings of Justin Howell, Anthony Evans, Alyssa Sanders, Levi Ayala, Jose Herrera, Bomani Barton, Meredith Drake, Christen Warkoczewski, Nicole Underwood, and Ariana Chavez, and Sam Kirsch.

q. Austin Police Department has not disciplined t a single officer, commander, Assistant Chief, or Chief of Police for the intentional use of 40 mm launchers or bean bag shotguns or the failure to intervene to stop their use during the protests, even though current Chief Chacon and his predecessor, Brian Manley, personally knew that officers were using the weapons inappropriately, dangerously, and against nonviolent people. Travis County grand juries have indicted more than twenty APD officers for aggravated assault by a public servant for firing kinetic projectiles at people who, like Alex Gonzales, Jr., posed no danger to anyone when APD officers fired upon them. APD has failed to discipline even one of the indicted officers—even those who caused serious and permanent injuries to people who were doing nothing more than standing on a street—.

r. **Alex Gonzales, Jr**.—On January 5, 2021, APD Officer Luis Serrato gunned down, Alex Gonzales, the subject of this lawsuit, even though Gonzales was gravely wounded and unarmed, posing no threat to officers; but he was a non-White male who found himself in an adversarial confrontation with Austin Police officers who APD and the City of Austin trained to perceive as serious threats they should meet with the use of force including lethal force.

s. Rajan Moonesinghe—And on November 15, 2022, Austin Police shot and killed Rajan Moonesinghe, continuing APD's annual and biannual as he attempted to repel what he believed were one or more intruders in his home, while he was on his own property. Officers shouted commands for him to drop his weapon while simultaneously opening firing and killing him, despite that he never pointed his weapon in their direction, and he was attempting to protect his home. Yet he, too, was a non-White male who found himself in an adversarial confrontation with Austin Police officers trained to shoot non-White males first and assess the situation later. While this matter is still under investigation, there is no reason to believe those officers or the officers who are defendants in this case will suffer any discipline by APD for the use of excessive deadly force that ended a life.

85. APD's own reports reflect that its officers routinely use force against those who are not resisting at all.

86. APD's reports reflect that from 2006 to 2016, APD used force against 1,159 people who only exhibited "passive" resistance, 838 people who only exhibited "verbal" resistance, and 6,626 who only exhibited "defensive" resistance.

87. During the middle of 2017, APD changed its reporting metric, so the type of resistance is not available during that year.

88. From 2018 through 2020, for identified individuals, APD used force against at least fifty-eight people who did not resist, 310 people whose resistance was "passive," and 4,148 people whose resistance was only "defensive."

89. From 2017 to 2020, APD began using force 58% more often—while making 51% fewer arrests.

90. An independent review, authorized by the City of Austin, found 112 uses of force (against eighty-eight individuals) in late 2019 to be inappropriate, despite approval of the officers' use of force by APD supervisors.

91. The same review found that the APD use of force process lacks proper internal supervisory review and investigation and frequently fails to address the appropriateness of the use of force used against members of the public.

92. And in response to discovery in the litigation involving the death of Jason Roque, the City identified a disturbing pattern of deadly force on unarmed persons. In fact, according to the City, in the 13 years before the shooting of Jason Roque, APD shootings non-White people comprised 83% of all shootings of unarmed people, a percentage that is grossly disproportionate to the non-White population.

93. And tellingly, the City failed to count the shootings of Landon Nobles, an unarmed man who an APD officer shot in the back and of Jason Roque, who APD officers gunned down while he stumbled unarmed and defenseless in the middle of the street. Thus, non-White people comprise a disproportionate percentage of unarmed people shot by APD than even the City has conceded.

C. THE APD TRAINED ITS POLICE OFFICERS TO ADOPT A PARAMILITARY CULTURE THAT CAUSED THEM TO ADOPT A "WARRIOR MINDSET" AND AN "US-VERSUS-THEM" APPROACH TO POLICING THAT PERMITTED, ENCOURAGED, AND TOLERATED EXCESSIVE FORCE AND A "SHOOT FIRST" MENTALITY.

94. APD's training policies fostered and encouraged officers to use force far too quickly and far too often resulting in a long history of excessive force against non-White individuals.

95. For years prior to the shooting of Alex Gonzales, Jr., the City of Austin trained its police officers in ways that expressly and implicitly encouraged and approved of the use of excessive force in policing encounters with non-White Austin residents. The Austin Police Department Training Academy used a training curriculum centered upon "paramilitary" training techniques that taught and reinforced a "paramilitary culture" throughout the APD. The APD Training Academy taught the officers to adopt a "warrior mindset" that encouraged an "us versus them" approach to encounters with non-White individuals during policing.

96. On May 22, 2020, Dr. Sara Villanueva delivered to then-Chief Brian Manley a Review Analysis and Strategic Plan of the Austin Police Department Training Academy. At that time, Dr. Villanueva was the Organizational Development and Training Manager at the Austin Police Department. On information and belief, Dr. Villanueva prepared and delivered her report within the scope of her authority as an employee and agent of the City of Austin.

97. After conducting a thorough "SWOT analysis" (assessing strengths, weaknesses, opportunities, and threats) of the APD Training Academy, Dr. Villanueva reported that the APD Training Academy operated under a paramilitary training format that was inconsistent with preparing cadets to work in a manner consistent with a community-police services model.

98. Dr. Villanueva further found that APD had a paramilitary culture and that its existence at APD's Training Academy promoted a warrior mindset and an adversarial approach to

training where police are prepared like the military in a war zone to be on the front lines fighting against crime.

99. On December 29, 2020, Austin Chief Equity Officer Brion Oaks delivered a memorandum to the Austin Mayor and City Council for the purpose of providing an overview of two bodies of work documenting racial inequities within APD, the Peace Mill Evaluations and the James Joyce Report.

100. The Peace Mill Research and Communications' Evaluation of the APD Training and Recruiting Divisions was a series of evaluations prepared by a third-party evaluator that found that multiple former APD cadets expressed concerns that APD staff foster a culture of violence, embracing brutality over wisdom throughout the Academy.

101. The Peace Mill Evaluations found that multiple cadets alleged that the brutality was a driving force of the Academy, and that physical aggression was the primary quality that trainers sought when promoting cadets.

102. The Peace Mill Evaluations further found that APD's Training Academy fostered a culture of violence that justified and legitimized direct or structural violence—manufacturing soldiers as officers rather than community-driven law enforcement professionals adept at de-escalation.

103. Joyce James Consulting prepared and submitted the Joyce James Report at the direction of the Austin City Council, and. delivered the Report in November 2020. The Report found that African American and Hispanic/Latinx Austin residents experienced higher rates of use of force at the hands of APD, even when adjusted for poverty or other confounding factors.

104. On January 18, 2021, a panel of Austin community members delivered a Community Report that provided a comprehensive assessment of training videos used in the

training curriculum of the APD Training Academy. The Community Report was prepared with the authorization of the Austin City Council.

105. The Community Report provides an assessment of videos and training materials that had been in use within the APD Training Academy for years prior to the shooting of Plaintiffs.

106. The Community Report states that leadership from the Austin Police Department and the Office of Police Oversight chose the videos to review.

107. The Community Report stated that the Academy's training videos demonstrated dehumanization and a lack of respect or humanity in the way the videos portrayed community members in their interactions with APD officers.

108. The Community Report found that APD's training videos demonstrated an "us-versus-them" mindset that reflected biases along race, ethnicity, gender, and disability. The Report further found that the Academy's training videos demonstrated a warrior mentality and a militarization of the police.

109. The Community Report found that the Academy's training videos focus on control and the warrior mentality, reinforcing the us-versus-them dichotomy in ways that tend toward escalation and grievous mistakes in judgment, as well as increased instances of excessive force.

110. On February 26, 2021, third-party consultant Kroll Associates, Inc. delivered to the City of Austin a Memorandum regarding Kroll's Preliminary Assessment of the Austin Police Training Academy. The Kroll Preliminary Assessment was prepared pursuant to the authorization of the Austin City Council.

111. Despite the dramatic findings by Dr. Villanueva and the Community Review panel, persons with the APD training academy have been resistant to changing the police training curriculum. The Kroll Preliminary Assessment specifically found APD and Academy leadership

are resistant to moving away from a paramilitary training academy, despite evidence that the Academy has fostered a "warrior" or "us-versus-them" mentality.

112. On April 23, 2021, third-party consultant Kroll Associates, Inc. delivered to the City of Austin, Office of Police Oversight / City Manager's Office their Final Report on the Austin Police Department: Review and Assessment of Training Academy (herein the "Kroll Final Report").

113. The Kroll Final Report states that the Academy has retained a paramilitary training model.

114. Kroll further found that APD leadership has expressed its belief that the paramilitary structure is an essential component of police culture, despite evidence that this approach leads to greater instances of violence and an "us-versus-them" mentality.

115. On information and belief, the City of Austin and the APD maintain other policies, practices, and customs that reinforce, encourage, and tolerate the paramilitary training of its police officers, the "warrior mindset," and the "us-versus-them" approach to policing. These policies and procedures include, without limitation, investigative approaches to incidents and complaints involving officer use of force and administrative / disciplinary approaches to incidents and complaints involving officer use of force. On information and belief, these additional policies, practices, and customs reinforce and exacerbate the pervasive APD culture that permits, encourages, and tolerates the use of excessive force by Austin police officers.

D. APD Created, Encouraged, And Tolerated A Policing Culture That Caused Officers To Use Excessive Force Disproportionately Against Non-White Individuals.

116. For years prior to the shooting of Alex Gonzales, Jr, who is Hispanic, the City of Austin adopted policies, practices, and customs that encouraged and tolerated a disproportionate

use of excessive force targeted towards non-White individuals, including Hispanic persons. The training methods and training materials used at the Austin Police Department Training Academy tolerated and even encouraged the use of excessive force in a discriminatory manner.

117. On December 5, 2019, the Austin City Council adopted Resolution No. 20191205-066 ("Resolution 66"). Resolution sixty-six states that the City of Austin itself recognized that patterns of discrimination and bigotry pervaded the Austin Police Department, which requires investigation and reform. This is an Admission by the City of Austin that the Austin Police Department has maintained a pattern and practice of treating non-White individuals with less consideration than White individuals not of Hispanic ethnicity.

118. On December 28, 2020, the Peace Mill Evaluation of APD Training and Recruiting Divisions (described above) stated that OPO and APD investigations evidence serious gaps in APD's efforts to address racism and inequity in policing.

119. Further, the Peace Mill Evaluations found that APD division leaders indicate that the department's commitment to anti-racism and the equity assessment process has been only superficial.

120. Even more specifically, the Peace Mill Evaluations found that APD's Internal Affairs and Professional Standards division has few strategies in place to ensure racial equity and reflect a significant deficiency in the department's ability to implement principles of equity and inclusion.

121. On January 18, 2021, the Community Report found that the videos and other training materials used by the APD Training Academy reflected harmful stereotypes perpetuated against Black and Brown communities and often showed the brutalization of non-Whites.

122. The Community Report further found that the videos repeatedly showed APD

officers quickly killing men of color within seconds of an interaction with police and exceptionally few videos showing police de-escalating. The videos revealed that officers in the videos quickly identified people of color as threats requiring the use of force, regardless of whether the subjects were armed or unarmed.

123. On April 23, 2021, the Kroll Final Report found that the trainers at the APD Training Academy taught students to exercise bias in enforcing the law and that students drew the conclusion that bias was an inherent part of APD culture.

124. On information and belief, the City of Austin and the APD maintain other policies, practices and customs that reinforce, encourage, and tolerate the disproportionate use of excessive force against non-White individuals. These policies and procedures include, without limitation, investigative approaches to incidents and complaints involving officer use of force and administrative / disciplinary approaches to incidents and complaints involving officer use of force. On information and belief, these additional policies, practices, and customs reinforce and exacerbate the pervasive APD culture that encourages and tolerates racially disproportionate use of excessive force by Austin police officers.

E. City Of Austin Policies, Practices, And Customs Demonstrably Caused Excessive Force To Be Disproportionately Directed At Non-White Persons, Particularly In Black And Hispanic Communities.

125. For many years prior to the shooting of Alex Gonzales, Jr., the City of Austin has exhibited a demonstrable racial bias in its policing practices, particularly with respect to the use of lethal force and excessive force against non-White individuals and/or in Hispanic or Black neighborhoods. The racial bias in policing outcomes is a direct result of the policies, practices, and customs of the City of Austin and APD, including the training methods used to train officers at the APD Training Academy.

126. In 2016, the Center for Policing Equity conducted an assessment of City of Austin policing data for the years 2014 and 2015 and released a research report entitled "The Science of Policing Equity: Measuring Fairness in the Austin Police Department."

127. The CPE Report found that Austin police officers used more force in the neighborhoods where Black and Hispanic Austinites live as compared to use of force in White neighborhoods. Even after adjusting for crime and poverty variables, the CPE Report found that Austin police officers' use of force in Black and Hispanic neighborhoods was disproportionate and unjustified.

128. On December 5, 2019, Austin City Council Resolution 66 recognized racial biases in APD policing practices and policing outcomes.

129. In November 2020, the Joyce James Report further documented the racial bias and disparities in the APDs use of lethal force and excessive force. The report found that Austin Police subjected Austin residents who lived in majority Black or Hispanic neighborhoods to disproportionate force and severe of force.

130. The City of Austin does not dispute that its City Council recognized biases in APD policy practices and policing outcomes

131. The City of Austin does not dispute that the Joyce James Report found that Austin Police subject Austin residents who live in Black or Hispanic neighborhoods to disproportionate force and severe of force.

132. Moreover, according to the City, a much higher percentage of unarmed persons shot by APD are non-White than should occur based on the demographics. In fact, as of 2018, 83% of unarmed people shot by APD since 2004 were non-White.

133. And in many instances, despite policymakers' knowledge of unreasonable uses of

force, including deadly force, APD policymakers publicly defend the abusive conduct or stay silent and refuse to condemn the conduct, thereby sending the message to APD officers that APD leaders and City leaders will tolerate the use of excessive force.

134. The foregoing studies and reports addressing the implicit and explicit biases against non-White members of the Austin community that exist in the training practices and policies of the Austin Police Department are a direct and proximate cause that resulted in Officer Serrato firing at least ten times at an unarmed Alex Gonzales, Jr., killing him at the scene of the encounter.

135. The foregoing studies and reports addressing the implicit and explicit biases against non-White members of the Austin community that exist in the training practices and policies of the Austin Police Department are a direct and proximate cause that resulted in off duty officer Gutierrez firing at least six times at an unarmed Alex Gonzales, Jr., that was a substantial contributing cause of Alex Gonzales's death at the scene of the encounter.

IV. CAUSES OF ACTION

A. Fourth And Fourteenth Amendment Excessive Force By Defendants Gutierrez And Serrato That Shocks The Conscience

136. Defendant Gutierrez, while acting under color of law, shot Alex Gonzales, Jr. when he posed no danger to anyone.

137. Even though Gutierrez was "off-duty" at the time he initially encountered Gonzales and undertook all his relevant interactions with Gonzales (including shooting Alex) under color of law.

138. Under the authority granted to him by the APD General Orders as an off-duty officer, Gutierrez made a decision to intervene with respect to Alex, and Gutierrez undertook law enforcement actions with respect to Alex, using deadly force and shooting Alex.

139. Only after he shot Alex, did Gutierrez identify himself as an Austin police officer.

140. Defendant Serrato, while acting under color of law, shot Alex Gonzales, Jr. when Gonzales posed no danger to anyone.

141. Both Gutierrez and Serrato's use of force was unreasonably excessive to any conceivable need, objectively unreasonable in violation of clearly established law, and directly caused Gonzales to suffer serious injuries. Therefore, both Gutierrez and Serrato's actions violated Alex Gonzales's clearly established Fourth Amendment to the Constitution's right to be free from excessive force and unreasonable seizure by the State.

142. Further, both Gutierrez and Serrato's intentional use of force caused Alex Gonzales's injuries, was unreasonably disproportionate to the need for action under the circumstances and malice or excess of zeal motivated their actions such that it amounted to abuse of official power that shocks the conscience. Without provocation of any kind or any legitimate reason, APD Officers Gutierrez and Serrato shot Alex Gonzales with a lethal weapon, causing death and serious injuries, while Alex did nothing to warrant the use of deadly force.

143. Therefore, APD Officers Gutierrez and Serrato violated Alex Gonzalez's clearly established Fourteenth Amendment substantive due process and Fourth Amendment rights to be free from excessive force in such a way that is unreasonable and clearly shocks the conscience.

144. As a direct and proximate result of Defendants Gutierrez and Serrato's actions, Alex Gonzales died of his wounds.

145. Gutierrez and Serrato were acting under color of law at all relevant times.

146. Gutierrez did not inform officers that he initiated the conflict with Gonzales, shot Gonzalez without provocation, and that he had reason to believe a child was in the vehicle, failing to prevent further force against Gonzales.

147. Gutierrez's falsehoods and fabrications caused Officer Serrato to use lethal force, killing Gonzales and injuring Plaintiff.

148. Gutierrez was acting under color of law at all relevant times.

149. Plaintiffs bring this claim under 42 U.S.C. 1983.

B. FOURTH AND FOURTEENTH AMENDMENT *MONELL* CLAIM AGAINST DEFENDANT CITY OF AUSTIN ONLY

150. Plaintiff incorporates by reference all the foregoing and further alleges as follows:

151. The conduct by Officer Gutierrez described in this complaint constituted excessive and conscience shocking force in violation of the Fourth and/or Fourteenth Amendment.

152. At all material times, including when he shot Alex Gonzales, Gutierrez acted under color of state law.

153. When he shot Alex Gonzales, Gutierrez was acting within the course and scope of his duties as a City of Austin police officer.

154. Defendant City of Austin's policymaker for all matters related to the activities of the Austin Police Department at the time APD Officers Gutierrez and Serrato shot and killed Alex Gonzales was Brian Manley and now is Joseph Chacon, who was an Assistant Chief at APD on January 5, 2021.

155. As more fully described earlier, Defendant City of Austin had the following policies, practices, and customs in place prior to and on January 5, 2021, that were a proximate cause of the death of Alex Gonzales, Jr.:

- The unreasonable use of deadly force against non-White individuals including those of Hispanic ethnicity.
- The disproportionate use of unreasonable deadly force against non-White individuals including those of Hispanic ethnicity.

- Failing to discipline officers for the use of unreasonable deadly force when used against non-White individuals.
- Training APD officers to function as militaristic warriors instead of the guardians of the community who employ an adversarial mentality towards non-White persons and condoning the disproportionate use of unreasonable deadly force against non-White individuals.
- Publicly defending and justifying the use of unreasonable deadly force.
- Failing to discipline officers for using unreasonable deadly force against unarmed non-White individuals.
- The failure to discipline officers who used unreasonable deadly force or who shot bystanders; and
- Shooting unarmed bystanders and/or innocents who pose no danger to anyone including APD officers.

156. Prior to and on January 5, 2021, each of the policies, practices, and customs alleged above was part of a persistent and widespread pattern within the Austin Police Department.

157. Prior to and on January 5, 2021, each of the policies, practices, and customs alleged above were known to the City of Austin's policymakers, including then Chief Manley and Assistant Chief Chacon, now Chief Chacon. The City of Austin ratified, adopted, or approved of each of the alleged policies, practices, and customs prior to and on January 5, 2021, and such policies, practices, and customs were a direct and proximate cause of the fatal shooting of unarmed Alex Gonzales, Jr.

158. One or more Austin policymakers acted with deliberate indifference to the pattern and practice of unreasonable force alleged in this Complaint as well as the known and obvious consequences of the identified policies, practices and customs that made the violation of Alex Gonzales's constitutional rights likely and predictable.

159. The identified Austin policies, practices, and customs caused the violation of Alex

Gonzales' constitutional rights and the injuries and damages the Plaintiffs, including Alex Gonzales, suffered as a result of such constitutional violation. This violation of Alex Gonzales's constitutional rights was a proximate cause of the injuries sustained by Plaintiffs.

160. Defendants Gutierrez and Serrato received their police training through the APD training academy that trained both officers within a paramilitary culture that taught each of them a "warrior mindset" and an adversarial mentality towards non-White individuals they encountered in the course of the discharge of their duties that encouraged and promoted the use of excessive deadly force against such persons including Alex Gonzales, Jr.

161. The APD Training Academy taught officer cadets and Defendants to perceive non-White individuals, including Hispanic individuals in Hispanic neighborhoods, as an inherent and imminent threat of danger. Based on reports and upon information and belief, the APD Training Academy taught Defendants policing methods that encouraged acceleration of force and quick use of lethal force when responding to incidents where they encountered non-White individuals including those of Hispanic ethnicity.

162. Gutierrez shot Alex Gonzales in a section of Austin that is a substantial Hispanic population center and occurred in the same neighborhood in which APD officer Christopher Taylor shot and killed Mike Ramos less than one year earlier.

163. Based on APD policymakers' ongoing refusal to discipline officers for unreasonable uses of deadly force, as well as their defense of officer-involved shootings of non-White people who posed no danger to anyone, Gutierrez and Serrato believed that their conduct would meet with no discipline by APD supervisors or other Austin Police Department investigators of the events because of the policies and practices alleged herein.

164. Furthermore, the City of Austin has further ratified the policies, practices, and

customs alleged above by failing to take appropriate disciplinary and/or administrative action with respect to Gutierrez and/or Serrato for shooting Alex Gonzales, and by failing to implement changes to its policies, practices and customs in response to the shooting of Alex Gonzales, and other similar incidents that set a standard for officers that such conduct would rarely meet with discipline or other adverse consequences.

165. Consequently, the City of Austin through the Austin Police Department enacted the practices and policies delineated above with deliberate indifference, and these practices and policies were the cause of the constitutional deprivations and injuries to Alex Gonzales, resulting in the damages sustained by Plaintiffs.

V. DAMAGES

166. Plaintiffs Alex Gonzales, Sr., individually, and as Representative of the Estate of Alex Gonzales, Jr., and Elizabeth Herrera, individually, seek the following damages:

a. Future lost wages and loss of earning capacity of Alex Gonzales, Jr.

b. Past and future physical pain and suffering by Plaintiffs from the loss of a child.

c. Past and future mental anguish by Plaintiffs from the loss of a child.

d. Attorneys' fees, including costs, expert fees, and attorneys' fees pursuant to 42 U.S.C. § 1988.

e. Pre-judgment and post-judgment interest at the highest rates allowable under the

f. Punitive damages in the highest amount allowed by law against Defendants Gutierrez and Serrato only.

g. Past and future mental anguish.

h. Past and future loss of companionship and society.

i. Past and future pecuniary loss, including loss of care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value; and

j. All applicable medical expenses.

V. JURY DEMAND

167. Plaintiffs respectfully request a trial by jury.

VI. PRAYER FOR RELIEF

168. To right this injustice, Plaintiffs Alex Gonzales, Sr., individually and as Representative of the Estate of Alex Gonzales, Jr., and Elizabeth Herrera, individually, request the Court through trial by jury provide the following relief:

a. Determine the amount of compensatory damages against all Defendants and order all Defendants to pay that amount.

b. Determine the amount of punitive damages against Defendants Gutierrez and Serrato, only, and order that these Defendants pay that amount.

c. Order Defendants to pay all recoverable costs, including expert fees and attorneys' fees, in accordance with 42 U.S.C. § 1988.

d. Determine and apply pre-judgement and post-judgment interest at the highest rate allowable under the law to the amount of damages determined by the jury and order Defendants to pay that amount; and,

e. Grant such other just relief as the Court deems proper.

Dated: January 3, 2023.

Respectfully submitted,
HENDLER FLORES LAW, PLLC

By *_/s/ Scott M. Hendler_*
Scott M. Hendler
State Bar No. 09445500
shendler@hendlerlaw.com

ATTORNEY FOR PLAINTIFF

JS 44 (Rev 10/20)

CIVIL COVER SHEET

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

I. (a) PLAINTIFFS

Alex Gonzales, Sr., et al.

(b) County of Residence of First Listed Plaintiff Bastrop County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

Scott M. Hendler, Hendler Flores Law, 901 S. MoPac Expressway Bldg. 1 Suite 300 Austin, TX 78746

DEFENDANTS

Luis Serrato, Gabriel Gutierrez and The City of Austin

County of Residence of First Listed Defendant Travis County
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U S Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U S Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U S Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☒ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer w/Disabilities - Employment
- ☐ 446 Amer w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
42 U.S.C. Section 1983

Brief description of cause:
Civil Rights Violation

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Robert Pitman DOCKET NUMBER 1:22-cv-00655

DATE 01/03/2023

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

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

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. **Origin.** Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

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

Alex Gonzales, Sr., individually as a wrongful death beneficiary of Alex Gonzales Jr., and as the Representative of the Estate of Alex Gonzales, Jr., Deceased, and Elizabeth Herrera, aka Elizabeth Gonzales, individually as a wrongful death beneficiary of Alex Gonzales Jr.,	§	**CIVIL ACTION NO. 1:23-CV-0009-RP**
Plaintiff,	§	
v.	§	
LUIS SERRATO, GABRIEL GUTIERREZ, and THE CITY OF AUSTIN,	§	
Defendant.	§	

DEFENDANT CITY OF AUSTIN'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant City of Austin files this Answer and Affirmative Defenses to Plaintiffs' Original Complaint (Doc. No. 1). Pursuant to Rules 8 and 12 of the Federal Rules of Civil Procedure, Defendant respectfully shows the Court the following:

ORIGINAL ANSWER

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

1. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 1 of the Original Complaint and therefore denies same.

[1] Paragraph numbers in Defendant's Answer correspond to the paragraphs in Plaintiffs' Original Complaint.

2. Defendant denies the allegations contained in Paragraph 2.

3. Defendant denies the allegations contained in Paragraph 3.

4. Defendant admits the allegations contained in Paragraph 4.

5. Defendant admits the allegations contained in Paragraph 5.

6. Defendant admits the allegations contained in Paragraph 6.

7. Defendant admits the allegations contained in Paragraph 7.

8. Defendant admits the allegations contained in Paragraph 8.

9. Defendant admits the allegations contained in Paragraph 9.

10. Defendant admits the allegations contained in Paragraph 10.

11. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 11 of the Original Complaint and therefore denies same.

12. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 12 of the Original Complaint and therefore denies same.

13. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 13 of the Original Complaint and therefore denies same.

14. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 14 of the Original Complaint and therefore denies same.

15. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 15 of the Original Complaint and therefore denies same.

16. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 16 of the Original Complaint and therefore denies the same.

17. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 17 of the Original Complaint and therefore denies the same.

18. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 18 of the Original Complaint and therefore denies the same.

19. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 19 of the Original Complaint and therefore denies same.

20. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 20 of the Original Complaint and therefore denies same.

21. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 21 of the Original Complaint and therefore denies same.

22. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 22 of the Original Complaint and therefore denies the same.

23. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 23 of the Original Complaint and therefore denies same.

24. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 24 of the Original Complaint and therefore denies same.

25. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 25 of the Original Complaint and therefore denies same.

26. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 26 of the Original Complaint and therefore denies same.

27. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 27 of the Original Complaint and therefore denies same.

28. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 28 of the Original Complaint and therefore denies same.

29. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 29 of the Original Complaint and therefore denies same.

30. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 30 of the Original Complaint and therefore denies same.

31. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 31 of the Original Complaint and therefore denies same.

32. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 32 of the Original Complaint and therefore denies same.

33. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 33 of the Original Complaint and therefore denies same.

34. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 34 of the Original Complaint and therefore denies same.

35. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 35 of the Original Complaint and therefore denies same.

36. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 36 of the Original Complaint and therefore denies same.

37. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 37 of the Original Complaint and therefore denies same.

38. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 38 of the Original Complaint and therefore denies same.

39. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 39 of the Original Complaint and therefore denies same.

40. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 40 of the Original Complaint and therefore denies same.

41. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 41 of the Original Complaint and therefore denies same.

42. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 42 of the Original Complaint and therefore denies same.

43. Defendant admits the allegations contained in the first sentence of Paragraph 43 of the Original Complaint. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations contained in Paragraph 43 of the Original Complaint and therefore denies same.

44. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 44 of the Original Complaint and therefore denies same.

45. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 45 of the Original Complaint and therefore denies same.

46. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 46 of the Original Complaint and therefore denies same.

47. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 47 of the Original Complaint and therefore denies same.

48. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 48 of the Original Complaint and therefore denies same.

49. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 49 of the Original Complaint and therefore denies same.

50. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 50 of the Original Complaint and therefore denies same.

51. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 51 of the Original Complaint and therefore denies same.

52. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 52 of the Original Complaint and therefore denies same.

53. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations

contained in Paragraph 53 of the Original Complaint and therefore denies same.

54. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 54 of the Original Complaint and therefore denies same.

55. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 55 of the Original Complaint and therefore denies same.

56. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 56 of the Original Complaint and therefore denies same.

57. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 57 of the Original Complaint and therefore denies same.

58. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 58 of the Original Complaint and therefore denies same.

59. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 59 of the Original Complaint and therefore denies same.

60. Defendant denies the allegations contained in Paragraph 60 of the Original Complaint.

61. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 61 of the Original Complaint and therefore denies same.

62. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 62 of the Original Complaint and therefore denies same.

63. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 63 of the Original Complaint and therefore denies same.

64. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 64 of the Original Complaint and therefore denies same.

65. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 65 of the Original Complaint and therefore denies same.

66. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 66 of the Original Complaint and therefore denies same.

67. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 67 of the Original Complaint and therefore denies same.

68. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 68 of the Original Complaint and therefore denies same.

69. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 69 of the Original Complaint and therefore denies same.

70. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 70 of the Original Complaint and therefore denies same.

71. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 71 of the Original Complaint and therefore denies same.

72. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 72 of the Original Complaint and therefore denies same.

73. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 73 of the Original Complaint and therefore denies same.

74. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 74 of the Original Complaint and therefore denies same.

75. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 75 of the Original Complaint and therefore denies same.

76. Defendant denies the allegations contained in Paragraph 76.

77. Defendant denies the allegations contained in Paragraph 77.

78. Defendant denies the allegations contained in Paragraph 78.

79. Defendant denies the allegations contained in Paragraph 79.

80. Defendant denies the allegations contained in Paragraph 80.

81. Defendant denies the allegations contained in Paragraph 81.

82. Defendant denies the allegations contained in Paragraph 82.

83. Defendant denies the allegations contained in Paragraph 83.

84. Defendant denies the allegations contained in Paragraph 84.

85. Defendant denies the allegations contained in Paragraph 85.

86. Defendant denies the allegations contained in Paragraph 86.

87. Defendant denies the allegations contained in Paragraph 87.

88. Defendant denies the allegations contained in Paragraph 88.

89. Defendant denies the allegations contained in Paragraph 89.

90. Defendant denies the allegations contained in Paragraph 90.

91. Defendant denies the allegations contained in Paragraph 91.

92. Defendant denies the allegations contained in Paragraph 92.

93. Defendant denies the allegations contained in Paragraph 93.

94. Defendant denies the allegations contained in Paragraph 94.

95. Defendant denies the allegations contained in Paragraph 95.

96. Defendant admits the allegations contained in Paragraph 96.

97. Defendant admits that the quoted language in Paragraph 97 accurately describes portions of the report. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations contained in Paragraph 97 and therefore denies same.

98. Defendant denies the allegations contained in Paragraph 98.

99. Upon information and belief, Defendant admits the allegations contained in Paragraph 99.

100. Defendant denies the allegations contained in Paragraph 100.

101. Defendant denies the allegations contained in Paragraph 101.

102. Defendant denies the allegations contained in Paragraph 102.

103. Defendant admits the allegations contained in the first sentence of Paragraph 103 of the Original Complaint. Defendant denies the remaining allegations contained in Paragraph 103.

104. Defendant denies the allegations contained in the first sentence of Paragraph 104. Defendant admits the remaining allegations contained in Paragraph 104 of the Original Complaint.

105. Defendant admits the allegations contained in Paragraph 105.

106. Defendant admits the allegations contained in Paragraph 106.

107. Defendant denies the allegations contained in Paragraph 107.

108. Defendant denies the allegations contained in Paragraph 108.

109. Defendant denies the allegations contained in Paragraph 109.

110. Defendant admits the allegations contained in Paragraph 110.

111. Defendant denies the allegations contained in Paragraph 111.

112. Defendant admits the allegations contained in Paragraph 112.

113. Defendant denies the allegations contained in Paragraph 113.

114. Defendant denies the allegations contained in Paragraph 114.

115. Defendant denies the allegations contained in Paragraph 115.

116. Defendant denies the allegations contained in Paragraph 116.

117. Defendant admits that the Austin City Council adopted the cited resolution. Defendant denies the remaining allegations contained in Paragraph 117.

118. Defendant denies the allegations contained in Paragraph 118.

119. Defendant denies the allegations contained in Paragraph 119.

120. Defendant denies the allegations contained in Paragraph 120.

121. Defendant denies the allegations contained in Paragraph 121.

122. Defendant denies the allegations contained in Paragraph 122.

123. Defendant denies the allegations contained in Paragraph 123.

124. Defendant denies the allegations contained in Paragraph 124.

125. Defendant denies the allegations contained in Paragraph 125.

126. Defendant admits the allegations contained in Paragraph 126.

127. Defendant denies the allegations contained in Paragraph 127.

128. Upon information and belief, Defendant admits the allegations contained in Paragraph 128.

129. Defendant denies the allegations contained in Paragraph 129.

130. Defendant denies the allegations as phrased in Paragraph 130.

131. Defendant denies the allegations as phrased in Paragraph 131.

132. Defendant denies the allegations contained in Paragraph 132.

133. Defendant denies the allegations contained in Paragraph 133.

134. Defendant denies the allegations contained in Paragraph 134.

135. Defendant denies the allegations contained in Paragraph 135.

136. The allegations contained in this paragraph are not addressed to this Defendant and therefore no response is required of this Defendant.

137. The allegations contained in this paragraph are not addressed to this Defendant and therefore no response is required of this Defendant.

138. The allegations contained in this paragraph are not addressed to this Defendant and therefore no response is required of this Defendant.

139. The allegations contained in this paragraph are not addressed to this Defendant and therefore no response is required of this Defendant.

140. The allegations contained in this paragraph are not addressed to this Defendant and therefore no response is required of this Defendant.

141. The allegations contained in this paragraph are not addressed to this Defendant and therefore no response is required of this Defendant.

142. The allegations contained in this paragraph are not addressed to this Defendant and therefore no response is required of this Defendant.

143. The allegations contained in this paragraph are not addressed to this Defendant and therefore no response is required of this Defendant.

144. The allegations contained in this paragraph are not addressed to this Defendant and therefore no response is required of this Defendant.

145. The allegations contained in this paragraph are not addressed to this Defendant and therefore no response is required of this Defendant.

146. The allegations contained in this paragraph are not addressed to this Defendant and therefore no response is required of this Defendant.

147. The allegations contained in this paragraph are not addressed to this Defendant and therefore no response is required of this Defendant.

148. The allegations contained in this paragraph are not addressed to this Defendant and therefore no response is required of this Defendant.

149. The allegations contained in this paragraph are not addressed to this Defendant and therefore no response is required of this Defendant.

150. Defendant incorporates and adopts its responses to the previous paragraphs of the Complaint.

151. Defendant denies the allegations contained in Paragraph 151.

152. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph152 of the Original Complaint and therefore denies same.

153. Defendant denies the allegations contained in Paragraph 153.

154. Defendant admits that Brian Manley was the City of Austin's policymaker for the Austin Police Department at the time of the incident which is the subject of this lawsuit, and that Joseph Chacon is currently the policymaker for the Austin Police Department. Defendant denies the remaining allegations contained in Paragraph 154.

155. Defendant denies the allegations contained in Paragraph 155.

156. Defendant denies the allegations contained in Paragraph 156.

157. Defendant denies the allegations contained in Paragraph 157.

158. Defendant denies the allegations contained in Paragraph 158.

159. Defendant denies the allegations contained in Paragraph 159.

160. Defendant denies the allegations contained in Paragraph 160.

161. Defendant denies the allegations contained in Paragraph 161.

162. Defendant denies the allegations contained in Paragraph 162.

163. Defendant denies the allegations contained in Paragraph 163.

164. Defendant denies the allegations contained in Paragraph 164.

165. Defendant denies the allegations contained in Paragraph 165.

166. Defendant denies the allegations contained in Paragraph 166.

167. Paragraph 167 is merely Plaintiff's request for jury trial and thus no response is required of this Defendant.

168. Defendant denies the allegations contained in Paragraph 168 and denies that Plaintiffs are entitled to any relief whatsoever of and from this Defendant.

AFFIRMATIVE DEFENSES

1. Defendant City of Austin asserts the affirmative defense of governmental immunity as a municipal corporation entitled to immunity while acting in the performance of its governmental functions, absent express waiver.

2. Defendant City of Austin asserts the affirmative defense of governmental immunity since its employees are entitled to qualified/official immunity for actions taken in the course and scope of their employment, absent express waiver.

3. Defendant reserves the right to assert additional affirmative defenses throughout the development of the case.

DEFENDANT'S PRAYER

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

RESPECTFULLY SUBMITTED,

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

/s/ H. Gray Laird III
H. GRAY LAIRD III
Assistant City Attorney
State Bar No. 24087054
gray.laird@austintexas.gov
City of Austin- Law Department
P. O. Box 1546
Austin, Texas 78767-1546
Telephone (512) 974-1342
Facsimile (512) 974-1311

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 3rd day of March, 2023.

Via CM/ECF:
Scott M. Hendler
State Bar No. 0944550
shendler@hendlerlaw.com
901 S. MoPac Expressway
Bldg 1, Suite #300
Austin, Texas 78746
Telephone: (512) 439-3200
Facsimile: (512) 439-3201

ATTORNEYS FOR PLAINTIFF

/s/ H. Gray Laird III
H. GRAY LAIRD III

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ALEX GONZALES, SR., ET AL.	§	
Plaintiffs,	§	
	§	**CAUSE OF ACTION NO.**
	§	**1:23-cv-00009-RP**
v.	§	
	§	
LUIS SERRATO, ET AL.	§	
Defendants.	§	

GABRIEL GUTIERREZ' ANSWER

TO THE UNITED STATES DISTRICT JUDGE:

Defendant, Gabriel Gutierrez, in support of this answer to the complaint would show:

FIRST DEFENSE

1. No response is necessary to paragraphs 1 through 4 of the complaint, except that it is admitted that Defendant Gabriel Gutierrez was at the time of the incident in question employed as a police officer with the Austin Police Department acting under color of law; and it is denied that he is liable for compensatory and punitive damages for the death of Alex Gonzales, Jr.

SECOND DEFENSE

2. Defendant admits to the jurisdiction and venue allegations in paragraphs 5 through 8.

THIRD DEFENSE

3. In response to the allegations against Defendant Gutierrez in paragraphs 9 through 75, Defendant denies the allegations except it is admitted that after midnight on

January 5, 2021, Alex Gonzales, Jr. and Jessica Arellano were driving their vehicle with an infant in South Austin, Texas, with Alex Gonzales, Jr. at the wheel. Defendant Gutierrez was driving his vehicle home from the gym in the same direction as Alex Gonzales, Jr. Immediately before Defendant Gutierrez attempted to turn left into his apartment complex, Alex Gonzales, Jr. stopped his vehicle and pointed a firearm at Defendant Gutierrez. Defendant Gutierrez reasonably believed that Alex Gonzales, Jr. was going to shoot Defendant Gutierrez. Fearing for his life, Defendant Gutierrez fired several shots at the direction of Alex Gonzales, Jr. until he perceived Alex Gonzales, Jr. was no longer a threat. Defendant Gutierrez wounded Alex Gonzales, Jr. Arellano was also injured. A firearm was found on the front passenger floorboard of Alex Gonzales, Jr.'s vehicle. After Defendant Gutierrez fired at Alex Gonzales, Jr., Alex Gonzales, Jr.'s vehicle rolled forward down the road about 100 feet and stopped. Other police officers arrived at the scene. Alex Gonzales, Jr. exited his vehicle and did not comply with numerous commands from other police officers to surrender to the police. Alex Gonzales, Jr. went around his vehicle and reached into the backseat of his vehicle, and a shooting ensued not involving Defendant Gutierrez. Alex Gonzalez, Jr. died from gunshot wounds.

FOURTH DEFENSE

4. The allegations in paragraphs 76 through 165 are made against the City of Austin, therefore no response is necessary to these allegations by this Defendant.

FIFTH DEFENSE

5. Defendant denies the allegations in paragraphs 166, and the Prayer for Relief. Any part of the Plaintiffs' complaint that is not specifically admitted is generally denied.

The Defendant still urging and relying on matters alleged without waiving any other matter asserted herein, further alleges as affirmative defenses the following:

SIXTH DEFENSE

6. Defendant asserts that at all relevant times, the Defendant was acting with legal authority. Defendant alleges as a defense that the actions of Defendant in all respects were reasonable, proper and legal, and the use of force was necessary as a last resort to protect life and person from death or serious bodily injury. Moreover, Defendant is not liable to Plaintiffs for any acts which may have been performed in his individual capacity. Any action taken in his individual capacity was done in the good faith exercise of his duties, and he is immune from individual or personal prosecution in this cause. Defendant asserts the defense of qualified and good faith immunity.

SEVENTH DEFENSE

7. Defendant alleges as a defense that under the circumstances, any injuries or damages allegedly suffered by Plaintiffs and the minor child were due to and solely caused by Alex Gonzales, Jr.'s acts and conduct. Defendant alleges as a defense that Alex Gonzales, Jr. knew or should have known that he had a duty to refrain from engaging in deadly conduct against Defendant Gutierrez.

EIGHTH DEFENSE

8. Alternatively, Defendant alleges as a defense that under the circumstances, any injuries or damages allegedly suffered by Plaintiffs and the minor child were due to and solely caused by Arellano's acts and conduct. Defendant alleges as a defense that Arellano knew or should have known that she had a duty to refrain from engaging

in deadly conduct by pointing a weapon at Defendant Gutierrez.

NINTH DEFENSE

9. Defendant states that it would be violative of the Due Process Clause of the United States Constitution to impose punitive damages on him under the circumstances of this case and requests that any punitive damage claims against him be separately tried, as permitted under Fed.R.Civ.P. 42(b).

10. Defendant demands a trial by jury.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays that upon hearing the Plaintiffs recover nothing of and from the Defendant by way of his suit; that the Court enter a Judgment that the Defendant go hence without delay with all costs of court; that the Defendant be awarded attorney's fees and court cost under 42 U.S.C. § 1988; and that the Defendant have such other and further relief to which it may be justly entitled.

Respectfully submitted,

LAW OFFICES OF ALBERT LÓPEZ
2222 Estate Gate Dr.
San Antonio, Texas 78260
Telephone: (210) 404-1983
Fax: (210) 404-1990

By: /s/Albert López
ALBERT LÓPEZ
State Bar No. 12562350
alopezoffice@gmail.com
ATTORNEY FOR DEFENDANT
GABRIEL GUTIERREZ

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

HENDLER FLORES LAW, PLLC
Scott M. Hendler
State Bar No. 09445500
shendler@hendlerlaw.com

Henry Gray Laird , III
City of Austin Law Department
P.O. Box 1546
Austin, TX 78767

Blair J. Leake
Wright and Greenhill PC
4700 Mueller Blvd.
Suite 200
Austin, TX 78723

/s/ Albert López
Albert López

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

ALEX GONZALES, SR., individually as a wrongful death beneficiary of Alex Gonzales, Jr., and as the Representative of the Estate of Alex Gonzales, Jr., Deceased, and ELIZABETH HERRERA, aka Elizabeth Gonzales, individually as a wrongful death beneficiary of Alex Gonzales, Jr., *Plaintiffs*,	§	
v.	§	Case No. 1:23-cv-9-RP
LUIS SERRATO, GABRIEL GUTIERREZ, and THE CITY OF AUSTIN, *Defendants*.	§	

DEFENDANT LUIS SERRATO'S ORIGINAL ANSWER TO PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COME NOW Defendant Luis Serrato, by and through his attorneys of record, and files this his Original Answer to Plaintiff's Original Complaint, and in support thereof would respectfully show the Court as follows:

I.
ORIGINAL ANSWER

A. Parties.

1. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained within Paragraph 1 of Plaintiff's Original Complaint.

2. As to the allegations contained within Paragraphs 2 – 3 of Plaintiff's Original Complaint, Defendant denies that any APD officer may be validly served at 715 E. 8th Street, Austin Texas

78701 through means other than personal service of process. Defendant otherwise admits the remaining allegations therein.

3. As to the allegations contained within Paragraph 4 of Plaintiff's Original Complaint, Defendant is without sufficient knowledge to form a belief as to the truth of who the policymaker is, nor how service of process may be served upon the City. Otherwise, admit.

B. Jurisdiction and Venue.

4. Defendant admits the allegations contained within Paragraphs 5 – 8 of Plaintiff's Original Complaint.

C. Facts.

5. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained within Paragraphs 9 – 42 of Plaintiff's Original Complaint, and therefore denies the same.

6. As to the allegations contained within Paragraphs 43 – 56 of Plaintiff's Original Complaint, Defendant admits that he drew his duty weapon in response to a shots-fired call, and that he engaged the suspect. Defendant denies that he personally knew there was a child in his car, and denies that he could have known for sure what Gonzales's intent or mindset was behind any of his conduct—including why he was reaching into the car, his conduct relative to the woman on the ground, and why he was refusing to follow urgent police commands. Defendant admits he did not immediately render aid when he arrived on the scene because the scene was not secure, due in large part to the suspect's refusal to follow all police commands, and because the suspect was believed to be armed and involved in the shots-fired incident. Defendant denies that he knew at this point the nature of any person's injuries or medical conditions, nor the precise causes of those injuries or conditions, nor what abilities if any of the suspect's had been impaired. Defendant

admits that he and Officer Nenno issued commands to the suspect, both in English and in Spanish, that the suspect failed or refused to follow. Defendant denies that at all times Gonzales's hands were in plain sight and that they could see he had no weapon. Defendant denies that Gonzales did not constitute a potential threat to other persons at the scene. Defendant further denies that Gonzales never did anything threatening, as his refusal to follow police commands during such a serious situation certainly constitutes potentially threatening conduct. Defendant admits that he moved to his right in order to try to more clearly see what was occurring, but denies that such actions suggest he had no fear of the suspect in doing so. Otherwise, denied.

7. As to the allegations contained within Paragraphs 56 – 75 of Plaintiff's Original Complaint, Defendant denies that he held no concern for the woman on the ground, as he was still not sure whether it was the suspect who had injured her. Defendant denies that no reasonable officer would have moved away from cover to obtain a better line of sight on the suspect. Defendant denies that any of his conduct was motivated by race. Defendant denies that he did not believe the suspect to pose a potential threat of harm, denies that Gonzales did not have access to and/or was armed with a firearm, denies that he knew any specific information about the suspect's medical potential injuries, conditions, and/or physical abilities. Defendant is without information or belief as to be able to admit or deny what the suspect's intentions were behind his actions. Defendant admits that the suspect reached into car—despite fervent and repeated commands for him not to do so—but denies that he did so in the manner characterized in the Complaint. Defendant denies that the suspect made no sudden movements. Defendant admits that he discharged his firearm at the suspect due to the belief that he was potentially reaching for his firearm he reportedly had, which had been corroborated by his refusal to obey fervent police commands issued over and over to

him. Defendant admits that the suspect died. Defendant denies the remainder of the allegations therein.

8. As to the allegations contained within Paragraphs 76 – 135 of Plaintiff's Original Complaint, no answer is needed from this Defendant as it is directed toward the City of Austin. To the extent an answer is deemed required, Defendant denies personal knowledge of any such failures to train, racist policies or practices, militaristic mindset training, nor any shoot-first culture. Defendant denies that APD has an unreasonable history of using excessive force, either generally and also against any specific demographics. Defendant further denies that—categorically, without exception—using force against persons who are exhibiting passive or defensive resistance is inappropriate or unconstitutional. Otherwise, Defendant is currently without sufficient knowledge to form a belief as to the truth of the specific allegations related to how routinely APD officers use force in such circumstances, and therefore denies the same. Defendant lacks sufficient information to be able to form a belief as to the truth of the allegations regarding other incidents and/or other officers; nor the truth of the contents of any of the reports, memorandums, and/or studies performed regarding APD. Defendant denies the remaining allegations therein.

D. Causes of Action.

i. Fourth and Fourteenth Amendment Excessive Force by Defendants Gutierrez and Serrato that Shocks the Conscience.

9. As to the allegations contained in Paragraphs 136 – 149 of Plaintiff's Original Complaint, Defendant admits that he was acting under the color of law during the incident that forms the basis of this lawsuit. Otherwise, denied.

ii. Fourth and Fourteenth Amendment *Monell* Claim against Defendant City of Austin Only.

10. As to the allegations contained in Paragraphs 150 – 165, no response is necessary from this Defendant. If a response is ultimately deemed necessary, then Defendant adopts and incorporates his responses to the previous Paragraphs of the Complaint, and deny all allegations therein not addressed *supra*.

E. Damages, Jury Demand, & Prayer.

11. As to the allegations contained in Paragraphs 166 – 168, no answer is necessary from this Defendant. To the extent any answer is deemed necessary, Defendant admits that Plaintiff seeks the relief requested therein. Otherwise, denied.

II.
AFFIRMATIVE DEFENSES & IMMUNITIES

12. 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*.

13. 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 were objectively reasonable in light of the law and the information possessed at that time, and that no clearly established law exists prohibiting them from using force to defend himself and/or other persons from an active or imminent assault with a potentially deadly weapon, and is uncompliant with officer commands when those commands are given in order to secure the scene to make it safe for all persons involved.

14. Further and in the alternative, the incident in question and the resulting harm to Plaintiff were caused or contributed to by another persons' own illegal and/or violent or reckless conduct, including but not limited to the conduct of Gonzales himself. To the extent legally applicable

herein, Defendant invokes the comparative responsibility provisions of the Texas Civil Practice & Remedies Code.[1]

15. Defendant further pleads that, in the unlikely event he is found to be liable, such liability be reduced by the percentage of the causation found to have resulted from the acts or omissions of other persons, including Gonzales himself.

16. Defendant pleads that he had legal justification for each and every action taken by him relating to this incident based on the information available to him at the time.

17. 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.

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

19. Defendant reserves the right to assert additional affirmative defenses throughout the development of this case.

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

III.
JURY DEMAND

21. Pursuant to Federal Rule of Civil Procedure 48, Defendant hereby requests a jury trial.

IV.
PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Defendant Luis Serrato prays that upon a final hearing of this cause, the Court dismiss all of Plaintiff's claims with prejudice, that all costs

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

of court be assessed against Plaintiff, that he be awarded attorney fees incurred in the defense of this suit, and for all further relief to which he may be justly entitled.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT LUIS SERRATO

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of March, 2023, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail and/or Regular U.S. Mail, in accordance with the Federal Rules of Civil Procedure, as follows:

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

ALEX GONZALES, SR., Individually and as "Next Friend" to minor child Z.A.G. and **ELIZABETH HERRERA** (aka Elizabeth Gonzales), Individually and as "Next Friend" to minor child Z.A.G.,	§	
Plaintiffs,	§	**Case No. 1:23-cv-00009-RP**
v.	§	**JURY TRIAL REQUESTED**
LUIS SERRATO, and **GABRIEL GUTIERREZ**,	§	
Defendants.	§	

PLAINTIFFS' FIRST AMENDED COMPLAINT

To the Honorable Court:

1. This is a lawsuit about Austin police officers Luis Serrato and Gabriel Gutierrez who fatally shot Alex Gonzales, Jr. ("Alex") on January 5, 2021, wrongfully and in violation of Alex's civil rights.

2. Alex's parents, Alex Gonzales, Sr. and Elizabeth Herrera (a/k/a Elizabeth Gonzales) (collectively "Plaintiffs") bring this lawsuit to vindicate their son's civil rights and to hold the responsible parties accountable. Each Plaintiff asserts claims in his or her individual capacity as a wrongful death beneficiary of Alex Gonzales Jr. under Texas law. Each Plaintiff also asserts claims as "Next Friend" on behalf of minor child Z.A.G., who also is a wrongful death beneficiary of Alex Gonzales, Jr. under Texas law.

I. PARTIES

3. Plaintiff Alex Gonzales, Sr. is a citizen of Texas and a resident of Bastrop County, Texas. His son, Alex Gonzales, Jr, also was from Bastrop County, Texas. As Alex Gonzales, Jr.'s biological father, Plaintiff Alex Gonzales, Sr. is a wrongful death beneficiary and, as such, brings this wrongful death action in his individual capacity pursuant to Texas Civil Practice and Remedies Code §§71.002(b), 71.004(b) and 42 U.S.C. §§1983, 1988.

4. Plaintiff Elizabeth Herrera (a/k/a Elizabeth Gonzales) is a citizen of Texas and a resident of Bastrop County, Texas. Her son, Alex Gonzales, Jr, also was from Bastrop County, Texas. As Alex Gonzales, Jr.'s biological mother, Plaintiff Elizabeth Herrera is a wrongful death beneficiary and, as such, brings this wrongful death action in her individual capacity pursuant to Texas Civil Practice and Remedies Code §§71.002(b), 71.004(b) and 42 U.S.C. §§1983, 1988.

5. Minor child Z.A.G. ("Z.A.G.") is a person under the age of eighteen (18) who is a citizen of Texas and, on information and belief, is a resident of Travis County, Texas. As the presumed biological child of Alex Gonzales, Jr., Z.A.G. is a wrongful death beneficiary pursuant to Texas Civil Practice and Remedies Code §71.004(b). Each Plaintiff has standing to assert wrongful death claims on behalf of Z.A.G. pursuant to Texas Civil Practice and Remedies Code §71.004(b). Each Plaintiff asserts claims on behalf of Z.A.G. in his or her capacity as "Next Friend" of Z.A.G. pursuant to Texas Civil Practice and Remedies Code §§71.002(b), 71.004(b) and 42 U.S.C. §§1983, 1988. Z.A.G. is a necessary party to this action because, under Texas law, the claims of all potential wrongful death beneficiaries must be joined in a single action.[1]

[1] *See Ordonez v. Abraham*, 545 S.W.3d 655, 667 (Tex. App. – El Paso 2017) ("Texas undoubtedly requires that only one suit be filed to address the alleged negligent death of a person."); *Avila v. St. Luke's Lutheran Hosp.*, 948 S.W.2d 841, 850 (Tex. App. – San Antonio 1997) ("The [wrongful death] act contemplates that only one suit shall be brought, which shall be for the benefit of all parties entitled to recover.").

6. Defendant Gabriel Gutierrez ("Gutierrez") was, at all relevant times, a police officer with the Austin Police Department, and Plaintiffs sue him in his individual capacity for compensatory and punitive damages for the death of Alex Gonzales, Jr. On information and belief, Defendant Gutierrez is a resident of Travis County, Texas. Defendant Gutierrez may be served with process at 715 E. 8th Street, Austin, Texas, 78701.

7. Defendant Luis Serrato ("Serrato") was, at all relevant times, a police officer with the Austin Police Department, and Plaintiffs sue him in his individual capacity for compensatory and punitive damages for the death of Alex Gonzales, Jr. On information and belief, Defendant Serrato is a resident of Travis County, Texas. Defendant Serrato may be served with process at 715 E. 8th Street, Austin, Texas, 78701.

II. JURISDICTION AND VENUE

8. Plaintiffs bring this case under 42 U.S.C. § 1983, and this Court has federal question subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

9. This Court has general personal jurisdiction over each Defendant because, on information and belief, each Defendant resides in the Western District of Texas, Austin Division.

10. This Court has specific *in personam* jurisdiction over each Defendant because this case arises out of conduct by each Defendant that occurred in Travis County, Texas, which is within the Western District of Texas, Austin Division.

11. Venue for this case and the asserted causes of action is proper in the Western District of Texas, Austin Division pursuant to 28 U.S.C. § 1391(b) because all or a substantial portion of the events or omissions giving rise to each Plaintiff's claims occurred in the Western District of Texas, Austin Division.

III. FACTUAL ALLEGATIONS

A. Officer Gutierrez Used Excessive Force When He Shot and Mortally Wounded Alex Gonzales, Jr. Without Provocation or Justification.

12. In the early morning hours of January 5, 2021, minutes past midnight, Alex Gonzales, Jr. ("Alex") was driving his family home for the night. In the vehicle with Alex was his long-time girlfriend and partner Jessica Arellano ("Jessica"), who sat in the front passenger seat. In the back seat of Alex's car was Alex and Jessica's two-month-old infant, Z.A.G., who was safely secured and sleeping in a child restraining seat located in the back seat of the car, on the right-hand side just inches behind his mother Jessica in the front passenger seat. Alex and Jessica were on their way home to tuck in baby Z.A.G. to sleep for the night.

13. As Alex and his family drove on or near Oltorf Avenue in Austin, Texas, Alex first encountered Defendant Gabriel Gutierrez ("Gutierrez") as Gutierrez was driving in the same direction as Alex's car.

14. Gutierrez was (and remains) a licensed peace officer in the State of Texas and a patrol officer for the Austin Police Department. At the time Gutierrez first encountered Alex's car on the roadway that night, Gutierrez was off duty. Gutierrez was dressed in civilian workout clothes following a late-night workout at his personal gym. Gutierrez was driving his personal, unmarked car.

15. On information and belief, Gutierrez was returning home to his apartment following a workout at his gym when he first encountered Alex's car on the road. On information and belief, Gutierrez was driving in a reckless and dangerous manner when he first encountered Alex's car. On information and belief, Gutierrez was responsible for creating and causing what Gutierrez would later describe to the 911 operator as a "road rage" encounter with Alex. On information and belief, Gutierrez drove his vehicle to make a sudden and unexpected turn in front

of Alex's car ("cutting off" Alex's car) as Gutierrez sped home from the gym. On information and belief, Gutierrez's aggressive and reckless driving as he encountered Alex's vehicle presented a real and substantial risk of causing a collision between the vehicles. On information and belief, Gutierrez's driving in his encounter with Alex's car posed a real and substantial danger to the physical safety of each passenger in Alex's car (including baby Z.A.G.), including risks of severe physical injury or even death to the passengers of Alex's car.

16. After Gutierrez cut off Alex's car, Gutierrez subsequently turned from E. Oltorf Street and headed southwest on Wickersham Lane. Alex followed behind Gutierrez, also turning from E. Oltorf Street onto Wickersham Lane.

17. Gutierrez's apartment was located on Wickersham Lane, with the apartment complex entrance located on the left side of the road to both Gutierrez and Alex as they each drove southwest on Wickersham. Gutierrez slowed his car as he approached the turn-in for his apartment complex on the left. But rather than attempting to turn left into his apartment complex, Gutierrez slowly pulled his car to the right-side curb and stopped his vehicle.

18. Gutierrez's driving actions were intended to invite or encourage Alex to pull up his car alongside Gutierrez's car. Gutierrez's driving actions signaled to Alex that Gutierrez was inviting a "road rage" confrontation between the drivers. Because of Gutierrez's own aggressive driving and provocation toward Alex's car, Gutierrez knew at that moment that Alex was likely to be angry when he pulled up next to Gutierrez, and would be likely to use aggressive words or actions in such a "road rage" confrontation. On information and belief, Gutierrez already had his firearm drawn and he was already contemplating scenarios in which he might use lethal force against the approaching driver even before Alex pulled his car up next to Gutierrez.

19. As Gutierrez pulled to the right and stopped, Alex pulled his vehicle forward until

it was alongside the left of Gutierrez's vehicle, where Alex stopped his vehicle.

20. Alex did not use his vehicle to "cut off" Gutierrez from making a left hand turn into the apartment complex. Gutierrez did not attempt to turn into the apartment complex at that time. Gutierrez slowed and pulled to the right, allowing Alex to pull up next to him on Gutierrez's left. At no time did Alex's driving present a risk of causing a collision with Gutierrez. At no time was Gutierrez required to alter his own driving in order to avert a collision with Alex's vehicle.

21. Jessica sat upright and was fully visible in the front passenger seat of Alex's car. When Alex stopped his car next to Gutierrez, Jessica was positioned in between the two men, Alex and Gutierrez. Jessica was sitting, clearly visible, no more than a few feet or less from Gutierrez as he sat in the driver's seat of his own car. Baby Z.A.G. was in the back, mere feet or inches behind Jessica.

22. Alex pulled up next to Gutierrez's car with the intention of confronting Gutierrez about his aggressive driving. Alex intended to inform Gutierrez that there was a baby in the back seat of the car. Alex intended to have an important "man-to-man" with this unknown civilian, this crazy aggressive road rage driver who almost crashed into a family with a baby in the back seat.

23. Gutierrez did not show his police badge or in any other way identify himself as a police officer before he made his decision to use lethal force. Gutierrez was wearing civilian clothes and driving an unmarked car at that moment. Alex and Jessica did not know (and had no reason to know) that Gutierrez was an APD patrol officer. Gutierrez did not issue any verbal commands for compliance directed at either Alex or Jessica before his decision to use lethal force. Gutierrez did not announce or attempt any arrest or detention before his decision to use lethal force.

24. Less than three seconds after Alex pulled his car up next to Gutierrez's car, a

barrage of gunfire erupted from Gutierrez's car, directing lethal force at Alex and Jessica through the car windows. Gutierrez fires his weapon at least six times. At least one bullet fired by Gutierrez hit Alex in the head, and at least three bullets fired by Gutierrez hit Jessica in the arm, back and chest. Immediately, both Alex and Jessica were severely wounded and began bleeding profusely.

25. Even though Gutierrez was off-duty at the time, Gutierrez's use of lethal force directed at Alex was undertaken as a law enforcement action by Gutierrez on Alex.

26. No gunfire or lethal force was ever directed at Gutierrez. Alex never fired a weapon at Gutierrez or anyone else. Jessica never fired a weapon at Gutierrez or anyone else. Even after Gutierrez began firing multiple bullets at Alex and Jessica, there was no return gunfire directed at Gutierrez.

27. Alex did not pull up to Gutierrez's car with a gun pointed at Gutierrez. Gutierrez's statements to the contrary are false.

28. On information and belief, Alex did not point a gun directly at Gutierrez at any time. On information and belief, Alex did not brandish a gun in a threatening manner toward Gutierrez at any time. On information and belief, Alex did nothing whatsoever toward Gutierrez that would have caused Gutierrez to form a reasonable belief that Alex posed any risk of inflicting immediate physical harm to Gutierrez or anyone else. On information and belief, after Gutierrez started firing his weapon Alex attempted to retrieve a handgun from underneath his seat, but Alex was unable to retrieve his firearm in time to defend himself because Gutierrez opened fire so quickly, and because Gutierrez so quickly and immediately shot Alex in the head.

29. On information and belief, Alex's attempts to retrieve his firearm to defend himself after Gutierrez started shooting were legally valid acts of self-defense and/or defense of others.

30. Gutierrez was off-duty at the time he shot Alex and Jessica. Gutierrez did not

witness or observe anything, or have any other information, that would justify his decision to take law enforcement actions with respect to Alex or Jessica while Gutierrez was off-duty. Gutierrez did not witness a completed crime or a crime in progress. Gutierrez had no reason to believe that Alex or Jessica posed any immediate risk of physical danger or harm to Gutierrez or anyone else. No reasonable off-duty officer at the time, given the totality of facts and circumstances, would have made the decision that Gutierrez made to take law enforcement actions against Alex and Jessica by directing lethal force at them.

31. Gutierrez decided to use lethal force in disregard of the safety of bystanders Jessica and baby Z.A.G. In particular, Jessica sat upright and clearly visible in the front passenger seat. Gutierrez, a patrol officer highly trained in situational awareness and tactical use of firearms in lethal force situations, shot her *three times* at close range. No reasonable officer under the circumstances would have made the same decision as Gutierrez to use lethal force, given the substantial risk of severe physical injury or death to Jessica, who was directly in Gutierrez's line of fire at close range.

32. On information and belief, at the time of the shooting Gutierrez was in a physical and/or mental condition where he lacked the ability to accurately perceive and/or mentally process the events as they actually occurred that evening. On information and belief, Gutierrez caused himself to be in such a physical and/or mental condition by ingesting or consuming substances or compounds that altered his natural physical and/or mental conditions and abilities.

33. Gutierrez had reasonable alternatives available to him other than the use of lethal force. For example, Gutierrez could have simply pulled his car forward and immediately ended the face-to-face confrontation. Gutierrez also could have pursued other methods of deescalating the situation, such as identifying himself as a police officer and issuing verbal commands to Alex

and Jessica. But Gutierrez instead chose to immediately use lethal force, with no efforts to deescalate or use alternatives to lethal force. Gutierrez's failure to pursue de-escalation or alternatives to lethal force was unreasonable. No reasonable officer under the circumstances would have chosen to use lethal force directed at Alex and Jessica given the available alternatives to the use of lethal force.

B. Gutierrez Calls 911 and Makes Materially False Statements to the 911 Operator.

34. In an instant that night, Alex had gone from driving along a city street with his girlfriend and baby to having the macabre experience of a stranger shooting repeatedly into his car with a semi-automatic handgun. As the events unfolded, Alex knew only that he had been shot in the head and that Jessica had been shot multiple times. At the moment Gutierrez ended his barrage of gunfire, Alex did not know whether his infant son Z.A.G. in the back seat had been shot, injured, or perhaps even killed.

35. Almost immediately after Gutierrez stopped shooting, Alex's vehicle rolled slowly forward and up onto the right-hand curb, until it stopped a short distance ahead of Gutierrez's vehicle. Alex's car stopped when it ran into the curb. Jessica opened the passenger-side door and almost immediately fell to the ground, continuing to bleed profusely from the gunshot wounds inflicted by Gutierrez.

36. Gutierrez's car followed Alex's car a short distance and then stopped several feet behind Alex's car. Gutierrez then exited his own vehicle with his gun drawn and pointed in the direction of Alex's car, with Alex and baby Z.A.G. still inside the car and Jessica laying injured and bleeding on the ground beside Alex's car. Gutierrez would keep his gun pointed at Alex and in the direction of Alex's car for at least the next several minutes.

37. At approximately 12:33 AM, after having fired at least six shots into Alex's vehicle

and hitting both Alex and Jessica, Gutierrez called 911.

38. Gutierrez began his call to 911 by identifying himself to the 911 operator as an off-duty APD officer. Gutierrez then stated "I have shots fired. 2400 Wickersham Lane."

39. When the 911 operator next asked Gutierrez how many shots he had heard, Gutierrez responded by informing the 911 operator that a "victim" had been shot. Gutierrez stated: "I have a— a victim—the driver—the, uh, other vehicle, he has a gun. I'm not—I'm not shot. I need EMS over here."

40. Seconds later, Gutierrez can be heard shouting at Alex "Hey, drop your gun. Austin Police." Gutierrez then states to the 911 operator: "He's got a gun in his hand." Gutierrez's statement was false when it was made. At the time Gutierrez made this statement to the 911 operator, Alex did not have a gun in his hand.

41. Seconds later, Gutierrez again states to the 911 operator: "I'm APD, I—he's got a gun in his hand." Again, Gutierrez's statement was false when it was made. At the time Gutierrez made this statement to the 911 operator, Alex did not have a gun in his hand.

42. Seconds later, Gutierrez can be heard yelling at Alex: "Put your gun down, man. Let me see your hands. Hands up, man." Again, this statement was false because at the time Alex did not have a gun in his hand.

43. Gutierrez next stated to the 911 operator: "He's hanging out the door. He *had* a gun in his hand." (Emphasis added) Gutierrez next stated to 911 dispatch: "There's a passenger. She's lying on the ground—female passenger."

44. The 911 operator then asked: "Okay, so tell me exactly what happened." Gutierrez responded by stating: "Um, it was a road rage incident. I was driving and he cut me off, and he pointed a gun at me." Gutierrez's account of the events to the 911 operator was false. Alex had not

used his vehicle to "cut off" Gutierrez; and Alex had not pointed a gun at Gutierrez.

45. The 911 operator next asked if anyone was injured, and Gutierrez responded by saying "Yes, the—the driver of the other vehicle. He's shot." Later in the call, Gutierrez would tell the 911 operator that he was unsure whether the female on the ground (Jessica) had been shot or injured. During the entirety of the 911 call, Gutierrez failed to inform the 911 operator that the female on the ground had been shot, even though he personally had shot Jessica three times at close range just moments before.

46. Gutierrez can next be heard yelling at Alex: "Put your gun down. Austin police, put your gun down. Don't make me shoot you again, man." Again, this statement was false because Alex did not have a gun in his hand at the time. Moments later, Gutierrez told the 911 operator: "The driver, he's standing. He's got blood all over his face. He's standing. *I don't know if he's still got the gun in his hand or not*." (Emphasis added).

47. Near the very end of the 911 call, Gutierrez can be heard yelling at Alex: "All right, put your gun down, man. It's the police." Again, this statement was false when made because Alex did not have a gun in his hand at the time.

48. During the 911 call, Gutierrez informed the 911 operator that the female on the ground was saying "My baby! My baby! My baby!" When the 911 operator asked "Is there a baby involved or is she pregnant? Do we not know?" Gutierrez responded by saying: "I have no idea, I don't know—I have no idea. She's just saying, 'My baby.'"

49. During the 911 call, Alex was severely wounded and bleeding profusely because he had been shot in the head at close range by Gutierrez,. The gunshot wound to Alex's head severely compromised Alex's physical and mental functions, and his comprehension. Alex's physical movements were slow and lumbering. After being shot in the head, Alex was physically

incapable of making quick, sudden, or unexpected physical movements. Because of Alex's bleeding and lumbering movements, his severe physical injuries and need for immediate medical attention were clearly apparent to any reasonable person and to any reasonable trained law enforcement officer.

50. During the time Gutierrez was on the phone with the 911 operator, Alex opened his car door and slowly exited the vehicle. Because of his severe injuries and physical limitations from being shot, Alex struggle to open his car door, but eventually he managed to open his car door and slowly exit his vehicle. Alex then stood nearly motionless beside his driver-side car door for several minutes. Alex remained in this spot next to the driver-side car door, without making any sudden or unexpected movements, and struggling to remain standing, for the duration of Gutierrez's 911 call and until on-duty police officers arrived at the scene. During this time before on-duty officers arrived, as Alex stood outside his car, Alex never held a gun in his hand.

51. Gutierrez finally, for the first time, identified himself as a police officer by yelling at Alex and Jessica while Gutierrez was on the call with the 911 operator. Gutierrez also began issuing verbal commands for compliance directed at both Alex and Jessica. On information and belief, Alex's hearing and audio perception were severely impaired at the time because he had been shot in the head. On information and belief, Alex was unable to hear or understand Gutierrez's verbal identification as a police officer and Gutierrez's verbal commands because Alex's hearing and audio perception were impaired from having been shot in the head.

52. During the entirety of Gutierrez's 911 call and before on-duty police officers arrived at the scene, Gutierrez made no attempt to render medical aid or provide any emergency physical care to either Alex or Jessica. Gutierrez failed to render aid even though he knew that he had just shot both Alex and Jessica at close range, causing them each to have severe and life-

threatening physical injuries.

53. As Gutierrez spoke to the 911 operator, on multiple occasions he turned his back to Alex and Jessica because he did not perceive either of them as presenting a threat to his physical safety. During the entirety of Gutierrez's 911 call and before on-duty police officers arrived at the scene, however, Gutierrez made no attempt to arrest or detain Alex or Jessica.

C. Officer Serrato Used Excessive Force When He Shot and Killed Alex Gonzales, Jr. Without Provocation or Justification.

54. At approximately 12:37 a.m., on-duty APD Officer Luis Serrato ("Serrato") and his partner APD Officer Brian Nenno ("Nenno") responded to Gutierrez's 911 call and arrived at the scene.

55. Prior to their arrival at the scene, both Serrato and Nenno had been apprised by 911 dispatch that a person claiming to be an off-duty APD officer had shot the driver of another vehicle. However, upon arriving at the scene neither Serrato nor Nenno took any steps to verify that Gutierrez was in fact an APD police officer. On information and belief, neither Serrato nor Nenno recognized Gutierrez as an APD officer from past interactions with him.

56. Prior to their arrival at the scene, both Serrato and Nenno had reason to know of the possible presence of a baby at the scene. The 911 dispatch call notes from the event were available to both Serrato and Nenno before they arrived at the scene, and those call notes contained an entry prior to their arrival at the scene that stated: "fem is saying my baby my baby…unkn preg or child". However, neither Serrato nor Nenno took steps to determine if a baby was present at the scene after they arrived.

57. When Serrato and Nenno arrived at the scene, Alex remained standing outside his driver-side door and Jessica remained laying on the ground just outside the passenger door of Alex's vehicle. Serrato and Nenno immediately lined up in formation with Gutierrez, positioned

behind Gutierrez's unmarked personal vehicle for cover.

58. Serrato and Nenno immediately joined Gutierrez in aiming their firearms at Alex as he struggled to maintain his balance outside the driver-door of his own vehicle. Serrato and Nenno each pointed his firearm at Alex even though they had not seen Alex holding a gun, had not been told that Alex was in possession of a gun, had no reason to think that Alex had fired a weapon, and had no reason to think that Alex posed a threat of harm to anyone at that time.

59. Only *after* Serrato and Nenno had each pointed their respective gun at Alex did Gutierrez then state to Serrato and Nenno that Alex had pointed a gun at him (Gutierrez). Again, Gutierrez's statement was false when it was made because Alex had not pointed a gun at Gutierrez. Gutierrez also stated to Serrato and Nenno at that time that there was a gun in the driver's side of Alex's car.

60. Almost immediately after arriving at the scene, Serrato and Nenno each knew that Gutierrez had shot both Alex and Jessica. Serrato and Nenno each could easily observe that both Alex and Jessica had suffered severe and life-threatening gunshot wounds. Yest, neither Serrato nor Nenno attempted to render medical aid or assistance to Alex or Jessica upon arriving at the scene.

61. Officer Nenno indicated to Gutierrez that Gutierrez should stand back from the officer's defensive position behind Gutierrez's car, and Gutierrez did so. Nenno and Serrato maintained their defensive position behind Gutierrez's car and continued to point their guns at Alex, who was still standing at the driver's door of his own car. Alex had his hands in plain sight and the officers could plainly see that Alex was not holding a weapon.

62. Nenno and Serrato began shouting multiple, conflicting commands at Alex such as walk, turn around, stop, and keep walking in both English and Spanish.

63. On information and belief, Alex continued to suffer from impaired hearing and impaired auditory processing that prevented him from hearing and understanding the commands that Serrato and Nenno shouted at him. An experienced and trained law enforcement officer in the position of Serrato and Nenno at that time reasonably should have known that there was a high probability that Alex could not hear or understand their verbal commands at the time because he had been shot in the head and was severely injured and bleeding.

64. Alex began to walk slowly and stumble toward the rear of his car and then around to the passenger side of the car. At all times, Alex's movements remained slow and lumbering. He never made any sudden or unexpected movements. Alex's hands remained visible at all times. Serrato and Nenno could both see that Alex had no weapon in his hands.

65. When Alex reached the passenger side of his car, he glanced down to see his girlfriend Jessica laying on the ground bleeding.

66. While Alex was struggling and staggering to reach the passenger side of the car to check on the welfare of Jessica and Z.A.G., Serrato unnecessarily and without reason abandoned his position of cover behind Gutierrez's vehicle and walked several steps to his right—into the open and away from any cover. Serrato stood completely upright, presenting his full body as a target for potential gunfire.

67. No reasonable officer in Serrato's position would have left cover to expose himself in the open if he believed Alex or his wounded passenger (Jessica) posed an imminent threat of harm to him in those circumstances. During this sequence of events, Nenno maintained his position of cover behind Gutierrez's vehicle at all times.

68. Serrato moved into the open to have a clear line of fire at Alex, as Alex stood next to the rear car door just inches from baby Z.A.G. Serrato kept his gun trained on Alex at all times.

On information and belief, Serrato had already decided at the time he abandoned his position of cover that he would use lethal force on Alex if Alex made any small movement with his hand toward the inside of the car.

69. Serrato continued to observe that Alex's hands were empty, and that Alex did not possess or have access to a weapon.

70. Serrato yelled at Alex several times "Don't reach! Don't reach!" On information and belief, Serrato had already determined that he was going to use lethal force on Alex if Alex made any slight reaching move into the car.

71. Not knowing whether his baby Z.A.G. had been shot, Alex slowly opened the rear passenger door to check on his infant son. As Alex bent down to look into the rear passenger door to check on baby Z.A.G., Alex kept his right hand visible and touching the open car door. Alex gently leaned below the roof line of the vehicle to look inside the car. Alex slowly made a small movement with his left hand toward the interior of the car where Z.A.G. was still secured in a child restraining seat. Alex continued to move slowly, and he made no sudden movements at all.

72. As soon as Alex made even the slightest movement of his left hand into the vehicle, Serrato began rapidly firing his weapon at Alex. In that moment, Alex did not even begin to make any movement to withdraw his hand from the vehicle. Alex did nothing to indicate to Serrato that he presented a threat of harm to anyone in that moment. Serrato did not see Alex in possession of a weapon, and Serrato had no reason to believe that Alex might be able to access a gun or weapon in the right rear seat of Alex's car.

73. Serrato fired at least ten shots at Alex, hitting him multiple times.

74. Serrato's barrage of gunfire further inflicted immediate and serious physical injuries on Alex. Alex slumped to the ground lifeless and dying, just inches away from his infant

son Z.A.G. Alex would later die on-scene as a result of his multiple gunshot wounds.

75. Serrato used lethal force on Alex without provocation or justification. At no time did Serrato observe Alex do anything to give Serrato a reasonable belief that Alex posed a risk of immediate physical danger to Serrato or anyone else. Serrato had no other reason or information to believe that Alex posed an immediate risk of physical danger to Serrato or anyone. Serrato knew that Alex himself had already been shot in the head. Serrato observed Alex making slow and lumbering movements at all times, and never making a surprise movement. No reasonable officer would have chosen to use lethal force on Alex give the lack of an immediate threat to anyone's safety.

76. No reasonable officer in Serrato's position that night would have increased his own risk of danger and/or escalated the situation by abandoning a position of cover in the way that Serrato did. Serrato himself was responsible for creating any risk of danger or perceived risk of danger that Serrato claims to have faced in the moment he chose to use lethal force.

77. Serrato showed no concern for the safety of bystanders when he decided to use lethal force. Serrato knew that Jessica, laying on the ground and severely bleeding from gunshot wounds, was in his line of fire and was at risk of Serrato shooting her if Serrato decided to fire at Alex. Serrato also knew or should have known that a baby may be present at the scene and was at risk of being shot if Serrato chose to use lethal force. No reasonable officer in Serrato's position at the time would have chosen to use lethal force directed at Alex, given the substantial risk of serious physical injury to bystanders.

78. Serrato had reasonable alternatives available to him other than the use of lethal force. For example, Serrato could have maintained his position of cover and waited for additional law enforcement officers to arrive on scene. Serrato could have continued to observe Alex's

actions and could have waited to see if Alex ever did anything to indicate that Alex presented a risk of physical injury to anyone. If Serrato had simply kept his cool and waited, he would have seen Alex check on Z.A.G. and would have realized that there was a baby in the car. Serrato could have pursued other methods of de-escalation. No reasonable officer under the circumstances would have chosen to use lethal force on Alex as Serrato did in that moment, given the available alternatives to the use of lethal force.

IV. ASSERTED CLAIMS AND CAUSES OF ACTION

A. Claim No. 1: Against Defendant Gutierrez Pursuant to 42 U.S.C. §1983 for Violation of Alex Gonzales, Jr.'s Right to be Free of Excessive Force Protected By The Fourth and Fourteenth Amendments to the U.S. Constitution.

79. Each Plaintiff asserts this claim and cause of action against Defendant Gabriel Gutierrez pursuant to 42 U.S.C. §1983. Each Plaintiff asserts his or her own individual cause of action under §1983 as a wrongful death beneficiary of Alex Gonzales, Jr. under Texas law pursuant to Tex. Civ. Pr. & Rem. Code §71.004(b). Each Plaintiff also asserts Z.A.G.'s cause of action under §1983 as a wrongful death beneficiary and as "Next Friend" of Z.A.G. under Tex. Civ. Pr. & Rem. Code §71.004(b). Plaintiffs incorporate by reference all allegations asserted in Sections I – III, *supra.*

80. Even though Defendant Gutierrez was "off-duty" at the time he initially encountered Alex, all of Gutierrez's relevant interactions with Alex (including shooting Alex) were undertaken under color of law. The APD General Orders in effect on January 5, 2021[2] expressly permitted off-duty officers to take law enforcement actions while off-duty.[3] The APD General Orders at the time also expressly authorized off-duty officers to carry a firearm while off-

[2] On information and belief, the APD General Orders in effect on January 5, 2021, were the APD General Orders issued on November 12, 2020.
[3] *See generally*, Austin Police Department General Orders Issued November 12, 2020 at §364.

duty as "a law enforcement officer as authorized by this order . . . ."[4] The APD General Orders at the time required that, when an off-duty officer decides to intervene and take a law enforcement action, the officer "should clearly identify himself as a police officer to those involved in the situation, if practicable."[5] Under the authority granted to him by the APD General Orders as an off-duty officer, Gutierrez made a decision to intervene with respect to Alex and the other passengers in Alex's vehicle, and Gutierrez undertook law enforcement actions with respect to Alex, including but not limited to using lethal force and shooting Alex. After he shot Alex, Gutierrez can be heard on the 911 call recording shouting at Alex in an attempt to identify himself as an Austin police officer. Gutierrez also can be heard on the 911 call recording continuing to take law enforcement actions with respect to Alex by shouting verbal commands for compliance.

81. No reasonable police officer would have made the same decision to use lethal force that Gutierrez made, given the totality of the circumstances—including but not limited to the fact that Gutierrez was off-duty, Gutierrez's current physical and mental condition, the fact that Gutierrez was responsible for creating and escalating the "road rage" encounter with Alex and Jessica, the fact that neither Alex nor Jessica presented a threat of physical harm to Gutierrez or anyone, the fact that Gutierrez had not witnessed the commission of a crime or a crime-in-progress, the fact that the use of lethal force presented a substantial risk of physical harm or death to innocent bystanders, the fact that Gutierrez had not identified himself as a police officer, the fact that Gutierrez had reasonable alternatives to the use of lethal force available to him, and the fact that Gutierrez had reasonable de-escalation techniques available to him.

82. Gutierrez's use of lethal force against Alex Gonzales, Jr. on January 5, 2021

[4] *See Id.* at §364.3(a).
[5] *See Id.* at §364.4.1(b).

amounted to excessive force in violation of Alex's rights under the Fourth and Fourteenth Amendments to the United States Constitution. The amount and degree of force used by Gutierrez was unnecessary and clearly excessive to any law enforcement objective or other need at the time.

83. Gutierrez is not entitled to qualified immunity for his use of excessive force against Alex Gonzales, Jr. The use of lethal force and excessive force by Gutierrez was in violation of clearly established law. Gutierrez's use of lethal force and excessive force was so egregious and unlawful that no reasonable officer would have made the same decision to use lethal force under the totality of the circumstances.

84. Gutierrez's use of unconstitutional excessive force against Alex Gonzales, Jr. was a direct and proximate cause of substantial injuries to Alex Gonzales, Jr., including Alex's death.

85. Plaintiff Alex Gonzales, Sr., Plaintiff Elizabeth Herrera, and minor child Z.A.G. each have suffered compensable damages, as described in more detail below, as a result of the wrongful death of Alex Gonzales, Jr. caused by the wrongful actions and excessive force of Defendant Gutierrez.

86. Gutierrez used lethal force toward Alex Gonzales, Jr. with a reckless and callous indifference to Alex's constitutional rights under the Fourth and Fourteen Amendments to be free from use of excessive force by the police. As such, each Plaintiff is entitled to an award of exemplary or punitive damages in an amount to be determined by a civil jury at trial.

B. Claim No. 2: Against Defendant Serrato Pursuant to 42 U.S.C. §1983 for Violation of Alex Gonzales, Jr.'s Right to be Free of Excessive Force Protected By The Fourth and Fourteenth Amendments to the U.S. Constitution.

87. Each Plaintiff asserts this claim and cause of action against Defendant Luis Serrato pursuant to 42 U.S.C. §1983. Each Plaintiff asserts his or her own individual cause of action under §1983 as a wrongful death beneficiary of Alex Gonzales, Jr. under Texas law pursuant to Tex. Civ.

Pr. & Rem. Code §71.004(b). Each Plaintiff also asserts Z.A.G.'s cause of action under §1983 as a wrongful death beneficiary and as "Next Friend" of Z.A.G. under Tex. Civ. Pr. & Rem. Code §71.004(b). Plaintiffs incorporate by reference all allegations asserted in Sections I – III, *supra.*

88. Defendant Serrato was an on-duty Austin police officer at the time he responded to the scene of Alex's shooting after Gutierrez called 911. Serrato's actions with respect to Alex (including shooting Alex) were undertaken under color of law.

89. No reasonable police officer would have made the same decision to use lethal force directed at Alex that Serrato made, given the totality of the circumstances—including but not limited to the fact that Alex was not in possession of a weapon and did not have immediate access to a weapon, the fact that Alex never did anything to indicate he posed a risk of physical harm to anyone, the fact that Alex had been visibly shot in the head, the fact that Alex was likely to be suffering from impaired hearing and/or audio processing, the fact that Alex could be seen making only slow and lumbering movements without any sudden or unexpected movements, the fact that the use of lethal force presented the risk of serious physical injury or death to bystanders, the fact that Serrato had increased his own risk of danger and escalated the situation by unreasonably abandoning his position of cover, and the fact that Serrato had reasonable de-escalation techniques and reasonable alternatives to the use of lethal force available to him.

90. Serrato's use of lethal force against Alex Gonzales, Jr. on January 5, 2021 amounted to excessive force in violation of Alex's rights under the Fourth and Fourteenth Amendments to the United States Constitution. The amount and degree of force used by Serrato was unnecessary and clearly excessive to any law enforcement objective or other need at the time.

91. Serrato is not entitled to qualified immunity for his use of excessive force against Alex Gonzales, Jr. The use of lethal force and excessive force by Serrato was in violation of clearly

established law. Serrato's use of lethal force and excessive force was so egregious and unlawful that no reasonable officer would have made the same decision to use lethal force under the totality of the circumstances.

92. Serrato's use of unconstitutional excessive force against Alex Gonzales, Jr. was a direct and proximate cause of substantial injuries to Alex Gonzales, Jr., including Alex's death.

93. Plaintiff Alex Gonzales, Sr., Plaintiff Elizabeth Herrera, and minor child Z.A.G. each have suffered compensable damages, as described in more detail below, as a result of the wrongful death of Alex Gonzales, Jr. caused by the wrongful actions and excessive force of Defendant Serrato.

94. Serrato used lethal force toward Alex Gonzales, Jr. with a reckless and callous indifference to Alex's constitutional rights under the Fourth and Fourteen Amendments to be free from use of excessive force by the police. As such, each Plaintiff is entitled to an award of exemplary or punitive damages in an amount to be determined by a civil jury at trial.

V. DAMAGES

95. Alex Gonzales, Jr. was a happy, loving man who adored his parents, who cherished his newborn son, and who embraced his new role as a father to Z.A.G. Alex's tragic and unnecessary death at the hands of police violence, acting in violation of Alex's constitutional rights, caused severe and permanent damages, including Alex's death.

96. Plaintiff Alex Gonzales, Sr. and Plaintiff Elizabeth Herrera each seek to recover the following categories of damages in their respective capacity as wrongful death beneficiaries of Alex, pursuant to Texas Civil Practice and Remedies Code §71.004(b):

a. Mental anguish damages (past and future) for the emotional pain, torment and suffering each Plaintiff has experienced and will continue to experience because of

the death of their son;

b. Physical pain and suffering (past and future) each Plaintiff has experienced and will continue to experience because of the death of their son;

c. Loss of companionship and society damages (past and future) for the loss of positive benefits flowing from the love, comfort, companionship, and society that each Plaintiff would have received from Alex had he lived; and

d. Pecuniary loss damages (past and future) for the loss of care, maintenance, support, services, advice, counsel, and reasonable contributions of pecuniary value that each Plaintiff would have received from Alex had he lived.

97. In their capacity as "Next Friend" to Z.A.G., Plaintiffs seek to recover, on behalf of Z.A.G., the following categories of wrongful death damages suffered by Z.A.G. pursuant to Texas Civil Practice and Remedies Code §71.004(b):

a. Future lost wages, lost earning capacity, and loss of economic support from Alex Gonzales, Jr.;

b. Mental anguish damages (past and future) for the emotional pain, torment and suffering Z.A.G. has experienced and will continue to experience because of the death of Z.A.G.'s father Alex;

c. Physical pain and suffering (past and future) Z.A.G. has experienced and will continue to experience because of the death of Z.A.G.'s father Alex;

d. Loss of companionship and society damages (past and future) for the loss of positive benefits flowing from the love, comfort, companionship, and society that Z.A.G. would have received from his father Alex had he lived; and

e. Pecuniary loss damages (past and future) for the loss of care, maintenance, support,

services, advice, counsel, and reasonable contributions of pecuniary value that Z.A.G. would have received from Alex had he lived.

98. Each Plaintiff seeks recovery of exemplary damages against each Defendant as a result of each Defendant's respective violation of Alex's constitutional rights that each Defendant undertook with a reckless and callous indifference to Alex's right to be free of excessive force from the police as protected by the Fourth and Fourteenth Amendments to the United States Constitution.

99. Each Plaintiff (both individually and as "Next Friend" to Z.A.G.) further seeks to recover the following categories of damages:

a. Prejudgment and post-judgment interest;

b. Costs of court;

c. Reasonable and necessary attorneys' fees incurred by Plaintiffs through trial, along with reasonable and necessary attorneys' fees that may be incurred by Plaintiffs for any post-trial proceedings or appeal, pursuant to 42 U.S.C. §1988; and

d. Any further and additional relief to which Plaintiffs may be legally entitled.

VI. REQUEST FOR A JURY TRIAL

100. Plaintiffs request a jury trial on all issues that legally may be tried to a jury.

VII. PRAYER FOR RELIEF

101. Plaintiffs request that Defendant Gutierrez and Defendant Serrato each be summoned to appear and answer Plaintiffs' allegations. After a jury trial regarding the asserted claims and causes of action, Plaintiffs pray the court enter judgment in their favor on the asserted claim under 42 U.S.C. §1983, assess monetary damages for the injuries alleged above, and award any other further relief to which Plaintiffs are legally entitled.

Dated: March 30, 2023

Respectfully Submitted,

/s/ Donald Puckett
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that March 30, 2023, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

/s/ Donald Puckett
Donald Puckett

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ALEX GONZALES, SR., ET AL.	§	
Plaintiffs,	§	
	§	**CAUSE OF ACTION NO.**
	§	**1:23-cv-00009-RP**
v.	§	
	§	
LUIS SERRATO, ET AL.	§	
Defendants.	§	

GABRIEL GUTIERREZ' AMENDED ANSWER

TO THE UNITED STATES DISTRICT JUDGE:

Defendant, Gabriel Gutierrez, in support of this amended answer to the amended complaint would show:

FIRST DEFENSE

1. No response is necessary to paragraphs 1 through 2 of the amended complaint, except that it is denied that Defendant wrongfully and fatally shot Alex Gonzales, Jr., in violation of his civil rights.

SECOND DEFENSE

2. No response is necessary to paragraphs 3 through 7 which merely identify the parties to this suit. However, it is admitted that Defendant Gabriel Gutierrez was at the time of the incident in question employed as a police officer with the Austin Police Department acting under color of law; and it is denied that he is liable for compensatory and punitive damages for the death of Alex Gonzales, Jr.

THIRD DEFENSE

3. Defendant admits to the jurisdiction and venue allegations in paragraphs 8 through 11.

FOURTH DEFENSE

4. Defendant Gutierrez denies the allegation in paragraphs 12 through 53, except it is admitted that after midnight on January 5, 2021, Alex Gonzales, Jr. and Jessica Arellano were driving their vehicle with an infant in South Austin, Texas, with Alex Gonzales, Jr. at the wheel. Defendant Gutierrez was driving his vehicle home from the gym in the same direction as Alex Gonzales, Jr. Defendant Gutierrez was (and remains) a licensed peace officer in the State of Texas and a patrol officer for the Austin Police Department. At the time of the incident in question, Defendant Gutierrez was off duty, dressed in civilian workout clothes following a late-night workout at his personal gym; and was driving his personal, unmarked car. Immediately before Defendant Gutierrez attempted to turn left into his apartment complex, Alex Gonzales, Jr. stopped his vehicle and pointed a firearm at Defendant Gutierrez. Defendant Gutierrez reasonably believed that Alex Gonzales, Jr. was going to shoot Defendant Gutierrez. Fearing for his life, Defendant Gutierrez fired several shots at the direction of Alex Gonzales, Jr. until he perceived Alex Gonzales, Jr. was no longer a threat. Defendant Gutierrez wounded Alex Gonzales, Jr. Arellano was also injured. A firearm was found on the front passenger floorboard of Alex Gonzales, Jr.'s vehicle. After Defendant Gutierrez fired at Alex Gonzales, Jr., Alex Gonzales, Jr.'s vehicle rolled forward down the road about 100 feet and stopped. Other police officers arrived at the scene. Alex Gonzales, Jr. exited his vehicle and

did not comply with numerous commands from other police officers to surrender to the police. Alex Gonzales, Jr. went around his vehicle and reached into the backseat of his vehicle, and a shooting ensued not involving Defendant Gutierrez. Alex Gonzalez, Jr. died from gunshot wounds. All actions of Defendant Gutierrez were undertaken as a law enforcement action. To the extent that audio and video recordings captured all or part of the events in question, such evidence speaks for itself.

FIFTH DEFENSE

5. The allegations in paragraphs 54 through 78 and paragraphs 87 through 94 are made against the Defendant Luis Serrato, therefore no response is necessary to these allegations by Defendant Gutierrez.

SIXTH DEFENSE

6. Defendant Gutierrez denies the allegations in paragraphs 78 through 89, paragraphs 95 through 101, and the Prayer for Relief. Any part of the Plaintiffs' complaint that is not specifically admitted is generally denied. The Defendant still urging and relying on matters alleged without waiving any other matter asserted herein, further alleges as affirmative defenses the following:

SEVENTH DEFENSE

7. Defendant Gutierrez asserts that at all relevant times, the Defendant was acting with legal authority. Defendant alleges as a defense that the actions of Defendant in all respects were reasonable, proper and legal, and the use of force was necessary as a last resort to protect life and person from death or serious bodily injury. Moreover, Defendant is not liable to Plaintiffs for any acts which may have been performed in

his individual capacity. Any action taken in his individual capacity was done in the good faith exercise of his duties, and he is immune from individual or personal prosecution in this cause. Defendant asserts the defense of qualified and good faith immunity.

EIGHTH DEFENSE

8. Defendant alleges as a defense that under the circumstances, any injuries or damages allegedly suffered by Plaintiffs and the minor child were due to and solely caused by Alex Gonzales, Jr.'s acts and conduct. Defendant alleges as a defense that Alex Gonzales, Jr. knew or should have known that he had a duty to refrain from engaging in deadly conduct against Defendant Gutierrez.

NINTH DEFENSE

9. Alternatively, Defendant alleges as a defense that under the circumstances, any injuries or damages allegedly suffered by Plaintiffs and the minor child were due to and solely caused by Arellano's acts and conduct. Defendant alleges as a defense that Arellano knew or should have known that she had a duty to refrain from engaging in deadly conduct by pointing a weapon at Defendant Gutierrez.

TENTH DEFENSE

10. Defendant states that it would be violative of the Due Process Clause of the United States Constitution to impose punitive damages on him under the circumstances of this case and requests that any punitive damage claims against him be separately tried, as permitted under Fed.R.Civ.P. 42(b).

11. Defendant demands a trial by jury.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays that upon hearing the Plaintiffs recover nothing of and from the Defendant by way of his suit; that the Court enter a Judgment that the Defendant go hence without delay with all costs of court; that the Defendant be awarded attorney's fees and court cost under 42 U.S.C. § 1988; and that the Defendant have such other and further relief to which it may be justly entitled.

Respectfully submitted,

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By: /s/Albert López
ALBERT LÓPEZ
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ATTORNEY FOR DEFENDANT
GABRIEL GUTIERREZ

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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Austin, TX 78723

/s/ Albert López
Albert López

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

ALEX GONZALES, SR., individually as a wrongful death beneficiary of Alex Gonzales, Jr., and as the Representative of the Estate of Alex Gonzales, Jr., Deceased, and ELIZABETH HERRERA, aka Elizabeth Gonzales, individually as a wrongful death beneficiary of Alex Gonzales, Jr., *Plaintiffs*,	§	
v.	§	Case No. 1:23-cv-00009-RP
LUIS SERRATO, GABRIEL GUTIERREZ, and THE CITY OF AUSTIN, *Defendants*.	§	

DEFENDANT LUIS SERRATO'S ORIGINAL ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COME NOW Defendant Luis Serrato, by and through his attorneys of record, and files this his Original Answer to Plaintiffs' First Amended Complaint, and in support thereof would respectfully show the Court as follows:

I.
ORIGINAL ANSWER

A. Parties.

1. No answer is necessary from this Defendant regarding the allegations contained within Paragraphs 1 – 2 of Plaintiffs' First Amended Complaint.

2. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained within Paragraphs 3 – 5 of Plaintiffs' First Amended Complaint.

3. As to the allegations contained within Paragraphs 6 – 7 of Plaintiffs' First Amended Complaint, Defendant denies he is liable for compensatory or punitive damages related to the subject incident, and denies that any APD officer may be validly served at 715 E. 8th Street, Austin Texas 78701 through means other than personal service of process. Defendant otherwise admits the remaining allegations therein.

B. Jurisdiction and Venue.

4. Defendant admits the allegations contained within Paragraphs 8 – 11 of Plaintiffs' First Amended Complaint.

C. Facts.

5. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained within Paragraphs 12 – 53 of Plaintiffs' First Amended Complaint, and therefore denies the same.

6. As to the allegations contained within Paragraphs 54 – 62 of Plaintiffs' First Amended Complaint, Defendant admits that he was advised of a shots-fired 911 call and responded to the scene, denies that he knew an off-duty APD officer was involved, denies that he personally knew there was a child in the car. Defendant admits he did engage the suspect with his weapon drawn to the shots-fired nature of the call. Defendant denies that he knew at this point the nature of any person's injuries or medical conditions, nor the precise causes of those injuries or conditions. Defendant admits he did not immediately render aid when he arrived on the scene because the scene was not secure, due in large part to the suspect's refusal to follow all police commands, and because the suspect was believed to be armed and involved in the shots-fired incident. Defendant admits Gutierrez was instructed to stand back and did so. Defendant admits that he and Officer Nenno issued commands to the suspect, both in English and in Spanish, that the suspect failed or

refused to follow. Defendant denies that at all times Gonzales's hands were in plain sight and that they could see he had no weapon. Defendant denies that Gonzales did not constitute a potential threat to other persons at the scene. Defendant further denies that Gonzales never did anything threatening, as his refusal to follow police commands during such a serious situation certainly constitutes potentially threatening conduct. Otherwise, denied.

7. As to the allegations contained within Paragraphs 63 – 78 of Plaintiffs' First Amended Complaint, Defendant denies that he knew at this point the nature of any person's injuries or medical conditions, nor what abilities if any of the suspect's had been impaired. Defendant denies the suspect made no sudden or unexpected movements, denies that his hands were visible at all times, and denies that he knew the suspect was unarmed. Defendant admits that he moved to his right in order to try to more clearly see what was occurring, but denies that such actions suggest he had no fear of the suspect in doing so. Defendant admits the order was given for the suspect to not reach into the car, and that the suspect disobeyed it by reaching into the car. Defendant denies he had no reason to believe the suspect's actions were threatening or dangerous. Defendant admits he discharged his firearm multiple times due to the risk of imminent death or serious bodily injury he faced due to the suspect's actions and refusal to follow police commands in a shots-fired situation. Defendant is without sufficient knowledge as to whether the bullets that struck the suspect were the only cause of death, as it was later confirmed the suspect had already suffered gunshot wounds moments earlier. Defendant denies his use of lethal force was excessive or unjustified, and denies that he used grossly improper tactics or judgment as suggested in the Complaint, and denies that he created a perceived risk of danger through his own actions. Defendant denies that his actions put bystanders in harm's way. Defendant denies that no reasonable officer would have used lethal force in this situation. Otherwise, denied.

D. Causes of Action.

i. Fourth and Fourteenth Amendment Excessive Force by Defendant Gutierrez Only.

8. As to the allegations contained in Paragraphs 79 – 86, no response is necessary from this Defendant. If a response is ultimately deemed necessary, then Defendant adopts and incorporates his responses to the previous Paragraphs of the Amended Complaint, and deny all allegations therein not addressed *supra*.

ii. Fourth and Fourteenth Amendment Excessive Force by Defendant Serrato.

9. As to the allegations contained in Paragraphs 87 – 94 of Plaintiffs' First Amended Complaint, Defendant admits that he an on-duty police officer for APD and was acting under the color of law during the incident that forms the basis of this lawsuit. Defendant admits Plaintiffs are seeking damages in this action. Otherwise, denied.

E. Damages, Jury Demand, & Prayer.

10. As to the allegations contained in Paragraphs 95 – 101, no answer is necessary from this Defendant. To the extent any answer is deemed necessary, Defendant admits that Plaintiffs seek the relief requested therein. Otherwise, denied.

II.
AFFIRMATIVE DEFENSES & IMMUNITIES

11. 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*.

12. 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 were objectively reasonable in light of the law and the information possessed at that time,

and that no clearly established law exists prohibiting them from using force to defend himself and/or other persons from an active or imminent assault with a potentially deadly weapon, and is uncompliant with officer commands when those commands are given in order to secure the scene to make it safe for all persons involved.

13. Further and in the alternative, the incident in question and the resulting harm to Plaintiffs was caused or contributed to by another persons' own illegal and/or violent or reckless conduct, including but not limited to the conduct of Gonzales himself. To the extent legally applicable herein, Defendant invokes the comparative responsibility provisions of the Texas Civil Practice & Remedies Code.[1]

14. Defendant further pleads that, in the unlikely event he is found to be liable, such liability be reduced by the percentage of the causation found to have resulted from the acts or omissions of other persons, including Gonzales himself.

15. Defendant pleads that he had legal justification for each and every action taken by him relating to this incident based on the information available to him at the time.

16. 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.

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

18. Defendant reserves the right to assert additional affirmative defenses throughout the development of this case.

19. To the extent Defendant did not address a specific averment made by Plaintiffs in their First Amended Complaint, Defendant expressly denies all such averments.

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

III.

JURY DEMAND

20. Pursuant to Federal Rule of Civil Procedure 48, Defendant hereby requests a jury trial.

IV.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Defendant Luis Serrato prays that upon a final hearing of this cause, the Court dismiss all of Plaintiffs' claims with prejudice, that all costs of court be assessed against Plaintiffs, that he be awarded attorney fees incurred in the defense of this suit, and for all further relief to which he may be justly entitled.

Respectfully submitted,

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By: /s/ Blair J. Leake
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ATTORNEYS FOR DEFENDANT LUIS SERRATO

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 2023, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service and/or E-Mail, in accordance with the Federal Rules of Civil Procedure.

/s/ Blair J. Leake
Blair J. Leake

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

ALEX GONZALES, SR. and ELIZABETH HERRERA, ***Plaintiffs***,	§	
v.	§	**Case No. 1:22-cv-00655-RP**
CITY OF AUSTIN, ***Defendant***.	§	

JESSICA ARELLANO, individually and as next friend of Z.A., minor child, and wrongful death beneficiary of Alex Gonzales, Jr., ***Plaintiffs***,	§	
v.	§	**Case No. 1:23-cv-8-RP**
THE CITY OF AUSTIN, GABRIEL GUTIERREZ, and LUIS SERRATO, ***Defendants***.	§	

ALEX GONZALES, SR., individually as a wrongful death beneficiary of Alex Gonzales, Jr., and as the Representative of the Estate of Alex Gonzales, Jr., Deceased, and ELIZABETH HERRERA, aka Elizabeth Gonzales, individually as a wrongful death beneficiary of Alex Gonzales, Jr., ***Plaintiffs***,	§	
v.	§	**Case No. 1:23-cv-9-RP**
LUIS SERRATO, GABRIEL GUTIERREZ, and THE CITY OF AUSTIN, ***Defendants***.	§	

DEFENDANTS' JOINT MOTION TO CONSOLIDATE

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants, **Officer Luis Serrato**, **Officer Gabriel Gutierrez**, and the **City of Austin** file this Joint Motion to Consolidate the above captioned lawsuits pursuant to Federal Rule of Civil Procedure 42(a)(2) and would respectfully show the Court as follows:

I. BACKGROUND & PROCEDURAL HISTORY

A. The Incident.

1. In the midnight hour of January 5, 2021, Plaintiff Jessica Arellano and decedent Alex Gonzales Jr. were driving with Z.A.—their minor child. Meanwhile, off-duty Officer Gabriel Gutierrez was returning to his apartment from the gym and was driving in the same direction. After Officer Gutierrez took a left hand turn onto Wickersham Lane, Gonzalez Jr. aggressively chased after Gutierrez's car by driving close behind. Subsequently, Gonzales Jr. continued his pursuit and pulled up extremely close to left side of Officer Gutierrez's car—essentially pinning Officer Gutierrez's car between the curb and Gonzales's car.[1]

2. At that point, Officer Gutierrez generally recounts that Gonzales Jr. brandished a firearm and menaced Officer Gutierrez with this weapon due to his extreme displeasure with Gutierrez's driving. Suddenly fearing for his life, Officer Gutierrez withdrew his own firearm and fired at Gonzales Jr. in order to defend himself from a perceived imminent attack. Gonzales Jr. then drove a short distance forward on Wickersham Lane and came to a stop. Officer Gutierrez called 911 to request backup from on-duty officers and to stage EMS to provide medical care once the scene was secure. On this call, Officer Gutierrez noted that he could see that Gonzales Jr. was still holding his firearm in his hand.[2]

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[1] **Ex. 1**, *Filed Under Seal, Security Video*, **00:00 – 00:41**.
[2] **Ex. 2**, *Filed Under Seal, Ofc. Gutierrez 911 Call*, **00:00 – 00:45** (reporting incident), **00:45 – 01:00** (informing the Dispatcher that Gonzales Jr. still had a gun in his hand at this time).

3. On-duty Officer Luis Serrato arrived at 12:36 a.m., and his actions were captured on his body-worn camera.[3] Upon arrival, Officer Serrato parked his APD police vehicle behind off-duty Officer Gutierrez and his car. Officer Serrato approached the scene, and loudly commanded Gonzales Jr. to put his hands up numerous times in both English and Spanish. During this time, Gonzales Jr. was standing by his driver's side door—without his gun—and he oscillated from: putting his hands up, to putting his hands on the car, to putting his hands down at his sides, to sticking his head into the car and making reaching motions inside the vehicle. Once Gonzales Jr. started reaching into his vehicle, both Officers began yelling "do not reach."[4]

4. A minute after arrival, Officer Serrato began commanding Gonzales Jr. to start walking away from the car towards him. Instead of obeying this command, Gonzales Jr. walked all the way around the back of his vehicle to the rear passenger-side door while Officer Serrato yelled "no."[5] Then, Gonzales Jr. began moving quickly, prompting Officer Serrato to begin yelling "do not reach" while he swiftly repositioning himself to have a better view of Gonzales Jr.[6] Unfortunately, Gonzales Jr. did not heed this command, and he opened the car door and reached inside. Suddenly fearing that the non-compliant Gonzales Jr. was reaching for his previously seen firearm or some other deadly weapon, Officer Serrato made the split-second decision to open fire on Gonzales Jr. in order to protect himself and others from imminent harm.[7] Gonzales Jr. died on scene.

[3] **Ex. 3**, *Filed Under Seal, Serrato BWC*, **00:05**.
[4] **Ex. 3** at **00:15 – 00:55**.
[5] **Ex. 3** at **01:00 – 00:10**.
[6] **Ex. 3** at **01:14 – 01:20**.
[7] **Ex. 3** at **01:25 – 01:30**.

5. Subsequent on scene investigators observed a black handgun on the driver's side floorboard of Gonzales Jr.'s car.[8] DNA from both Gonzales Jr. and Plaintiff Arellano was confirmed to be on this handgun after DNA testing.[9]

B. Procedural History.

6. Three separate lawsuits have been filed arising out of this exact incident.

7. **First** was cause number 1:22-cv-655, which was filed on July 6, 2022. This lawsuit was filed by decedent Gonzales Jr.'s parents—Plaintiffs Gonzales Sr. and Elizabeth Herrera—against the City of Austin as the sole defendant. Pursuant to 42 U.S.C. §1983 the lawsuit alleges that the City of Austin is liable under a *Monell* theory of liability for the allegedly unconstitutional actions of Officers Gutierrez and Serrato during the above-described incident.[10]

8. Though it was filed 43 weeks ago, very little has occurred in the lawsuit. Officer Gutierrez sat for a deposition on September 27, 2022. Officer Serrato sat for a deposition on November 1, 2022. Both Officers generally invoked their Fifth Amendment privilege and declined to answer questions touching and concerning this incident due to an ongoing criminal investigation by the Travis County District Attorney. Since that time, a Travis County Grand Jury "no-billed" both Officers in January 2023 for their conduct during this incident.

9. **Second** was cause number 1:23-cv-8, which was filed on January 3, 2023. This lawsuit was filed by Plaintiff Jessica Arellano—the mother of Z.A.—against the City of Austin and Officers Gutierrez and Serrato. Pursuant to 42 U.S.C. §1983 the lawsuit alleges that the City of Austin is liable under a *Monell* theory of liability, and that Officers Gutierrez and Serrato

[8] **Ex. 4**, *Filed Under Seal, Arellano DNA Probable Cause Affidavit*, **pg. 2.**
[9] **Ex. 5**, *Filed Under Seal, DNA Testing*, **pgs. 1 – 7** (highlighted by counsel).
[10] *See* Pls.' Orig. Compl., pgs. 1 – 10, Dkt. # 1 (1:22-cv-00655-RP).

violated Plaintiff Arellano's and Gonzales Jr.'s Fourth Amendment rights to be free of excessive force.[11] This lawsuit just began, and no significant discovery or litigation has taken place.

10. **Third** and finally is cause number 1:23-cv-9, which was also filed on January 3, 2023. Curiously[12], this lawsuit was also filed by decedent Gonzales Jr.'s parents—Plaintiffs Gonzales Sr. and Elizabeth Herrera. This time, these Plaintiffs have only filed suit against the individual officers, alleging nearly identical claims that Plaintiff Arellano alleged in her lawsuit, which was filed on that same day. Namely, this lawsuit also alleges that Officers Gutierrez and Serrato violated Gonzales Jr.'s Fourth Amendment rights for their conduct during the incident.[13] This lawsuit also just began, and no significant discovery or litigation has taken place.

11. The Joint Defendants now file this Motion to Consolidate pursuant to Federal Rule of Civil Procedure 42(a)(2), because these three lawsuits should be combined into one singular case with one singular trial date.

II. LEGAL STANDARD

12. Federal Rule of Civil Procedure 42(a)(2) provides that a court may consolidate actions that involve common questions of law or fact.[14] In the Fifth Circuit, "[c]onsolidating actions in a district court is proper when the cases involve common questions of law and fact, and the district judge finds that it would avoid unnecessary costs or delay."[15] A district court may order

[11] *See* Pls.' Orig. Compl. pgs. 24 – 28, Dkt. # 1 (1:23-cv-8-RP) (Plaintiff Arellano's suit encompasses a Fourth Amendment claim for Gonzales Jr. on behalf of the minor child).
[12] It is unclear to the undersigned Defendants why these Plaintiffs did not merely request leave to amend their prior lawsuit in cause number 1:22-cv-00655-RP.
[13] Pls.' Orig. Compl. pgs. 28 – 33, Dkt. # 1 (1:23-cv-9-RP).
[14] FED. R. CIV. P. 42.
[15] *St. Bernard Gen. Hosp. Inc. v. Hosp. Serv. Ass'n of New Orleans, Inc.*, 712 F.2d 978, 989 (5th Cir. 1983).

consolidation despite the opposition of the parties.[16] Granting or denying consolidation is purely discretionary.

13. "In weighing whether to consolidate actions, courts generally consider factors such as (1) whether the actions are pending before the same court; (2) whether the actions involve a common party; (3) any risk of prejudice or confusion from consolidation; (4) the risk of inconsistent adjudications of common factual or legal questions if the matters are tried separately; (5) whether consolidation will reduce the time and cost of trying the cases separately; and (6) whether the cases are at the same stage of preparation for trial."[17]

III. ARGUMENTS & AUTHORITIES

A. This Court should use its discretion to save these Defendants from the same trial three separate times, because all of the factors weigh in favor of consolidation.

14. The same lawsuit has been filed three separate times against these Defendants.[18] Though the stylistic presentation of the case differs between the three Complaints, at bottom, each lawsuit complains of: (a) the same incident, (b) against the same parties, while (c) bringing identical legal claims under 42 U.S.C. § 1983 for excessive force under the Fourth Amendment with an accompanying *Monell* claim against the City of Austin.[19] Since these lawsuits are all pending before this Court, it is indisputable that factors 1 and 2 weigh in favor of consolidation.

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[16] *Id*. (citing *In re Air Crash Disaster at Florida Everglades on Dec. 29, 1972,* 549 F.2d 1006, 1013 (5th Cir. 1977).

[17] *Samataro v. Keller Williams Realty, Inc*, No. 1:18-CV-775-RP, 2021 WL 3596303, at *2 (W.D. Tex. Apr. 27, 2021) (citing *Arnold & Co., LLC v. David K. Young Consulting, LLC*, No. SA:13-CV-00146-DAE, 2013 WL 1411773, at *2 (W.D. Tex. Apr. 8, 2013).

[18] The first lawsuit only brings a *Monell* claim, but such a claim encompasses the underlying Constitutional violations alleged in the newer filings.

[19] ***See*** Pls.' Orig. Compl. pgs. 28 – 33, Dkt. # 1 (1:23-cv-9-RP); ***see also*** Pls.' Orig. Compl., pgs. 28 – 29, Dkt. # 1 (1:22-cv-00655-RP); ***see also*** Pls.' Orig. Compl. pgs. 24 – 28, Dkt. # 1 (1:23-cv-8-RP).

Accordingly, the undersigned will address the remaining factors. Each reveal that consolidation is eminently appropriate.

a. Factors 3 and 4 weigh in favor of consolidation, because these Defendants will be prejudiced if they must submit to three separate trials, which would inevitably create the potential for inconsistent adjudications.

15. Plaintiffs Gonzales Sr. and Elizabeth Herrera (hereinafter "the Opposed Plaintiffs") have refused to concede that these lawsuits should be consolidated into one proceeding. Instead, the Opposed Plaintiffs submit that these three lawsuits should only be consolidated for discovery purposes, but that it is too early to consolidate these cases for all purposes—including trial. Conversely, Plaintiff Arellano has agreed not to oppose consolidation.

16. Courts across the United States regularly consolidate 42 U.S.C §1983 claims against officers and municipalities ***under these exact circumstances*** as a matter of course.[20] In *Kong Meng Xiong*, the Eastern District of California thoroughly analyzed this exact issue in a case involving two "different plaintiffs who are represented by separate counsel…" both of whom

[20] *Flanagan v. Anne Arundel Cnty*, 593 F. Supp 2d 803, 806 (D. Md. 2009) (holding "[t]he facts of each case are nearly identical, all three plaintiffs are represented by the same counsel and are proceeding against the same defendants, the papers are virtual facsimiles of one another, and identical counts are alleged. Specifically, the plaintiffs raise a single federal claim under 42 U.S.C. § 1983 for a violation of their federal rights. Because each action raises identical questions of law and fact, the Court, by separate Order, CONSOLIDATES the actions pursuant to Federal Rule of Civil Procedure 42(a)"); ***see also*** *Adams v. Szczerbinski*, 329 Fed. Appx. 19, 22 (7th Cir. 2009) (holding consolidating a *Monell* claim and an excessive force claim was not an abuse of discretion); ***see also*** *Skovgard v. Pedro*, No. 3:08-CV-071, 2010 WL 546368, at *1, fn 1 (S.D. Ohio Feb. 10, 2010, aff'd, 448 Fed. Appx. 538 (6th Cir. 2011) (noting "Plaintiffs originally filed separate suits against Defendants Pedro, Mannix, 1st Choice Security, Inc. and Kaminski (case number 3:08cv071) and against Defendant City of Kettering (case number 3:09cv082), as a result of the same incident. On April 9, 2009, the Court sustained a Motion to consolidate the two cases, administratively processed case number 3:09cv082 and ordered that all future filings be made in case 3:08cv071).

brought excessive force and *Monell* claims for their injuries arising out of the same officer involved shootings.[21]

17. The *Kong Meng Xiong* Court granted the Defendants' Motion to Consolidate, finding that the excessive force claims and the *Monell* claims necessarily shared overlapping issues of fact and law because they arose out of the same incident. Crucially, the Eastern District of California noted that if the court did ***not*** consolidate these cases, "there [was] a risk of inconsistent judgments" and consolidation was accordingly needed to "alleviate the risk of inconsistent judgments or any collateral estoppel effect of a dispositive decision in either case…".[22] The Court noted that this concern was especially pressing considering that the Plaintiffs were represented by different counsel that might pursue different strategies. The *Kong Meng Xiong* Court's analysis is directly on point to the issue facing this Court, and the undersigned have attached this Order as **Exhibit 6** for the Court's convenience.

18. Accordingly, factors 3 and 4 weigh in favor of a stay.

b. Factor 5 weighs in favor of consolidation to reduce the burden on these Defendants. The Opposed Plaintiffs' objections to consolidation are nebulous and appear to be based on their desire to "wait and see" if they can avoid consolidation after more discovery.

19. In support for their resistance, the Opposed Plaintiffs have claimed during conferencing that some nebulous and yet to be revealed evidence might render consolidation inappropriate sometime in the future. This is not the standard, and other Courts have chided Plaintiffs for wanting to take a "wait and see" approach to consolidation without being able to articulate meritorious arguments opposing it.[23]

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[21] **Ex. 6**, *Order, Kong Meng Xiong v. City of Merced*, No. 1:13-CV-00083-SK0 (E.D. Cal Oct. 01, 2013), **pg. 2**.
[22] **Ex. 6** at **pg. 10**.
[23] *Simon v. Muschell*, No. 1:09-CV-301 JTM, 2010 WL 3946528, at *2 (N.D. Ind. Oct. 4, 2010).

20. In *Simon*, identical plaintiffs filed a *Bivens* action against IRS Special Agents for violating their Fourth Amendment Rights for allegedly presenting false information in a probable cause affidavit, and allegedly unlawfully executing the resulting warrant. Simultaneously, those same plaintiffs filed a separate Tort Claims lawsuit against the United States for the exact same conduct.[24] The *Simon* defendants filed a motion to consolidate the two cases.

21. In opposing that motion, the *Simon* plaintiffs "consent[ed] to consolidating the cases for discovery" but argued that it was "too early to consolidate the case for all purposes." The District Court rejected that argument and noted that "many of the plaintiffs' reasons for objecting are without merit."[25] Instead, the *Simon* Court noted that the plaintiffs "allege almost identical facts in support of their claims and both cases turn on whether the search warrant was properly issued and executed."[26] In sum, the Court noted that the plaintiffs only proffered one objection with any merit, and it was insufficient to substantiate their objection to consolidating their lawsuits for trial regarding the ***exact*** same conduct.[27]

22. The same reasoning applies here. These Joint Defendants should be allowed to face the allegations arising out of this incident in one lawsuit and in one trial due to the "commonality of the factual and legal issues" and to decrease the "burden on the parties and witnesses," and to conserve judicial resources.[28] Accordingly, factor 5 weighs in favor of consolidation.

c. Factor 6 weighs in favor of consolidation. The two latest lawsuits were filed recently and on the same day. Conversely, the first lawsuit has proceeded slowly, and only taken the depositions of the Officers.

[24] *Id*. at *1.
[25] *Id*. at *2.
[26] *Id*. at *2.
[27] *Id*. at *3.
[28] *Id.* at *3.

23. Finally, factor 6 weighs in favor of consolidation. It is beyond dispute that case number 1:23-CV-8 and 1:23-CV-9 were filed recently and on the same day—January 3, 2023.[29] Those cases are thus demonstrably in the same "stage of preparation for trial."[30] Accordingly, the only way this factor ***might*** weigh against consolidation would be if case number 1:22-CV-00655 was in a substantially different stage of preparation.

24. The first case has not proceeded in any meaningful way. As noted above, other than exchanging written discovery—which can easily be reproduced in the two newest cases—the only event that has occurred in that case are the depositions of Officer Serrato and Officer Gutierrez. Those depositions occurred ***before*** the Grand Jury no-billed Serrato and Gutierrez regarding this incident, and thus contain a plethora of Fifth Amendment invocations that may no longer be appropriate. Because no other event of note has happened in the first lawsuit, the sixth factor does not weigh against a stay.

IV. CONCLUSION & PRAYER

25. As demonstrated above, these Joint Defendants have met their burden to establish that consolidating these lawsuits is appropriate, and that they will be prejudiced if they are not joined into one lawsuit. Tellingly, Plaintiff Arellano has agreed not to oppose consolidating these cases. Conversely, the Opposed Plaintiffs' anticipated objections are nebulous, and rely on their hope that they can avoid consolidation based on some as of yet unarticulated evidence. The Court should reject this anticipated argument and utilize its discretion to consolidate these matters.

26. WHEREFORE PREMISES CONSIDERED, **Defendant Gutierrez**, **Defendant Serrato**, and **Defendant City of Austin** respectfully request that this Court GRANT this Joint Motion to

[29] Pls.' Orig. Compl. Dkt. # 1 (1:23-cv-8-RP); *see also* Pls.' Orig. Compl. pgs. 28 – 33, Dkt. # 1 (1:23-cv-9-RP).
[30] *Samataro*, 2021 WL 3596303, at *2.

Consolidate these cases pursuant to Federal Rule of Civil Procedure 42(a)(2) and join cause numbers (1) 1:22-CV-655; (2) 1:23-CV-8; and (3) 1:23-CV-9 into one consolidated case for all purposes, and to close all other open case numbers. These Defendants additionally respectfully request that this Court issue a new scheduling order similar to the Order recently issued in 1:22-CV-8, and for all other relief to which these Joint Defendants may be justly entitled in law or equity.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Counsel for the joint defendants have complied with the Court's requirement to confer. After conference, counsel for Plaintiff Jessica Arellano is unopposed consolidation but does not join the motion.

Counsel for Alex Gonzales and Elizabeth Herrera is opposed to consolidation because they oppose consolidating for all purposes. (the "Opposed Plaintiffs").

/s/ Stephen B. Barron
Stephen B. Barron

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of May, 2023, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail, in accordance with the Federal Rules of Civil Procedure.

/s/ Stephen B. Barron
Stephen B. Barron

Exhibit 1

Security Video.mp4
COA 4397

FILED UNDER SEAL

Filed Traditionally via Zip Drive to Court and via Dropbox Link to all Counsel

Exhibit 2

Officer Gutierrez 911 Call.wma
COA 4341

FILED UNDER SEAL

Filed Traditionally via Zip Drive to Court and via Dropbox Link to all Counsel

Exhibit 3

Officer Serrato BWC.mp4
COA 3979

FILED UNDER SEAL

Filed Traditionally via Zip Drive to Court and via Dropbox Link to all Counsel

Exhibit 4

Arellano DNA Probable Cause Affidavit.pdf
COA 1701 – 1705

FILED UNDER SEAL

E-FILED

Exhibit 5

DNA Testing.pdf
COA 2547 – 2553

FILED UNDER SEAL

E-FILED

Exhibit 6

Order.pdf
Kong Meng Xiong v. City of Merced,
No. 1:13-CV-00083-SK0 (E.D. Cal Oct. 01, 2013)

E-FILED

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KONG MENG XIONG,

Plaintiff,

v.

CITY OF MERCED, et al.,

Defendants.

_____

Case No. 1:13-cv-00083-SKO

ORDER GRANTING DEFENDANTS' MOTION TO CONSOLIDATE

(Doc. No. 25)

Related Action:

LUH XIONG,

Plaintiff,

v.

CITY OF MERCED, et al.,

Defendants.

_____/

Case No. 1:13-cv-00111-SKO

ORDER GRANTING DEFENDANTS' MOTION TO CONSOLIDATE

(Doc. No. 22)

I. INTRODUCTION

This action, *Kong Xiong v. City of Merced, et al.* ("*Kong Xiong*"), 1:13-cv-00083-SKO, was filed on January 17, 2013. (*Kong Xiong*, 1:13-cv-00083, Doc. 1.) The case was deemed

related to a second civil action filed on January 23, 2013, captioned *Luh Xiong v. City of Merced, et al.*(*"Luh Xiong*"), 1:13-cv-00111-SKO. Although the two actions involve different plaintiffs who are represented by separate counsel, each complaint states claims against the same three defendants: (1) City of Merced; (2) Officer James Lodwick ("Lodwick"); and (3) Officer Eduardo Chavez ("Chavez") (collectively "Defendants"). Both complaints arise out of Officers Lodwick and Chavez' discharge of their weapons on December 3, 2011, at a residence at or near 1594 Buckingham Court in Merced, California, which injured both Plaintiffs Kong Xiong and Luh Xiong[1] (collectively, "Plaintiffs").

At an initial scheduling conference of both cases held on August 8, 2013, Defendants indicated they intended to file a motion to consolidate the *Kong Xiong* and *Luh Xiong* actions. The Court set a briefing schedule, requiring that any motion to consolidate be filed no later than September 6, 2013, any opposition to the motion be filed no later than September 20, 2013, and any reply be filed no later than September 26, 2013. (Doc. 20.) A hearing on the motion was set for October 2, 2013. (Id.)

On September 6, 2013, Defendants filed a motion to consolidate the two cases, and no opposition was filed by Plaintiffs. After having considered the motion and the supporting documentation, the Court finds the motion suitable for a decision without argument, and the hearing set for October 2, 2013, is VACATED pursuant to U.S. District Court for the Eastern District of California's Local Rule 230(g). For the reasons set forth below, Defendants' motion is GRANTED.

II. BACKGROUND

A. Summary of the Complaints

1. *Kong Xiong v. City of Merced, et al.*, Case No. 1:13-cv-00083-SKO

Plaintiff Kong Xiong alleges that he attended a house party located at 1594 Buckingham Court in Merced, California. The Merced Police Department received a call that a man at the house party had a gun. (*Kong Xiong*, 1:13-cv-00083-SKO, Doc. 1, ¶ 28.) Shortly after the call was placed, Officers Chavez and Lodwick arrived at an area near the house, and walked down the

[1] Kong Xiong and Luh Xiong are unrelated individuals. (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶ 20.)

side of the house toward a window. (*Kong Xiong*, 1:13-cv-00083-SKO, Doc. 1, ¶¶ 30-32.) As the Officers were approaching the side of the house, they heard a semi-automatic pistol being readied to fire. (*Kong Xiong*, 1:13-cv-00083-SKO, Doc. 1, ¶ 34.) The Officers then walked along the side of the house, toward the rear window, and Kong Xiong came out of the house. (*Kong Xiong*, 1:13-cv-00083-SKO, Doc. 1, ¶ 35.) The Officers turned up their gun-mounted flashlights and yelled, "get your hands up." (*Kong Xiong*, 1:13-cv-00083-SKO, Doc. 1, ¶ 37.) Immediately after turning on the flashlights, Kong Xiong turned his back to the Officers and began to run away towards the back of the property. (*Kong Xiong*, 1:13-cv-00083-SKO, Doc. 1, ¶ 40.) Within "a second or less" of yelling at Kong Xiong to get his hands up, and after he turned and ran about 6 to 8 feet from the Officers, the Officers fired multiple rounds at and into Kong Xiong, who immediately fell to the ground in pain. (*Kong Xiong*, 1:13-cv-00083-SKO, Doc. 1, ¶¶ 42, 45.) Individuals within the house and in the backyard of the house informed the Officers that there was a victim of their shooting in the backyard and another victim in the house. (*Kong Xiong*, 1:13-cv-00083-SKO, Doc. 1, ¶ 46.) Although the Officers knew there were two injured civilians and possibly a third, neither made an attempt for 10 minutes or more to render any assistance to any of the injured individuals. (*Kong Xiong*, 1:13-cv-00083-SKO, Doc. 1, ¶ 46.)

Within "moments" of the shooting, Sergeant Court, Officers Chavez and Lodwick's direct supervisor, arrived on the scene. (*Kong Xiong*, 1:13-cv-00083-SKO, Doc. 1, ¶ 47.) The Officers and Sergeant Court "took the position" that they could not render assistance to those individuals who had been shot until after the house had been cleared of all people. (*Kong Xiong*, 1:13-cv-00083-SKO, Doc. 1, ¶ 49.) Officers located a handgun near Kong Xiong, but left the gun lying near him, using the proximity of the gun as another excuse not to move Kong Xiong. (*Kong Xiong*, 1:13-cv-00083-SKO, Doc. 1, ¶ 52.) However, within 10 minutes, Sergeant Court and Officers Chavez and Lodgwick, along with other officers, moved Kong Xiong to a location where paramedics could begin to assist him. (*Kong Xiong*, 1:13-cv-00083-SKO, Doc. 1, ¶ 50.) Another individual who was shot in the backyard was not removed to a location where he could receive medical assistance for several more minutes and by the time he was taken to the paramedics, he was no longer breathing. (*Kong Xiong*, 1:13-cv-00083-SKO, Doc. 1, ¶ 51.)

Kong Xiong filed his complaint on January 17, 2013. He alleges claims for violation of the California Civil Code §§ 51.71 and 52.1, battery, assault, negligence, excessive force in violation of the Fourth Amendment, conspiracy pursuant to 42 U.S.C. § 1985, a *Monell* claim pursuant to Section 1983 (*see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)), and a claim for injunctive relief.

2. *Luh Xiong v. City of Merced, et al*., Case No. 1:13-cv-00111-SKO

Luh Xiong alleges that he was in attendance at a party on December 3, 2011, at a residence located at 1594 Buckingham Court in Merced, California. (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶¶ 1, 18.) Luh Xiong asserts that Officers Chavez and Lodwick responded to the residence to investigate reports that a person had a firearm at the party. (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶ 18.) When the Officers approached the residence, purportedly recorded on a video camera contained in Officer Chavez' eyeglasses, they saw several people, readily identifiable as teenagers, standing in front of the residence. (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶ 19.) As the Officers approached, they had their guns drawn, heard the sounds of a verbal argument, and shined their flashlights on Kong Xiong. (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶ 20.) The Officers yelled for Kong Xiong to "get his hands up," the Officers' presence startled Kong Xiong, and he turned and ran away from the Officers. (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶ 20.) The Officers then fired several bullets in the direction of the house. (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶ 21.) The bullets "ripped through" the house's wooden fence, and struck Luh Xiong in his right thigh. (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶ 21.) In total, three people were struck with bullets. (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶ 21.) After he was shot, Luh Xiong ran into the house, collapsed, and lost consciousness. (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶ 22.) He was awakened by the pain of being bitten on his arm by a Merced Police canine. (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶ 22.) He was later transported to Mercy Hospital where he was treated for his gunshot wound and dog-bite injuries. (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶ 22.)

Luh Xiong filed a complaint against Officers Chavez and Lodwick as well as the City of Merced on January 23, 2013. Luh Xiong alleges claims against Officers Chavez and Lodwick

under Section 1983 for unreasonable search and seizure and excessive force in violation of the Fourth Amendment (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶¶ 24-25), violation of Plaintiff's due process rights under the Fourteenth Amendment (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶¶ 24-25), and state-law claims for assault, battery, and negligence (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶¶ 40-46). Against the City of Merced, Luh Xiong alleges two Section 1983 claims, including a *Monell* claim. (*Luh Xiong*, 1:13-cv-00111-SKO, Doc. 2, ¶¶ 26-39.)

B. Procedural Background

On July 2, 2013, the parties in *Luh Xiong v. City of Merced, et al.,* 1:13-cv-00111-SKO, appeared for a scheduling conference before U.S. Magistrate Judge Boone. Defendants indicated they would file a notice that the *Luh Xiong* case was related to the *Kong Xiong* case; as a result, the scheduling conference was continued to July 23, 2013. On July 3, 2013, U.S. District Judge O'Neill issued an order relating *Kong Xiong v. City of Merced, et al.*, 1:13-cv-00083-SKO with *Luh Xiong v. City of Merced, et al.,*, 1:13-cv-00111-SKO, and both actions were assigned to District Judge O'Neill and U.S. Magistrate Judge Sheila K. Oberto. (Doc. 13.)[2]

A joint scheduling conference in both cases was held on August 8, 2013, before the undersigned. Defendants indicated they intended to file a motion to consolidate *Kong Xiong* and *Luh Xiong* actions, and the Court ordered that any motion for consolidation be filed no later than September 6, 2013, any opposition be filed no later than September 20, 2013, and any reply be filed no later than September 26, 2013. The Court also ordered the parties to serve initial disclosures by no later than September 13, 2013. No other scheduling deadlines were set, and the Court noted that a further scheduling conference would be set once the Court ruled on Defendants' motion to consolidate. (Doc. 20.)

On September 6, 2013, Defendants filed a motion to consolidate the *Kong Xiong* and the *Luh Xiong* actions. The motion was filed in both cases, and neither Plaintiff filed an opposition.

III. DISCUSSION

Federal Rule of Civil Procedure 42(a) provides that "[i]f actions before the court involve a common question of law or fact," the court may consolidate the actions. District courts have

[2] The parties in both cases have consented to the jurisdiction of the U.S. Magistrate Judge.

broad discretion to grant or deny consolidation. *Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1203 (9th Cir. 2008); *see also In re Adams Apples, Inc.*, 829 F.2d 1484, 1487 (9th Cir. 1987). In considering whether to consolidate cases, the court "weighs the interest of judicial convenience against the potential for delay, confusion and prejudice caused by consolidation." *S.W. Marine Inc. v. Triple A Mach. Shop*, 720 F. Supp. 805, 807 (N.D. Cal. 1989).

A. Common Issues of Law and Fact

The threshold requirement for consolidation is the presence of a common question of fact or law. *Yousefi v. Lockheed Martin Corp.*, 70 F. Supp. 2d 1061, 1064-65 (C.D. Cal. 1999). Defendants assert that both cases arise out of Officers Chavez and Lodwick's discharge of their firearms on the evening of December 3, 2011, which resulted in injury to both Plaintiffs. Specifically, Kong Xiong alleges that one of the Officer's bullets struck his leg, and Luh Xiong alleges that a bullet struck him in the right thigh. Defendants contend that several of Plaintiffs' claims thus share common issues of law and fact such that consolidation of the two actions is appropriate, and the interests of the parties as well as the interest of judicial economy favor consolidation.

1. Plaintiffs' Claims for Excessive Force Share Common Issues of Fact and Law

The claims of each Plaintiff share several common issues of fact and law. Specifically, each Plaintiff alleges a Section 1983 claim under the Fourth Amendment, asserting that the Officers used excessive force in discharging their weapons on the evening of December 3, 2011. Defendants contend that the main use of force at issue is the Officers' discharge of their firearms at Kong Xiong, and the same facts will determine whether this force was reasonable as to both Plaintiffs under the reasonableness test set forth in *Graham v. Connor*, 490 U.S. 386, 395 (1989).

Under *Graham*, to determine whether the force used by a police officer was objectively reasonable, the nature and quality of the intrusion on the individual's Fourth Amendment interests are balanced against the countervailing governmental interests at stake. Thus, each Plaintiff's Fourth Amendment claim hinges on the reasonableness of the conduct of the Officers in discharging their weapons that resulted in gunshot injuries to both Plaintiffs. The factual and legal basis for making that determination is the same with regard to both claims. As Defendants

indicate, the governmental interest at stake is the same with respect to both Plaintiffs in that the severity of the crime involves Kong Xiong possibly brandishing a firearm at partygoers earlier in the evening, the Officers' hearing a gun slide rack moments before the incident, Kong Xiong's possession of a firearm, his reaction to police commands, and whether he turned toward officers to point his firearm at them. These facts are common to both claims, and the same legal analysis is applicable.

Further, as Defendants note, the Officers' defense of qualified immunity in each case turns on shared issues of common facts and law. The application of qualified immunity requires consideration of (1) whether an officer's conduct violated a constitutional right; and (2) if so, whether the right was clearly established in light of the specific context of the case. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Robinson v. York*, 566 F.3d 817, 821 (9th Cir. 2009). Whether the Officers' conduct violated Plaintiffs' constitutional rights overlaps with Plaintiffs' excessive force claims, and, as discussed above, will necessarily involve the same factual and legal analysis. As to the second prong, the specific circumstances confronted by the Officers involve the same facts with respect to both Plaintiffs, particularly because the Officers' use of force did not differ between Plaintiffs. Thus, Defendants' defenses will share common issues of law and fact in relation to Plaintiffs' excessive force claims.

In sum, the Court finds that Plaintiffs' excessive force claims, as well as Defendants' defense of qualified immunity, share overlapping issues of fact and law.

2. Plaintiffs' *Monell* Claims Share Common Issues of Fact and Law

Both Plaintiffs assert a Section 1983 claim against the City of Merced pursuant to *Monell* for the failure to adequately train and supervise police officers in the use of deadly force. Although a city may not be held vicariously liable for the unconstitutional acts of its employees on the basis of an employer-employee relationship with the tortfeasor, it may be held liable under *Monell* when a municipal policy or custom causes an employee to violate another's constitutional right. *Monell*, 436 U.S. at 691-92.

The Ninth Circuit has held that municipal liability under *Monell* may be established in one of three ways: (1) "the plaintiff may prove that a city employee committed the alleged

constitutional violation pursuant to a formal governmental policy or a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity;" (2) "the plaintiff may establish that the individual who committed the constitutional tort was an official with final policy-making authority and that the challenged action itself thus constituted an act of official governmental policy;" or (3) "the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it." *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992). A city may only be held liable under Section 1983 where its policy or custom is the "moving force behind the constitutional violation." *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

Defendants assert that whether a constitutional violation occurred as a result of the Officers' discharge of their weapons will encompass the same facts and applicable law. Specifically, the issues that will arise in determining *Monell* liability include the sufficiency of the Merced Police Department's use of force policy; whether both Plaintiffs can demonstrate the occurrence of a sufficient number of similar violations so as to infer a pattern or practice; the adequacy of the departments' training in use of force in light of the situations its officers commonly face; and the Department's process in hiring and supervising Officers Chavez and Lodwick. (Doc. 25-1, 7:6-16.)

Although both litigations are in an early stage, the Court agrees that, based upon the allegations of the two complaints, common issues of fact and law appear to predominate in both Plaintiffs' *Monell* claims, including those issues identified by Defendants.

3. Plaintiffs' State-Law Claims for Assault, Battery, and Negligence Share Common Issues of Fact and Law

Each Plaintiff alleges California state-law claims for assault, battery, and negligence. Defendants maintain that the reasonableness of the force used by the Officers underpins these claims. Therefore, the same factual and legal issues that govern the Officers' use of force under the Fourth Amendment will also govern Plaintiffs' claims for assault, battery, and negligence. (Doc. 25-1, 7:19-8:4.)

In a claim for assault and battery by a peace officer, under California law, a plaintiff must

prove that unreasonable force was used. Judicial Council of California, Civil Jury Instruction 1305; *see also Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1272 (1998). Unreasonable force is conduct that is objectively unreasonable based on the facts and circumstances confronting the peace officer. *Brown v. Ransweiler*, 171 Cal. App. 4th 516, 527 (2009). As such, Plaintiffs' claims for assault and battery flow from the same facts as Plaintiffs' Fourth Amendment excessive force claims and the applicable law is analogous. Because the conduct of the Officers and the reasonableness of their actions with respect to discharging their weapons will be central to Plaintiffs' assault and battery claims, those claims share common issues of fact and law in the same manner as Plaintiffs' excessive force claims discussed above.

Similarly, under California law, negligence is measured by the same standard as battery and excessive use of force under the Fourth Amendment. *Morales v. City of Delano*, 852 F. Supp. 2d 1253, 1278 (E.D. Cal. 2012) (citing *Abston v. City of Merced*, No. 1:09-cv-00511-OWW-DLB, 2011 WL 2118517, at * 16 (E.D. Cal. May 24, 2011)). As discussed, the Officers' conduct and the reasonableness of their actions arise from the same set of facts with regard to both Plaintiffs and will be analyzed under the same legal standard. Thus, Plaintiffs' negligence claims share common issues of fact and law.

4. Conclusion

Both Plaintiffs' claims for excessive force pursuant to Section 1983 arise out of the same use of force by the same Defendant Officers. As such, common issues of fact and law will predominate across both Plaintiffs' excessive force claims. Further, because the legal standard for excessive force overlaps with the standard for state-law claims for assault, battery, and negligence, all of the claims will share the same factual and legal predicate, i.e., the reasonableness of the Officers' discharge of their weapons. Finally, both Plaintiffs' *Monell* claims will require Plaintiffs to establish that the Officers' conduct was unreasonable and therefore unconstitutional. As such, each Plaintiff's claim for excessive force, *Monell* liability pursuant to Section 1983, and state-law claims for assault, battery, and negligence share common issues of fact and law. The threshold requirement for consolidation, therefore, is met. The Court next balances the interests of efficiency and fairness against the risks of prejudice and delay.

B. Considerations of Efficiency and Fairness

In determining whether consolidation is warranted, courts "weigh the interests of judicial convenience against the potential for delay, confusion and prejudice." *S.W. Marine, Inc.*, 720 F. Supp. at 807. Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial. *Johnson v. Celotex Corp*., 899 F.2d 1281, 1284 (2d Cir. 1990). The factors weighed include the risk of (1) prejudice and confusion; (2) inconsistent adjudications of common factual and legal issues; (3) burden on the parties, witnesses, and available judicial resources; and (4) delay and expense. *Id.*

1. There is Risk of Inconsistent Judgments Absent Consolidation

The Court agrees with Defendants that there is a risk of inconsistent judgments if the cases proceed with dispositive motions or trials in an uncoordinated manner. If one case proceeds to dispositive motion or trial more quickly, this may lead to inconsistent results that are not justified by the overlapping facts and applicable law involved in the cases. Additonally, because Plaintiffs are represented by different counsel, they may pursue different strategies that may result in different outcomes. To alleviate the risk of inconsistent judgments or any collateral estoppel effect of a dispositive decision in either case, consolidation of the cases is appropriate.

2. There is No Risk of Delay

Both actions were filed in January 2013, and they are in the same procedural posture, i.e., Defendants have answered the complaint filed in each case, the Court has set a deadline for the parties to make initial disclosures, and no other discovery has yet been opened. Thus, consolidation will not cause delay in either case. *See Antoninetti v. Chipotle Mexican Grill, Inc.*, Nos. 05-cv-1660-J (WMc), 06-cv-2671-J (WMc), 2007 WL 2669531, at *2 (S.D. Cal. Sept. 7, 2007) ("Federal courts have declined to consolidate cases involving common questions of law or fact where the cases were at different stages of preparedness for trial and where consolidation would delay the case ready of disposition." (quoting *Servants of the Paraclete, Inc. v. Great Am. Ins. Co.*, 886 F. Supp. 1560, 1572 (D.N.M. 1994))).

3. Risk of Prejudice or Confusion

Defendants contend that consolidation will not result in jury confusion or prejudice to any party; rather, consolidation will prevent prejudice to all parties in the form of potentially inconsistent rulings or the application of res judicata or collateral estoppel. Plaintiffs have not asserted that they will be prejudiced by consolidated litigation and trial. Although Plaintiff Kong Xiong states claims under the Unruh Act that are not alleged by Plaintiff Luh Xiong, at this stage it does not appear that there will be a substantial risk of jury confusion with respect to Kong Xiong's additional claims. Further, as it pertains to the claims of each Plaintiff, any risk of confusion can be ameliorated by properly structuring the presentation of trial evidence and instructing the jury. *See Dusky v. Bellasaire Invs.*, No. SACV 07-393-DOC, 2007 WL 4403985, at * 5 (C.D. Cal. 2007) (potential for jury confusion in consolidated matters can be alleviated by "properly structuring argument and instructing the jury"). Additionally, if a risk of unfairness or prejudice becomes apparent during the course of discovery on a more complete record, either party may seek to bifurcate issues that are not common to each case or request separate trials. Fed. R. Civ. P. 42(b).

4. Potential Burden on Parties, Witnesses, and Judicial Resources

Defendants contend that the same documentary evidence applies to both actions, and the same witnesses have knowledge of the events. Defendants maintain that consolidating the actions for all purposes, including trial, will significantly reduce the burden on the parties and the witnesses, while promoting judicial efficiency and economy. Neither Plaintiff takes issue with Defendants' assertions.

The Court finds that coordinated pretrial proceedings will allow the parties to propound and respond to fewer discovery requests and conduct fewer depositions, and permit the parties to coordinate their motions to eliminate unnecessary and duplicative arguments. This should preserve the parties' resources and result in less expense to both sides. For purposes of trial consolidation, based upon the allegations in the two complaints, it appears there will be significant overlap in terms of the evidence and witnesses. As Plaintiffs have not asserted how they will be prejudiced by a consolidated trial, trial consolidation is appropriate.

C. Conclusion

Defendants have met their burden of establishing that both cases involve common questions of law and fact, and consolidation is appropriate. Moreover, consolidation does not pose a significant risk of delay, jury confusion, or prejudice to either party. As such, Defendants' motion to consolidate is GRANTED. Upon consolidation, the higher numbered case (*Luh Xiong*, 1:13-cv-00111-SKO) will be closed and consolidated with the lower numbered case (*Kong Xiong*, 1:13-cv-00083-SKO).

D. A Further Scheduling Conference is Set for October 17, 2013, at 10:00 a.m.

A scheduling conference is set in these consolidated cases for October 17, 2013, at 10:00 a.m. in Courtroom 7. Telephonic appearances are approved and encouraged. The parties shall prepare and file a joint scheduling report that encompasses both actions on or before October 10, 2013. In their report, beyond the other required content, the parties shall address the logistical issue of filing any motions for summary judgment. As some of Plaintiffs' claims differ and Plaintiffs have separate counsel, Plaintiffs will be permitted to file separately or to oppose separately, any motion for summary judgment and Defendants will be permitted to file jointly against both Plaintiffs or oppose jointly against both Plaintiffs any motion for summary judgment.

The Court anticipates that if Plaintiffs' theories of the cases diverge, Defendants will be required to address Plaintiffs' motions or oppositions in separate sections of their brief. If this logistical procedure is implemented, the parties would be required to coordinate the timing of their motions and/or oppositions. Moreover, the parties would be required to meet and confer to create one joint statement of undisputed facts as a precursor to any summary judgment motion filed. The Court will entertain alternative suggestions of the parties and their counsel at the scheduling conference regarding the mechanics of filing any dispositive motions, and thus this issue should be addressed in the parties' joint scheduling report.

IV. CONCLUSION AND ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. Defendants' motion to consolidate is GRANTED;
2. The Clerk of Court is DIRECTED to consolidate these cases, closing case number

1:13-cv-00111-SKO:

3. All further filings with respect to either case shall be made in Case Number 1:13-cv-00083-SKO; and

4. A scheduling conference is set for October 17, 2013, at 10:00 a.m. in Courtroom 7.

IT IS SO ORDERED.

Dated: **October 1, 2013**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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

ALEX GONZALES, Sr. and **ELIZABETH HERRERA,**	§	
Plaintiffs.	§	
v.	§	
THE CITY OF AUSTIN, LUIS SERRATO, AND GABRIEL GUTIERREZ,	§	**Case Nos. 22-CV-655, 23-CV-9-RP**
Defendants.	§	
Hendler Flores Law, PLLC, Intervenor.	§	

HENDLER FLORES LAW, PLLC'S
MOTION FOR LEAVE TO INTERVENE AS OF RIGHT
AND BRIEF IN SUPPORT

Hendler Flores Law, PLLC (HFL or Intervenor), a professional limited liability company with its principal place of business in Travis County, Texas, files this Motion for Leave to Intervene as of Right and Brief in Support, in accordance with Federal Rule of Civil Procedure 24(a)(2).

A. INTRODUCTION

Plaintiffs, referred to as Respondents, are Alex Gonzales, Sr., Individually and as Next Friend to minor child Z.A.G., and Elizabeth Herrera (aka Elizabeth Gonzales) Individually and as Next Friend to minor child Z.A.G. Defendants are the City of Austin, Officer Luis Serrato, and Officer Gabriel Guttierez.

B. FACTS

On January 7, 2020, Respondents retained HFL as memorialized by a signed, written Attorney Retainer Agreement (Retainer Agreement) employing HFL to represent them in connection with the instant litigation. (Ex. A, Decl. of Scott M. Hendler, at ¶2).

The Retainer Agreement includes the basis for the charging of legal fees as a

contingent percentage of any monetary recovery in the litigation by settlement, judgment, or otherwise. It further provides that the plaintiffs agreed to an attorneys' fee of 40% of any settlement, verdict, or recovery obtained in the matter to compensate HFL for its legal services in the case. The Retainer agreement also set forth that HFL would recover the expenses it advanced on the Respondents' behalf from the Respondents' net amount of any monetary settlement, verdict, or recovery, after the deduction of the 40% attorney's fee.

The Retainer Agreement also provides that HFL has a lien and that if Respondents terminated HFL without cause, HFL would continue to have a claim for its full percentage contingent attorneys' fee of 40% of the gross recovery as well as its expenses incurred up to the time of termination. The Retainer Agreement states that if Respondents were to terminate HFL without cause and later obtain a recovery, the full percentage of the contingent fee would remain due, in addition to expenses incurred prior to the date of termination.

While representing Respondents, HFL investigated, researched, and filed two separate lawsuits on behalf of the Respondents; served and responded to written discovery; noticed and conducted depositions of two witnesses; ordered medical records; HFL facilitated a private autopsy; consulted experts and retained one expert on the subject of police excessive force; and reviewed thousands of pages of records and hours of video. (Ex. A at ¶8). HFL also incurred several significant expenses for Respondents' benefit, including assisting the family with ancillary matters including probate, memorials, grief support and management, and family law, among other services. *Id.* Those expenses are, at a minimum, $65,136.95. Respondents have not repaid these expenses. (Ex. A at ¶12).

On March 24, 2023, without any notice whatsoever, HFL received a letter from the Marconi Firm informing HFL that Respondents intended to discharge HFL effective April 7, 2023, and transfer their representation to Mr. Puckett and his new employer, the Devlin Law Firm LLC. Respondents discharge of HFL was without cause. (Ex. A at ¶11). HFL subsequently withdrew and transferred the file to the Devlin Law Firm on April 24, 2023,

and this Court granted HFL's motion to withdraw on May 2, 2023.

C. ARGUMENT AND AUTHORITIES

HFL has a right to intervene in accordance with FRCP 24(a)(2):

> **Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
>
> . . .
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Fifth Circuit breaks down Rule 24(a) into four requirements. To be entitled to intervene as of right, HFL must demonstrate that it: (1) it timely applied; (2) it has an interest relating to the property or transaction that is the subject of the case; (3) disposition of the case may practically impair or impede its ability to protect its interest; and (4) it is inadequately represented by the existing parties. *Adam Joseph Res. v. CNA Metals Ltd.*, 919 F.3d 856, 865 (5th Cir. 2019).

Intervenor timely files this motion 35 days after the April 7, 2023 termination of its representation of Respondents and one day after this Court granted Intervenor's motion to withdraw from the matter in accordance with Respondents' request.

Intervenor's interest arises from a contingent fee contract with Intervenor Respondent signed providing for a fee equal to forty percent of any monetary recovery Respondents obtained in this litigation. In Texas, when a client employs an attorney on a contingent-fee basis and then discharges the attorney without cause before the attorney completes the representation, the attorney may sue to enforce the contract and recover the amount of the contracted compensation from any monetary damages that the client subsequently recovers. *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561 (Tex. 2006) (citing *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969)). The ability of an attorney discharged without cause to recover for the services he rendered dates back at least as far as 1855. *Myers v.*

Crockett, 14 Tex. 257 (1855). Respondents discharged HFL without notice and without good cause.

Disposition of the case through a negotiated agreement will almost certainly involve payment of money damages to Respondents. In that event, it will become exponentially difficult if not impossible for Intervenor to recover its fee. This is because the funds could be put out of reach through a structed settlement—a type of annuity for personal injury plaintiffs only—that will pay Respondents over a long period of time; alternatively, Respondents, may spend the funds and deplete them before Intervenor can recover its interest, or Respondents may otherwise dispose of the funds before Intervenor could obtain its monetary interest through legal action.

Respondents have no incentive to protect HFL's interest in any monetary recovery they obtain in this matter because it will likely reduce their net recovery. That is because Respondents have hired replacement counsel who they purport to compensate through a percentage of any monetary recovery they obtain through the litigation. Similarly, none of the Defendants have any incentive to protect HFL's contingent fee interest. In fact, if the matter is resolved through a negotiated agreement either before or after a verdict, it is standard practice for a Defendant to require a Plaintiff (Respondents in this case) to assume all responsibility for any party claiming an interest in the settlement funds. As such, Defendants have no incentive to protect HFL's interests and Respondents interests now conflict with HFL's because payment of HFL's fee risks reducing Respondents recovery on top of the fee that Respondents have agreed to pay its replacement counsel.

The Fifth Circuit has repeatedly recognized that "a law firm that has been discharged by its client must be allowed to intervene as of right in a suit to protect its contingent fee interest in any recovery by its former client." *Adam Joseph Res.,* 919 F.3d at 866 (recognizing the holding of *Gaines v. Dixie Carriers, Inc.* 434 F.2d 52 (5th Cir. 1970)). In *Gaines v. Dixie Carriers, Inc.,* Mr. Gaines signed a contingent fee contract with a law firm and discharged the firm without cause after the firm "allegedly spent considerable time working on" his

claim. *Id.* at 53. While the litigation was pending, the firm filed a motion to intervene in the underlying action to protect its contingent fee interest in any potential recovery. Addressing the Rule 24(a) requirements for intervention as of right, the court held that the discharged firm claimed an interest in the action, the firm was so situated that the final disposition of the action may as a practical matter impair or impede the firm's ability to protect that interest, and neither of the existing parties was "concerned with protecting the appellant's interest." *Id.* at 54.

From *Gaines* forward, the Fifth Circuit has consistently held that a contingent attorney's fee suffices as an "interest relating to the property or transaction that is the subject of the action" and that a law firm discharged without cause after performing work for the client "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." *Adam Joseph Res.,* 919 F.3d at 866-67. *Gaines* and cases following it also recognize that after an attorney has been discharged without cause, the parties to the underlying case will not concern themselves with protecting the former attorney's interest. *Id.* at 868.

Here, under *Gaines* and its progeny, HFL has an interest in the property or transaction that is the subject matter of this action. HFL represented Respondents in this matter from January 7, 2020, to April 7, 2023, over three years. HFL earned its negotiated fee interest in the case. And Respondents should repay HFL's expenses per the terms of the Retainer Agreement, should they recover in the case that HFL brought for them.

In accordance with Rule 24(a) of the Federal Rules of Civil Procedure, Intervenor HFL moves for leave to intervene as of right as a party with an interest in the property or transaction made the subject of this action. Intervenor attaches as Exhibit B its proposed Plea in Intervention by Hendler Flores Law, LLP (Complaint) and seeks leave of Court to file the Complaint.

D. CONCLUSION

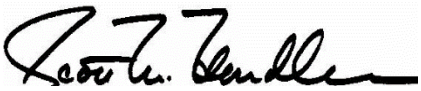
WHEREFORE, Intervenor HFL asks that the Court grant its Motion for Leave to Intervene, allow it to file its Plea in Intervention, and grant it such other and further relief to

which Intervenor may be entitled at law or in equity.

Dated: May 12, 2023

Respectfully submitted,

HENDLER FLORES LAW, PLLC



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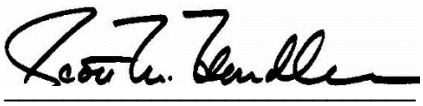
CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Court's CM/ECF system on May 12, 2023.



Scott M. Hendler

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

ALEX GONZALES, Sr. and **ELIZABETH HERRERA**,	§	
Plaintiffs.	§	
v.	§	
CITY OF AUSTIN, LUIS SERRATO, and GABRIEL GUTIERREZ,	§	**Case Nos. 22-CV-655, 23-CV-9-RP**
Defendants.	§	
Hendler Flores Law, PLLC, **Intervenor.**	§	

DECLARATION OF SCOTT M. HENDLER

I, SCOTT M. HENDLER, do declare upon personal knowledge and under penalty of perjury in the State of Texas, that I am an attorney duly licensed to practice law in the State of Texas, and that the following is true and correct:

1. I am the Chief Executive Officer and firm principal of Hendler Flores Law, PLLC (HFL), with offices at 901 S. MoPac Expressway, Bldg. 1, Suite #300, Austin, Texas 78746.

2. On January 7, 2020, Alex Gonzales, Sr, and Elizabeth Herrera (aka Elizabeth Gonzales (collectively, Respondents), signed a written Attorney Retainer Agreement (Retainer Agreement) with HFL employing HFL to represent them and provide legal services in connection with the death of their son, Alex Gonzales, Jr.

3. The Retainer Agreement set forth the basis for the payment of legal fees as a contingent percentage of any recovery obtained in the litigation by settlement, judgment, or otherwise as follows, "I agree to pay [HFL] an attorneys' fee of 40% of any settlement, verdict, or recovery obtained in the matter for which [Respondents] retained [HFL] for their legal services performed during investigation, pretrial, and trial proceedings related to the claim[s] [for the death of their son, Alex Gonzales, Jr.]."

4. The Retainer agreement also provided that HFL would recover expenses as

follows, "I understand that attorneys' fees will be calculated based on the gross amount of settlement, verdict or recovery, and the expenses which have been advanced will be deducted from the net proceeds payable to the Client after deduction of the attorneys' fees."

5. The Retainer Agreement further granted HFL a lien:

In recognition of [HFL]'S interest in the proceeds of this legal matter, and to secure payment to [HFL] of all expenses, court costs, and attorney's fees Client is obligated to pay under this retainer agreement, Client hereby grants to [HFL] a charging lien immediately applicable to this matter and any and all recoveries on his/her claims or causes of action, whether by settlement, collection of a judgment, or otherwise. Client understands that this charging lien may be used to protect [HFL]'S fee and right to reasonable compensation for work done in the event Client discharges [HFL] without cause.

6. With respect to termination, the Retainer Agreement reads:

Should Client elect to terminate [HFL]'S representation without sufficient legal cause prior to the full conclusion of [HFL]'S services under this contract, Client understands and agrees that [HFL] has a claim for all expenses of litigation incurred up to that time and its full percentage contingent attorneys' fee of 40% of the recovery which will become due upon receipt by me or by any successor attorney of any proceeds for any remaining portion of my personal injury or wrongful death claim. In the event of such termination, **Client agrees that Texas law will apply to the rights of the parties to this agreement.** Texas law provides that unless [HFL] is terminated "for cause" as that term is understood under Texas law, [HFL] will retain its full contingent fee interest in this matter unless the parties agree otherwise.

7. While representing Respondents, HFL has investigated the facts surrounding the shooting death of Alex Gonzales, Jr.; HFL conducted legal research related to the law applicable to the death of Alex Gonzales, Jr.; HFL engaged probate counsel and advanced the costs of such counsel and his expenses to open probate for the estate of Alex Gonzales, Jr.; HFL filed two separate lawsuits on behalf of Respondents for damages from the death of Alex Gonzales, Jr.; HFL represented Respondents in family law proceedings regarding the welfare of their grandchild Z.A.G.; HFL drafted, served, and responded to written discovery to the City of Austin; HFL noticed and conducted three depositions of the officers involved in Alex Gonzales's shooting; HFL ordered, paid for , and obtained medical records; HFL paid for and facilitated a private autopsy of Alex Gonzales, Jr.,; HFL, consulted experts and retained one expert on the subject of the use of force by police and

police tactical conduct; and HFL assisted the family with ancillary matters including probate, memorials, grief support and management, and family law matters, and assisting with procuring reliable transportation for Elizabeth Herrera to attend work and school, among other services.

8. On March 24, 2023, HFL received a letter from Michael Marconi from the Marconi Firm—claiming to represent the Respondents. Mr. Marconi's letter stated that Respondents intended to terminate HFL's representation but requested that HFL's representation continue until April 7, 2023. The Marconi letter requested that HFL transfer the Gonzales case file to Mr. Puckett's new employer, the Devlin Law Firm LLC. A true and correct copy of the letter received on March 24, 2023, is attached hereto as Exhibit A. Respondents discharge of HFL was without cause under Texas law.

9. HFL continues to compile expenses incurred on Respondents' behalf during HFL's representation. HFL's records currently show that HFL has incurred $65,136.95, however, this amount could change HFL accountants identify additional expenses. Respondents have not repaid any of these expenses.

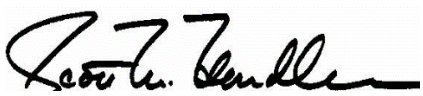
10. By this intervention, HFL seeks to protect its interest in its contingent fee from any recovery Respondents obtain up to and through final judgment in this matter, as well as its right to reimbursement for all advanced expenses on Respondents' behalf.

11. HFL has an interest in the property that is the subject matter of this action—namely money damages arising from the death of Alex Gonzales, Jr and the expenses HFL incurred on Respondents' behalf.

12. Because HFL no longer counsel of record in this matter, it cannot, as a practical matter, protect this interest without intervention. A settlement will ordinarily be in the form of money paid to Respondents and its replacement counsel of record. Neither will adequately protect HFL's interests without this Court's order that it do so.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: May 12, 2023, in Austin, Texas.



Scott M. Hendler

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

ALEX GONZALES, Sr. and ELIZABETH HERRERA, Plaintiffs. v. **CITY OF AUSTIN, LUIS SERRATO, AND GABRIEL GUTTIERREZ**, Defendants. Hendler Flores Law, PLLC, Intervenor.	§ § § § § § § § § § § § §	**Case Nos. 22-CV-655, 23-CV-9-RP**

PLEA IN INTERVENTION BY HENDLER FLORES LAW, PLLC

Hendler Flores Law, PLLC (HFL or Intervenor) files, pursuant to Federal Rule of Civil Procedure 24(a)(2), this Plea in Intervention complaining of Alex Gonzales, Sr., Individually and as Next Friend to minor child Z.A.G., and Elizabeth Herrera (aka Elizabeth Gonzales) Individually and as Next Friend to minor child Z.A.G. (collectively, Respondents), and for cause of action respectfully show the Court the following:

I.

PARTIES AND SERVICE OF PROCESS

1. Intervenor is a professional limited liability company with its principal place of business in Travis County, Texas.

2. Alex Gonzales, Sr. is a citizen of Texas and a resident of Bastrop County, Texas. Alex Gonzales, Sr. is the father and next of kin of Alex Gonzales, Jr. Alex Gonzales, Sr. may be served with process by serving counsel of record via the Court's CM/ECF system.

3. **Elizabeth Herrera** (aka Elizabeth Gonzales) is a citizen of Texas and a resident of Bastrop County, Texas. Elizabeth Herrera is the mother and next of kin of Alex Gonzales, Jr. Elizabeth Herrera may be served by serving her counsel of record via the Court's CM/ECF system.

4. Minor child **Z.A.G.** is a person under the age of eighteen (18) who is a citizen of Texas and, on information and belief, is a resident of Travis County, Texas. This action is brought on behalf of Z.A.G. by Alex Gonzales, Sr. and Elizabeth Herrera as "Next Friends." Z.A.G. may be served with process through service on counsel for Alex Gonzales, Sr. and Elizabeth Herrera as well as on counsel for **Z.A.G.'s** custodial parent's attorney, Jeff Edwards, The Edwards Law Firm, 603 West 17th Street, Austin, Texas 78701.

II.

FACTS

On January 7, 2020, Respondents signed a written Attorney Retainer Agreement (Retainer Agreement) employing HFL to provide legal services to them in connection with the above-referenced litigation. (Ex. A, Decl. of Scott M. Hendler, fully incorporated here by reference, at ¶2).

The Retainer Agreement includes the basis for the charging of legal fees as a contingent percentage of any monetary recovery in the litigation by settlement, judgment, or otherwise. It further provides that the plaintiffs agreed to an attorneys' fee of 40% of any settlement, verdict, or recovery obtained in the matter to compensate HFL for its legal services in the case. The Retainer agreement also set forth that HFL would recover the expenses it advanced on the Respondents' behalf from the Respondents' net amount of any

monetary settlement, verdict, or recovery, after the deduction of the 40% attorney's fee.

The Retainer Agreement also provides that HFL has a lien and that if Respondents terminated HFL without cause, HFL would continue to have a claim for its full percentage contingent attorneys' fee of 40% of the gross recovery as well as its expenses incurred up to the time of termination. The Retainer Agreement states that if Respondents were to terminate HFL without cause and later obtain a recovery, the full percentage of the contingent fee would remain due, in addition to expenses incurred prior to the date of termination.

While representing Respondents, HFL investigated, researched, and filed two separate lawsuits on behalf of the Respondents; served and responded to written discovery; noticed and conducted depositions of two witnesses; ordered medical records; HFL facilitated a private autopsy; consulted experts and retained one expert on the subject of police excessive force; and reviewed thousands of pages of records and hours of video. (Ex. A at ¶8). HFL also incurred several significant expenses for Respondents' benefit, including assisting the family with ancillary matters including probate, memorials, grief support and management, and family law, among other services. *Id.* Those expenses are, at a minimum, $65,136.95. Respondents have not repaid these expenses. (Ex. A at ¶12).

On March 24, 2023, without any notice whatsoever, HFL received a letter from the Marconi Firm informing HFL that Respondents intended to discharge HFL effective April 7, 2023, and transfer their representation to Mr. Puckett and his new employer, the Devlin Law Firm LLC. Respondents discharge of HFL was without cause. (Ex. A at ¶11). HFL subsequently withdrew and transferred the file to the Devlin Law Firm on April 24, 2023, and this Court

granted HFL's motion to withdraw on May 2, 2023.

III.

CLAIM

Intervenor has an interest in the property or transaction that is the subject matter of this action, in that it served as counsel for Respondents from January 7, 2020 to April 7, 2023, and is entitled to payment for its services. *See Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561 (Tex. 2006) (citing *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969)) (an attorney discharged without cause may recover for the services he rendered). Intervenor is similarly entitled to its contingent fee per the terms of the Retainer Agreement. Intervenor is so situated that disposition of this action in its absence may, as a practical matter, impair or impede its ability to protect that interest. Intervenor's interests are not adequately represented by the existing parties since Respondents have discharged Intervenor without cause and the underlying parties will not concern themselves with protecting Intervenor's interest. HFL is entitled to 40% of any judgment or settlement and reimbursement for expenses.

IV.

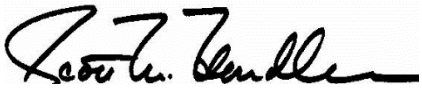
PRAYER

WHEREFORE, Intervenor requests citation and service be made as requested and that the Court award directly to Intervenor the expenses it has advanced and its share of any settlement to be paid by Defendants or judgment awarded against Defendants, in addition to such other and further relief to which Intervenor may be entitled at law or in equity.

Dated: May 12, 2023

Respectfully submitted,

HENDLER FLORES LAW, PLLC



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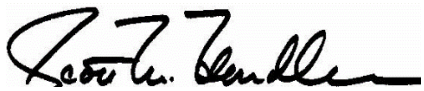
Facsimile: (512) 439-3201

CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Court's CM/ECF system on May 12, 2023.



Scott M. Hendler

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

ALEX GONZALES, SR., Individually and as "Next Friend" to minor child Z.A.G. and **ELIZABETH HERRERA** (aka Elizabeth Gonzales), Individually and as "Next Friend" to minor child Z.A.G.,	§	
Plaintiffs,	§	**Case No. 1:22-cv-00655-RP**
v.	§	**JURY TRIAL REQUESTED**
CITY OF AUSTIN,	§	
Defendant.	§	

ALEX GONZALES, SR., Individually and as "Next Friend" to minor child Z.A.G. and **ELIZABETH HERRERA** (aka Elizabeth Gonzales), Individually and as "Next Friend" to minor child Z.A.G.,	§	
Plaintiffs,	§	**Case No. 1:23-cv-00009-RP**
v.	§	**JURY TRIAL REQUESTED**
LUIS SERRATO, and **GABRIEL GUTIERREZ**,	§	
Defendants.	§	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO CONSOLIDATE

Plaintiff Alex Gonzales, Sr. and Plaintiff Elizabeth Herrera (collectively "Plaintiffs") file this Opposition to Defendants' joint motion to consolidate.[1] While Plaintiffs acknowledge that the similar factual issues ***may ultimately*** make this case amenable to consolidation for trial, (1) any such consolidation is premature at this time when no party has obtained testimony from the primary fact witnesses shedding light on the events in question; (2) Defendants' motion fails to address the procedural complications of consolidating these cases for ***pretrial*** purposes; and (3) the record developed to date may make it difficult to consolidate these cases for trial.

Defendants' motion puts the cart before the horse. Rather than asking the Court to make a speculative determination about the ultimate suitability of case consolidation for all purposes under Fed. R. Civ. P. 42(a)(2), the parties should instead meet and confer to develop a workable discovery plan to facilitate efficient pretrial discovery. At an appropriate time, after the facts have developed, the Court should consider whether to consolidate the actions in their entirety (under Fed. R. Civ. P. 42(a)(2)) or for hearing and trial (under Fed. R. Civ. P. 41(a)(1)).

Contrary to Defendants' representations, Plaintiffs are not opposed to consolidation; just the premature consolidation for all purposes Defendants seek. In fact, it was ***Plaintiffs*** who first broached consolidation with Defendants on March 29, raised the possibility again on a March 30 meet-and-confer call, and have since ***repeatedly*** sought to confer with Defendants (and Ms. Arellano) regarding consolidation for discovery. Plaintiffs proposed consolidation of these cases for ***pretrial discovery*** purposes if the parties can agree on the discovery limitations and discovery procedures that will apply. Plaintiffs agree with Defendants that "no consolidation at all" will squander party and judicial resources. But counsel for defendants have refused to even ***discuss***

[1] Defendants' joint motion ("Def. Mot.") with accompanying Exhibits 1-6 ("Def. Ex. [*n*]") was filed as Dkt. 36 in Case No. 1:22-cv-655-RP (the "-655 case"), Dkt. 13 in Case No. 1:23-cv-8-RP (the "-008 case"), and Dkt. 24 in Case No. 1:23-cv-9-RP (the "-009 case").

agreement on discovery limitations without a prior agreement on consolidation for trial. As discussed below, such a premature consolidation for trial raises more issues than it resolves.

I. BACKGROUND AND PROCEDURAL HISTORY

As alleged in the complaints for each of the three lawsuits, Alex Jr., Jessica, and baby Z.A.G. were riding together in Alex, Jr.'s vehicle when they first encountered APD Officer Gabrielle Gutierrez—an out-of-uniform and off-duty police officer driving a private car.[2] It appears largely undisputed that when Alex, Jr. pulled his car up next to Gutierrez's car, Gutierrez fired at least six gunshots into Alex's car in the space of two seconds, shooting Alex, Jr. at least once in the head and shooting Jessica at least three times in the arm, chest, and back.[3] No one ever returned fire at Gutierrez.[4] Gutierrez then placed a 911 call which resulted in additional on-duty APD officers, including Defendant Serrato, responding to the scene.[5] Rather than stopping to render aid to the injured and disoriented Alex, Jr. (who was checking on his infant son's welfare while keeping his hands visible and remaining upright with aid of his car), or aiding Ms. Arellano (who was on the ground crying for her baby), Serrato unjustifiably fired approximately 10 shots into an unarmed Alex, Jr., killing him.[6] All of this transpired while baby Z.A.G. was secured in a child safety seat located in the rear seat of Alex, Jr.'s car.[7]

Plaintiffs brought the -655 case on July 6, 2022.[8] The -655 case asserts a state law cause

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[2] *See* -655 case, Dkt. 26 at ¶¶11-12; -009 case, Dkt. 12 at ¶¶12-13; -008 case, Dkt. 1 at ¶¶10-13.
[3] *See* -655 case, Dkt. 26 at ¶13; -009 case, Dkt. 12 at ¶¶19, 24; -008 case, Dkt. 1 at ¶¶14-18. *See also*, Def. Ex. 1 at 0:24-25.
[4] *See* -655 case, Dkt. 26 at ¶¶14-16; -009 case, Dkt. 12 at ¶26; -008 case, Dkt. 1 at ¶¶26-27.
[5] *See* -655 case, Dkt. 26 at ¶¶17-26; -009 case, Dkt. 12 at ¶¶34-54; -008 case, Dkt. 1 at ¶¶32-48. *See also*, Def. Ex. 2.
[6] *See* -655 case, Dkt. 26 at ¶¶35-39; -009 case, Dkt. 12 at ¶¶71-74; -008 case, Dkt. 1 at ¶¶68-69. *See also*, Def. Ex. 3.
[7] *See* -655 case, Dkt. 26 at ¶11, ¶24, ¶33, ¶35; -009 case, Dkt. 12 at ¶12, ¶15, ¶22, ¶31, ¶34, ¶36, ¶66, ¶68, ¶¶71-71, ¶74; -008 case, Dkt. 1 at ¶10, ¶¶43-45, ¶57, ¶¶66-69.
[8] *See* -655 case, Dkt. 1.

of action for wrongful death ***against the City of Austin only*** under Texas Civil Practice and Remedies Code §§71.002(b), 71.004(b) and a federal cause of action under 42 U.S.C. §§1983, 1988 on behalf of Plaintiff Alex Gonzales, Sr. (in his individual capacity), Plaintiff Elizabeth Gonzales (in her individual capacity), and each as next friend and on behalf of baby Z.A.G.[9]

Plaintiffs brought the -009 case on January 3, 2023.[10] The -009 case asserts a state law cause of action for wrongful death ***against Luis Serrato and Gabriel Gutierrez only*** under Texas Civil Practice and Remedies Code §§71.002(b), 71.004(b) and a federal cause of action under 42 U.S.C. §§1983, 1988 on behalf of Plaintiff Alex Gonzales, Sr. (in his individual capacity), Plaintiff Elizabeth Gonzales (in her individual capacity), and each as next friend of Z.A.G.[11]

The -008 case was likewise filed on January 3, 2023.[12] The -008 case asserts two wholly distinct categories of claims: (1) a ***federal cause of action*** for excessive force under 42 U.S.C. § 1983 on behalf of Ms. Arellano ***against Gutierrez and the City of Austin only*** in her individual capacity, and (2) ***state wrongful death and federal causes of action*** against ***all three Defendants*** on behalf of Z.A.G.[13]

II. LEGAL STANDARD

"District courts enjoy substantial discretion in deciding whether and to what extent to consolidate cases."[14] "A motion to consolidate must meet the threshold requirement of involving

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[9] -655 case, Dkt. 26, ¶¶3-6.
[10] -009 case, Complaint, Dkt. 1.
[11] -655 case, Dkt. 26, ¶¶3-6.
[12] -008 case, Complaint, Dkt. 1.
[13] Though ambiguously worded, Ms. Arellano does not assert an individual claim against Serrato, who at least never shot ***her***. *See* -008 case, Dkt. 1, ¶¶ 127 (alleging Gutierrez "shot Jessica Arellano and Alex Gonzales, Jr. when they posed no danger to anyone"), 129 (alleging Serrato "shot Alex Gonzales, Jr. when he posed no danger to anyone"), 147(g) (seeking punitive damages against Gutierrez only for Mr. Arellano's claim), 148(d) (seeking punitive damages against Gutierrez and Serrato for Z.A.G.'s claim). *See also*, -009 case, Dkt. 17 at 4, fn. 15.
[14] *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018).

'a common question of law or fact. If that threshold requirement is met, then whether to grant the motion becomes an issue of judicial discretion."[15] In contrast, "[c]onsolidation is improper if it would prejudice the rights of the parties."[16]

III. ARGUMENT

Though Defendants have asked the Court to consolidate three separate causes of action involving different Plaintiffs and different (sub)sets of Defendants, they have provided the Court with no guidance on what that consolidation should look like. More, Defendants neglected to inform the Court of the full extent of discovery in the -655 case and the resulting issues that may prevent trying all claims against all parties in a single action. More, while Plaintiffs acknowledge that the claims asserted in the two cases arise from largely ***overlapping facts***, the ***distinct bases of recovery*** make full consolidation for trial a fraught enterprise.

A. The Plaintiffs' Claims and Ms. Arellano's Claims Arise Out of Distinct Facts and Distinct Legal Theories, Posing Minimal Risk of Inconsistent Outcomes

Defendants are simply incorrect to assert that the three cases at issue are the same lawsuit and differ only as to "stylistic presentation of the case" (Def. Mot. at 6). It is true that the same general series of events gives rise to the claims of (1) Alex Gonzales, Sr; Elizabeth Gonzales, and baby Z.A.G., on the one hand, and (2) the claims of Ms. Arellano, on the other hand. But the legal theories of recovery differ completely, and the key relevant facts for each set of claims is at least partially distinct. Consolidation of the three actions for trial is thus ***not necessary*** to avoid

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[15] *Matthews v. Exec. Office for the United States Attys.*, No. 1:20-CV-370-RP-SH, 2020 U.S. Dist. LEXIS 257013, at *4 (W.D. Tex. Sep. 20, 2020) (quoting *Pedigo v. Austin Rumba, Inc.*, No. A-08-CA-803-JRN, 2010 U.S. Dist. LEXIS 78631, 2010 WL 2730463, at *1 (W.D. Tex. June 24, 2010); *In re Settoon Towing LLC*, No. 07-1263, 2008 U.S. Dist. LEXIS 15683, 2008 WL 594556, at *1 (E.D. La. Feb. 28, 2008)).

[16] *St. Bernard Gen. Hosp., Inc. v. Hosp. Serv. Ass'n of New Orleans, Inc.*, 712 F.2d 978, 989 (5th Cir. 1983) (citing *Dupont v. Southern Pacific Co.*, 366 F.2d 193, 195-96 (5th Cir.1966), *cert. denied*, 386 U.S. 958, 87 S. Ct. 1027, 18 L. Ed. 2d 106 (1967)).

inconsistent adjudications of common factual and legal questions, ***nor is it sufficient*** to generate the efficiencies Defendants seek.

As outlined above, and detailed in Plaintiffs' Unopposed Motion for Appointment of a Guardian ad Litem, the claims of Plaintiffs (and Z.A.G.) are fundamentally ***wrongful death*** claims under ***Texas law***. All of these claims are ***derivative*** of the injury and death to Alex, Jr., and all of these claims factually relate to the actions of Defendants Gutierrez ***and*** Serrano.[17]

Ms. Arellano's ***individual*** claims contrast starkly with the claims of Plaintiffs. Ms. Arellano asserts a personal claim under § 1983 based on her own injuries, inflicted by Gutierrez. Ms. Arellano does not assert individual claims against Defendant Serrato because she was not shot by Serrato. Ms. Arellano does not have any individual claim arising from the death of Alex Gonzales, Jr. because she is not a wrongful death beneficiary. The chart below illustrates the causes of action alive in these three cases and where they are asserted.[18]

	Def. City of Austin	**Def. Gutierrez**	**Def. Serrato**
Alex Gonzales, Sr.	Alex, Jr. wrongful death claim under §1983, related to actions of both Gutierrez and Serrato (-655 case)	Alex. Jr. wrongful death claim under §1983 (-009 case)	Alex, Jr. wrongful death claim under §1983 (-009 case)
Elizabeth Herrera	Alex, Jr. wrongful death claim under §1983, related to actions of both Gutierrez and Serrato (-655 case)	Alex, Jr. wrongful death claim under §1983 (-009 case)	Alex, Jr. wrongful death claim under §1983 (-009 case)
Minor Child Z.A.G.	Alex, Jr. wrongful death claim under §1983, related to actions of both Gutierrez and Serrato (-655 case & -008 case)	Alex, Jr. wrongful death claim under §1983 (-009 case & -008 case)	Alex, Jr. wrongful death claim under §1983 (-009 case & -008 case)
Jessica Arellano	Personal claim under §1983, related to actions of Gutierrez only (-008 case)	Personal claim under §1983 (-008 case)	No claim

[17] Plaintiffs' Unopposed Motion for Appointment of a Guardian ad Litem ("GAL Mot.") is filed as Dkt. 30 in the -655 case and Dkt. 17 in the -009 case. *See* GAL Mot. at 1-2, 6-9.
[18] The Estate of Alex Gonzales, Jr. also likely has survival claims against all three parties, but on information and belief no person has yet been appointed Administrator of that Estate.

In other words, the ostensible similarity among these cases results from Z.A.G.'s claims being in the -008 case. If Z.A.G.'s claims are instead resolved in the -655 case and the -009 case, Defendants' complaint (and the need for consolidation) largely disappears. As Ms. Arellano's case involves only her personal claims based on the actions of Gutierrez alone, differing outcomes as between her claims and Plaintiffs' claims would not necessarily be ***inconsistent***.

B. Gutierrez's and Serrato's Depositions in the -655 Case Create a Potential Barrier to Joint Trial of the Actions.

As Defendants acknowledge, in the -655 case:

> Officer Gutierrez sat for a deposition on September 27, 2022. Officer Serrato sat for a deposition on November 1, 2022. Both Officers generally invoked their Fifth Amendment privilege and declined to answer questions touching and concerning this incident due to an ongoing criminal investigation by the Travis County District Attorney. Since that time, a Travis County Grand Jury "no-billed" both Officers in January 2023 for their conduct during this incident.

(Def. Mot. at 4.) But the decision by Gutierrez and Serrato to invoke the Fifth Amendment has significant consequences. For example, unless otherwise prohibited by the Federal Rules of Evidence, an invocation of the Fifth Amendment privilege regarding a relevant question (such as those Defendants characterize as "touching and concerning this incident") is admissible at trial.[19] Not only is such testimony presumptively admissible, but an adverse inference instruction is appropriate where a witness has refused to answer on Fifth Amendment grounds.[20]

In short, Plaintiffs in the -655 case are already armed with strong evidence against the

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[19] *See, e.g., Robert v. Maurice*, No. 18-11632, 2022 U.S. Dist. LEXIS 184768, at *34 (E.D. La. Mar. 11, 2022); *Hassan v. City of Shreveport*, No. 15-2820, 2018 U.S. Dist. LEXIS 102460, at *16 (W.D. La. June 18, 2018) (citing *FDIC v. Fid. & Deposit Co.*, 45 F.3d 969, 977 (5th Cir. 1995)); *Kadlec Med. Ctr. v. Lakeview Anesthesia Assocs.*, No. 04-0997, 2006 U.S. Dist. LEXIS 8723, at *17-19 (E.D. La. Mar. 6, 2006) (citing *Pyles v. Johnson*, 136 F.3d 986, 997 (5th Cir. 1998); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 119 (5th Cir. 1990); *Baxter v. Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976)).

[20] *See, e.g.*, *FDIC v. Fid. & Deposit Co.*, 45 F.3d 969, 977-79 (5th Cir. 1995); *Rad Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 272 (3d Cir. 1986).

City of Austin. Any consolidation that would preclude such evidence from being admitted at trial would therefore substantially prejudice Plaintiffs. And while the admissibility of Gutierrez's and Serrato's depositions in the -655 case against the City of Austin is well-settled, it is not yet established that its admissibility in ***other*** cases is quite as clear.

When deciding whether and how to consolidate cases, "the trial judge should be most cautious not to abuse his judicial discretion and to make sure that the rights of the parties are not prejudiced by the order of consolidation under the facts and circumstances of the particular case. Where prejudice to rights of the parties obviously results from the order of consolidation, the action of the trial judge has been held reversible error."[21]

C. Other Discovery in the -655 Case Creates Additional Issues a Consolidated Proceeding Will Have to Address.

While the admissibility at trial of the -655 case depositions of Gutierrez and Serrato is the ***clearest*** source of potential prejudice to Plaintiffs that can already be identified, it is far from the only source of prejudice to a party that can arise from consolidation of actions where major elements of discovery have taken place. For example, setting aside the ultimate ***admissibility*** of Gutierrez's and Serrato's deposition testimony invoking the Fifth Amendment, these individuals ***have already been deposed*** in the -655 case. If all three cases are consolidated, will these Defendants get another opportunity to offer testimony? If so, the potential to offset the negative effects of their prior testimony may be prejudicial to Plaintiffs. If not, will Ms. Arellano be precluded from taking their depositions? Depriving her of any opportunity to develop the facts of her case by deposing two key fact witnesses would certainly be prejudicial to her.

Additionally, Defendants' joint motion failed to mention that Plaintiffs in the -655 case have already answered all 25 interrogatories permitted by Fed. R. Civ. P. 33(a)(1) propounded by

[21] *Dupont v. S. Pac. Co.*, 366 F.2d 193, 196 (5th Cir. 1966) (collecting authority).

the City of Austin. Will Gutierrez and Serrato get additional interrogatories? Will any party be able to serve interrogatories on Ms. Arellano? Will Ms. Arellano and each of Plaintiffs be permitted to serve 25 individual interrogatories on each Defendant? How will baby Z.A.G. be treated for purposes of discovery? Similarly, there has already been a substantial production of documents in the -655 case. What happens to documents that have already been produced in that case? Are they immediately admissible in the other cases? Each of these questions, and many others, will need to be answered in order for "consolidation" of cases to create efficiencies. Two depositions, 25 interrogatory answers, and 42 weeks into a case is simply too late to push the reset button on discovery without risk of prejudice to at least one party.

D. The Court Should Instead Order the Parties to Meet and Confer

Notwithstanding the issues outlined above, Plaintiffs believe pretrial consolidation could conserve the parties' and Court's resources. But the "'consolidation' of which Rule 42 of the Federal Rules of Civil Procedure speaks is a very malleable concept."[22] Since the original 1813 consolidation statute, courts "understood consolidation . . . as enabling more efficient case management while preserving the distinct identities of the cases and the rights of the separate parties in them."[23] In the spirit of achieving the goals of consolidation without undue risk of prejudice, the Court should deny Defendants' motion and order the parties to confer on a consolidated discovery plan through pretrial proceedings that ***actually creates*** the efficiencies Defendants promise rather than creating uncertainty around whether and how the rights of Plaintiffs and Ms. Arellano will be preserved.

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[22] Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be Part I: Justiciability and Jurisdiction*, 42 UCLA L. Rev. 717, 724 (1995) (footnotes and citations omitted).
[23] *Hall v. Hall*, 138 S. Ct. 1118, 1125 (2018).

Dated: May 17, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2023, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

/s/ *Donald Puckett*
Donald Puckett

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

ALEX GONZALES, SR. and ELIZABETH HERRERA, ***Plaintiffs***,	§	
v.	§	**Case No. 1:22-cv-00655-RP**
CITY OF AUSTIN, ***Defendant***.	§	

JESSICA ARELLANO, individually and as next friend of Z.A., minor child, and wrongful death beneficiary of Alex Gonzales, Jr., ***Plaintiffs***,	§	
v.	§	**Case No. 1:23-cv-8-RP**
THE CITY OF AUSTIN, GABRIEL GUTIERREZ, and LUIS SERRATO, ***Defendants***.	§	

ALEX GONZALES, SR., individually as a wrongful death beneficiary of Alex Gonzales, Jr., and as the Representative of the Estate of Alex Gonzales, Jr., Deceased, and ELIZABETH HERRERA, aka Elizabeth Gonzales, individually as a wrongful death beneficiary of Alex Gonzales, Jr., ***Plaintiffs***,	§	
v.	§	**Case No. 1:23-cv-9-RP**
LUIS SERRATO, GABRIEL GUTIERREZ, and THE CITY OF AUSTIN, ***Defendants***.	§	

DEFENDANTS' JOINT REPLY
IN SUPPORT OF CONSOLIDATION

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants, **Officer Luis Serrato**, **Officer Gabriel Gutierrez**, and the **City of Austin** file this Reply in Support of Consolidation pursuant to Federal Rule of Civil Procedure 42(a)(2) and would respectfully show the Court as follows:

I. ARGUMENTS & AUTHORITIES

A. The Gonzales Plaintiffs' opening arguments against Consolidation ask this Court to "wait and see" if they can develop facts that might save them from submitting to a consolidated trial. This is not the test, and other District Courts have disfavored this strategy.

1. Plaintiffs Gonzales, Sr. and Herrara's (collectively "the Opposed Plaintiffs") response in opposition to these Defendants' Joint Motion to Consolidate accuses the Defense of "putting the cart before the horse."[1] In the opening of their motion, they argue that it is "premature" for the Defense to seek complete consolidation and that this Court should revisit this issue "after the facts have developed."[2] Meantime, the Opposed Plaintiffs would like this Court to Order the Defense to submit to additional conferencing.[3]

2. Translation: the Opposed Plaintiffs cannot articulate meritorious objections to consolidation *based on the underlying facts* at the moment, and instead would like time and more discovery to craft those objections. This is not the standard, and the Defense foresaw this argument in its motion. As previously argued, other Courts have specifically rebuked plaintiffs for attempting this "wait and see" strategy.[4] Tellingly, the Opposed Plaintiffs' motion basically

[1] Pls. Resp. to Joint Mot. to Consolidate, pg. 1, Dkt. # 28 (1:23-cv-0009-RP), Dkt. # 39 (1:22-cv-00655-RP).
[2] *Id*.
[3] *Id*.
[4] *Simon v. Muschell*, No. 1:09-CV-301-JTM, 2010 WL 3946528, at *2 (N.D. Ind. Oct. 4, 2010) (noting with disapproval the plaintiffs' argument that they would "consent to consolidating the cases for discovery but argue[d] that it [was] too early to consolidate the case for all purposes.").

abandons this line of argument, because they never actually articulate *what* facts need to be developed in order to support their nebulous future objections to consolidating these cases for trial.[5]

3. Instead, Plaintiffs switch tactics halfway through their motion and instead spend their ink arguing that these cases should not be consolidated because: (1) the Gonzales Plaintiffs rightfully represent Z.A.'s interests in their lawsuits—655 and 009—and (2) that they will be prejudiced if they have to relinquish the advantage that they gained when Officers Serrato and Gutierrez invoked the Fifth Amendment at their depositions in cause 655 before a Travis County Grand Jury "no-billed" these defendant officers. Both of these arguments are meritless, and actually weigh in favor of consolidation under the relevant factors.[6]

B. Under Texas law, Plaintiff Arellano—as Z.A.'s mother—is the proper Plaintiff to act as Z.A.G.'s Next Friend. The Opposed Plaintiffs concede that all the Wrongful Death beneficiaries need to be in one lawsuit, but their arguments in opposition improperly attempt to strip Next Friend status from Arellano under Texas law.

4. The Opposed Plaintiffs' first substantive argument against consolidation posits—via a chart—that Plaintiff Arellano's lawsuit (008) does not actually completely overlap with their lawsuits. They arrive at this conclusion by noting that Arellano's individual cause of action only properly gives rise to claims against the City of Austin and Officer Gutierrez, as Arellano appears to concede that Officer Serrato never used force against her personally.[7]

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[5] Pls. Resp. to Joint Mot. to Consolidate, pgs. 4 – 8, Dkt. # 28 (1:23-cv-0009-RP), Dkt. # 39 (1:22-cv-00655-RP) (the Argument of Plaintiffs' response motion never articulates what facts need further development).

[6] *Samataro v. Keller Williams Realty, Inc,* No. 1:18-CV-775-RP, 2021 WL 3596303, at *2 (W.D. Tex. Apr. 27, 2021).

[7] This concession is extrapolated by Plaintiff Arellano only seeking punitive damages from Defendant Gutierrez. *See* Pl. Orig. Compl, ¶ **147**, Dkt. # 1 (1:23-cv-00008-RP).

5. Yet Plaintiff Arellano is also *clearly* bringing a lawsuit identical to the Opposed Plaintiffs' in her capacity as "Next Friend" of her minor child Z.A.[8] In fact, the Opposed Plaintiffs' response opposing consolidation seems to recognize *sub silentio* that Z.A.'s claims are identical to their own.[9] However, the Response argues that ***their lawsuits*** are the proper vehicles to resolve Z.A.'s claims against these Defendants, therefore making the need for consolidation "largely disappear[].":[10]

6. To effectuate this litigation strategy the Opposed Plaintiffs replead both of their lawsuits to allege that ***they*** are actually the "Next Friends" of Z.A.[11] They additionally filed a Motion to Appoint a *Guardian Ad Litem* for baby Z.A. in those lawsuits.[12] Puzzlingly, the Opposed Plaintiffs initially conceded in their motion to appoint an *ad litem* that the Texas "one action" rule would require these three cases to be consolidated.[13] But the motion to appoint an *ad litem* subsequently embarks on a rather confusing argument that seems to claim that Arellano's alleged conflicts with Z.A. leaves Z.A. effectively "unrepresented".[14] Beyond being confusing, this argument is simply wrong, and conflates what "Next Friend" status is with what a *guardian ad litem* is and what the *ad litem*'s function is meant to achieve.[15]

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[8] Pl. Orig. Compl, ¶ **148**, Dkt. # 1 (1:23-cv-00008-RP).
[9] Pls. Resp. to Joint Mot. to Consolidate, **pg. 5**, Dkt. # 28 (1:23-cv-0009-RP), Dkt. # 39 (1:22-cv-00655-RP).
[10] Pls. Resp. to Joint Mot. to Consolidate, **pg. 6**, Dkt. # 28 (1:23-cv-0009-RP), Dkt. # 39 (1:22-cv-00655-RP).
[11] Pls. 1st Am. Compl., Dkt. # 12 (1:23-cv-0009-RP) (filed March 30, 2023); *see also* Pls. 1st Am. Compl. Dkt. # 26 (1:22-cv-00655-RP) (filed April 4, 2023).
[12] Pl. Mot. to Appoint *Ad Litem*, Dkt. # 17 (1:23-cv-00009-RP).
[13] *Id*. at pg. 10 (claiming "the requirements of the Texas one action rule likely will require some consolidation of the various wrongful death claims asserted in the -0008, the -009 and the -655 cases.").
[14] *Id*. (claiming "For purposes of Rule 17(c), Z.A.G. would still be unrepresented in a consolidated case…").
[15] *In re KC Greenhouse Patio Apartment, LP*, 445 S.W.3d 168, 172 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

7. Under Texas Family Code § 151.001(a)(7), Plaintiff Arellano—***as Z.A.'s parent***—has "the right to represent [Z.A.] in legal actions and to make other decisions of substantial legal significance concerning [Z.A.]."[16] As a Next Friend, Arellano is present in the -008 suit for Z.A.'s claims in a representative capacity only, but Z.A. remains the real party in interest.[17] In Texas, a "child's sole surviving parent can bring suit on the child's behalf, even though no court order appoints the parent as the sole managing conservator."[18] "This exclusive power granted to parents may not be exercised by a third party absent an appropriate court order."[19]

8. Additionally, the presence of a conflict of interest does not strip a parent of the right to be their child's "Next Friend." As explored at length in *In re KC Greenhouse*, "the rule that grants a [Texas] trial court authority to address conflicts of interests" allows the Court to do so "through the appointment of a guardian ad litem, ***not the replacement of the next friend***."[20] Thus, the Opposed Plaintiffs' arguments must fail to the extent that they are attempting to avoid Consolidation by supplanting Arellano as Z.A.'s Next Friends.

9. Z.A. is not "unrepresented" due to the potential existence of a conflict with Arellano.[21] Generally, in Texas "the guardian ad litem's role is to participate in attempts to settle the case and to advise the court on whether any agreed settlement is in the minor's best interest."[22] If a settlement or a verdict awarding damages is reached in this case, this Court might find it appropriate to appoint a guardian ad litem to ensure that Z.A. is given appropriate compensation.

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[16] *Id*. (citing TEX. FAM. CODE ANN. § 151.001(a)(7)).
[17] *Id*. (citing *Byrd v. Woodruff*, 891 S.W.2d 689, 704 (Tex. App.—Dallas 1994, writ dism'd by agr.).
[18] *Id*. at 173 (cleaned up) (citing *In re Collins*, 242 S.W.3d 837, 847 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding).
[19] *Id.* (referencing *Munoz v. II Jaz Inc.*, 863 S.W.2d 207, 209 (Tex. App.—Houston [14th Dist.] 1993, no writ)).
[20] *Id*. at 172. (emphasis added) (citing *King v. Payne*, Tex. 105, 121 (1956)).
[21] *Id*.
[22] *Id*. (citing TEX. R. CIV. P. 172.4(c)).

Until that time, the Opposed Plaintiffs cannot meritoriously argue that Consolidation is inappropriate because Z.A.'s claims can be "resolved in the -655 case and the -009 case"[23] as they are not Z.A.'s Next Friends by right. Since they admit Z.A.'s claims are identical to their own, consolidation with Z.A.'s Next Friend—Plaintiff Arellano—is eminently appropriate under the relevant factors.

C. The Opposed Plaintiffs' desire to keep these cases separate so they can cling to a Fifth Amendment advantage over the City of Austin is not meritorious under *Davis-Lynch* to preclude consolidation, and this discovery disparity between the cases vastly increases the likelihood of inconsistent adjudications.

10. The Opposed Plaintiffs' second substantive argument in opposition to consolidation is easier to understand. Namely, they would like to keep the tactical advantage they gained when they induced Officer Serrato and Gutierrez to invoke their Fifth Amendment privilege at their non-party depositions in cause -655.[24] Both officers invoked the privilege due to an ongoing investigation by the Travis County District Attorney. Since that time, a Travis County Grand Jury "no-billed" both officers.[25] These officers thus no longer face a potential criminal indictment, and they are likely free to testify fully and openly in their defense of civil liability.

11. Yet the Opposed Plaintiffs claim that they will be prejudiced if this Court consolidates these cases and strips them of their "strong [Fifth Amendment] evidence against the City of Austin."[26] The Opposed Plaintiffs' claims of prejudiced are not well supported in the case law. Under the Fifth Circuit's guidance in *Davis-Lynch* this Court likely would afford Officers

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[23] Pls. Resp. to Joint Mot. to Consolidate, **pg. 6**, Dkt. # 28 (1:23-cv-0009-RP), Dkt. # 39 (1:22-cv-00655-RP).
[24] *Id*.
[25] *No indictments for APD officers in fatal January 2021 shooting of Alex Gonzales*, KVUE (Dec. 27, 2022 6:41 PM), https://www.kvue.com/article/news/local/apd-no-indictments-alex-gonzales-shooting/269-f5017d15-68e7-4638-bc54-93098d6329a7.
[26] Pls. Resp. to Joint Mot. to Consolidate, **pg. 7**, Dkt. # 28 (1:23-cv-0009-RP), Dkt. # 39 (1:22-cv-00655-RP) (claiming "the potential to offset the negative effects of their prior testimony may be prejudicial to Plaintiffs").

Serrato and Gutierrez the opportunity to withdraw their prior Fifth Amendment invocations in cause -655—***even if these cases were not consolidated***.[27]

12. In *Davis-Lynch* the Fifth Circuit held that a District Court abused its discretion when it denied a defendant's attempt to withdraw his assertion of his Fifth Amendment privilege in a civil action.[28] In so holding, the Fifth Circuit explained that the Supreme Court has cautioned that "the Constitution limits the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly'".[29] Accordingly the *Davis-Lynch* court held that:

> "The Court should be especially inclined to permit withdrawal of the privilege if there are no grounds for believing that opposing parties suffered undue prejudice from the litigant's later-regretted decision to invoke the Fifth Amendment…The timing and circumstances under which a litigant withdraws the privilege are relevant factors in considering whether a litigant is attempting to abuse or gain some unfair advantage.

At bottom, the *Davis-Lynch* court held that a party should be able to withdraw their invocation of the Fifth Amendment privilege—even at a late stage in litigation—if the circumstances "indicate that (1) the litigant was not using the privilege in a tactical, abusive manner, and (2) the opposing party would not experience undue prejudice as a result."[30]

13. Here, the undersigned submit that there is no evidence that the officers have abused their Fifth Amendment privileges as they awaited the Grand Jury's decision. Furthermore, as the Opposed Plaintiffs all but concede, they will have to take Officers Serrato and Gutierrez's depositions again in their second lawsuit—cause number 009—because the first deposition is

[27] *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 546 (5th Cir. 2012).
[28] *Id*. (noting "the district court accordingly erred in denying Moreno's attempt to withdraw his assertion of the privilege more than a month before the discovery deadline.").
[29] *Id*. (citing *Spevack v. Klein*, 385 U.S. 511, 515 (1967)).
[30] *Id*. (citing *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 193 (3d Cir. 1994)).

likely not admissible at trial against those officers in a case with different parties under Rule 32(a)(8).[31]

14. Finally, the Opposed Plaintiffs desire to keep the Fifth Amendment discovery advantage they obtained in cause number 655 ironically reveals how likely it is that there will be inconsistent adjudications of common factual or legal questions if these cases are tried separately. Essentially, if case number 655 proceeded unconsolidated, there is a chance that the City of Austin might have faced *Monell* liability upon a finding of an underlying constitutional violation ***solely*** because a jury was permitted to take an adverse inference based on Officer Serrato and Gutierrez's now unnecessary invocation of their Fifth Amendment privileges.[32]

15. Conversely, a subsequent jury in cause number 009 might find that Officer Serrato and Gutierrez committed no constitutional violation based on their open and unfettered testimony. This would ***necessarily*** be an inconsistent adjudication—exactly the type of undesirable event that Consolidation under Rule 42(a)(2) is designed to prevent. Accordingly, the Opposed Plaintiffs' claims of Discovery prejudice are meritless, and actually weigh in favor of consolidation.

D. There is no need for the Court to Order additional conferencing before granting this Joint Motion to Consolidate.

16. The undersigned respectfully submit that the Opposed Plaintiffs' desire for additional Court ordered conferencing is not needed. Contrary to the Opposed Plaintiffs' litany of

[31] The individual officers were never parties to cause number -655; *see* FED. R. CIV. P. 32 (a)(8) (noting a deposition taken in an earlier action may only be used in another action if that deposition involves (1) the same subject matter and (2) is between the same parties or their representatives.).

[32] *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (if a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force [the *Monell claim*] is quite beside the point.") (emphasis original).

hypotheticals, consolidating these cases for the purposes of pretrial discovery should be simple. As stated in the Prayer of the Original Motion, the Joint Defendants believe that the agreed proposed scheduling orders recently submitted in cause numbers -008 and -009 can provide the appropriate framework for the new litigation deadlines in a singular consolidated case.

17. As to the discovery that was exchanged between the Opposed Plaintiffs and the City of Austin in cause number -655—this Court should simply order that Discovery must be reproduced to all Defendants and all Plaintiffs in the newly consolidated case, and that Officers Serrato and Gutierrez may be deposed again. Absent that, the undersigned do not contemplate any other necessary deviations from the standard Rules that normally govern multi-party litigation.

II. PRAYER

18. WHEREFORE PREMISES CONSIDERED, **Defendant Gutierrez**, **Defendant Serrato**, and **Defendant City of Austin** respectfully request that this Court GRANT this Joint Motion to Consolidate, and for all other relief to which these Joint Defendants may be justly entitled in law or equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2023, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail, in accordance with the Federal Rules of Civil Procedure.

/s/ Stephen B. Barron
Stephen B. Barron

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

ALEX GONZALES, SR. and ELIZABETH HERRERA, ***Plaintiffs***,	§	
v.	§	**Case No. 1:22-cv-00655-RP**
CITY OF AUSTIN, ***Defendant***.	§	

JESSICA ARELLANO, individually and as next friend of Z.A., minor child, and wrongful death beneficiary of Alex Gonzales, Jr., ***Plaintiffs***,	§	
v.	§	**Case No. 1:23-cv-8-RP**
THE CITY OF AUSTIN, GABRIEL GUTIERREZ, and LUIS SERRATO, ***Defendants***.	§	

ALEX GONZALES, SR., individually as a wrongful death beneficiary of Alex Gonzales, Jr., and as the Representative of the Estate of Alex Gonzales, Jr., Deceased, and ELIZABETH HERRERA, aka Elizabeth Gonzales, individually as a wrongful death beneficiary of Alex Gonzales, Jr., ***Plaintiffs***,	§	
v.	§	**Case No. 1:23-cv-9-RP**
LUIS SERRATO, GABRIEL GUTIERREZ, and THE CITY OF AUSTIN, ***Defendants***.	§	

JOINT MOTION FOR ENTRY OF
AGREED ORDER REGARDING CONSOLIDATION OF CASES

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Pending in each of the above-styled cases is a joint motion by each of the Defendants to consolidate these three cases for pretrial discovery and trial. The parties have continued to meet and confer regarding the Defendants' joint motion to consolidate. Now, the parties respectfully present the Court with this proposed agreed order that would resolve the parties' current disputes over consolidation of these cases. More specifically, the parties jointly move for an entry of an agreed order that:

1. Consolidates each of the above-styled cases into one case for all purposes;

2. Memorializes an agreement between the parties that this Agreed Order does not waive any parties' right to later move for a separate trial pursuant to FRCP 42(b) or otherwise;

3. Establishes an agreed deadline 3 months prior to the close of discovery for any party to move for separate trials pursuant to FRCP 42(b);

4. Requires that all parties conduct a joint conference, within 14 days following entry of this proposed agreed order, to discuss the topics set forth in FRCP 26(f)(2) and FRCP 26(f)(3) for purposes of the consolidated case; and

5. Requires the parties to file a joint written report of their agreements and disagreements from the joint conference within 21 days following entry of the agreed order.

6. The parties agree that the pending Motions to Consolidate in the above captioned matters may be denied as moot.

Respectfully submitted,

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LAW OFFICES OF ALBERT LÓPEZ

Attorneys for Defendant Gabriel Gutierrez

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June, 2023, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail, in accordance with the Federal Rules of Civil Procedure.

/s/ Stephen B. Barron
Stephen B. Barron

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

ALEX GONZALES, SR. and ELIZABETH HERRERA, ***Plaintiffs***,	§	
v.	§	**Case No. 1:22-cv-00655-RP**
CITY OF AUSTIN, ***Defendant***.	§	

JESSICA ARELLANO, individually and as next friend of Z.A., minor child, and wrongful death beneficiary of Alex Gonzales, Jr., ***Plaintiffs***,	§	
v.	§	**Case No. 1:23-cv-8-RP**
THE CITY OF AUSTIN, GABRIEL GUTIERREZ, and LUIS SERRATO, ***Defendants***.	§	

ALEX GONZALES, SR., individually as a wrongful death beneficiary of Alex Gonzales, Jr., and as the Representative of the Estate of Alex Gonzales, Jr., Deceased, and ELIZABETH HERRERA, aka Elizabeth Gonzales, individually as a wrongful death beneficiary of Alex Gonzales, Jr., ***Plaintiffs***,	§	
v.	§	**Case No. 1:23-cv-9-RP**
LUIS SERRATO, GABRIEL GUTIERREZ, and THE CITY OF AUSTIN, ***Defendants***.	§	

AGREED ORDER TO CONSOLIDATE

CAME ON this day to be considered, Plaintiffs, Alex Gonzales, Sr., Elizabeth Herrera, and Jessica Arellano, with Defendants, Officer Luis Serrato, Officer Gabriel Gutierrez, and the City of Austin's Joint Motion for Entry of Agreed Order Regarding Consolidation of the above captioned cases. After considering said motion the Court is of the opinion that the Motion should be GRANTED.

It is therefore, ORDERED, ADJUDGED AND DECREED that:

1. Each of the above-styled cases are hereby CONSOLIDATED into one case for all purposes;

2. This Agreed Order does not waive any parties' right to later move for a separate trial pursuant to FRCP 42(b) or otherwise;

3. Deadline for any party to move for separate trials pursuant to FRCP 42(b) must be filed 3 months prior to the close of discovery;

4. All parties are required to conduct a joint conference within 14 days following entry of this Agreed Order, to discuss the topics set forth in FRCP 26(f)(2) and FRCP 26(f)(3) for purposes of the consolidated case; and

5. The parties are required to file a joint written report of their agreements and disagreements from the joint conference within 21 days following entry of this Agreed Order.

6. The pending Motions to Consolidate in the above captioned matters is DENIED as MOOT.

SIGNED this _____ day of _____, 2023.

_____
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

AGREED AND ENTRY REQUESTED:

Donald Puckett
Typed or Printed Name

/s/ Donald Puckett
Signature

ATTORNEY FOR PLAINTIFFS
ALEX GONZALES, SR. AND
ELIZABETH HERRERA

H. Gray Laird, III
Typed or Printed Name

/s/ H. Gray Laird III
Signature

ATTORNEY FOR DEFENDANT
CITY OF AUSTIN

Jeff Edwards
Typed or Printed Name

/s/ Jeff Edwards
Signature

ATTORNEY FOR PLAINTIFF
JESSICA ARELLANO

Albert López
Typed or Printed Name

/s/ Albert López
Signature

ATTORNEY FOR DEFENDANT
GABRIEL GUTIERREZ

Stephen B. Barron
Typed or Printed Name

/s/ Stephen B. Barron
Signature

ATTORNEY FOR DEFENDANT
LUIS SERRATO

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

ALEX GONZALES, Sr. and **ELIZABETH HERRERA,**	§	
Plaintiffs.	§	
v.	§	
THE CITY OF AUSTIN, LUIS SERRATO, AND GABRIEL GUTIERREZ,	§	**Case Nos. 22-CV-655, 23-CV-9-RP**
Defendants.	§	
Hendler Flores Law, PLLC, Intervenor.	§	

HENDLER FLORES LAW, PLLC'S
FIRST AMENDED MOTION FOR LEAVE TO INTERVENE AS OF RIGHT
AND BRIEF IN SUPPORT

Hendler Flores Law, PLLC (HFL or Intervenor), a professional limited liability company with its principal place of business in Travis County, Texas, files this First Amended Motion for Leave to Intervene as of Right and Brief in Support, in accordance with Federal Rule of Civil Procedure 24(a)(2).

A. INTRODUCTION

Plaintiffs in this matter are referred to as Respondents, and are Alex Gonzales, Sr., Individually and as Next Friend to minor child Z.A.G., and Elizabeth Herrera (aka Elizabeth Gonzales) Individually and as Next Friend to minor child Z.A.G. Defendants are the City of Austin, Officer Luis Serrato, and Officer Gabriel Gutiérrez. Intervenor files this amended motion for leave to intervene to clarify the basis of its lien in light of correspondence received from Respondents' Counsel demanding withdrawal of the Motion to Intervene on the ground that the motion violates FRCP 11.

B. FACTS

On January 7, 2020, Respondents retained HFL as memorialized by a signed, written Attorney Retainer Agreement (Retainer Agreement) employing HFL to represent them in connection with the instant litigation. (Ex. A, Decl. of Scott M. Hendler, at ¶2).

The Retainer Agreement states the basis for the charging of legal fees as a contingent percentage of any monetary recovery in the litigation by settlement, judgment, or otherwise. (*Id.* ¶3). It provides that the plaintiffs agreed to pay a contingent attorneys' fee of 40% of any settlement, verdict, or recovery obtained in the matter to compensate HFL for its legal services in the case. (*Id.*). The Retainer Agreement also set forth that HFL would recover the expenses it advanced on the Respondents' behalf from the Respondents' net amount of any monetary settlement, verdict, or recovery, after the deduction of the 40% attorney's fee. (*Id.* ¶4).

The Retainer Agreement also provides, and the Respondents agreed, that HFL has a charging lien to secure recovery of its fees and expenses in the matter, and that if Respondents terminated HFL without cause, HFL would continue to have a claim for its full percentage contingent attorneys' fee of 40% of the gross recovery, including its expenses incurred up to the time of termination. (*Id.* ¶5.) The Retainer Agreement states that if Respondents were to terminate HFL without cause and later obtain a recovery, the full percentage of the contingent fee would remain due, in addition to expenses incurred prior to the date of termination from that recovery. (*Id.* ¶6.)

While representing Respondents, HFL investigated, researched, and filed two separate lawsuits on behalf of the Respondents; served and responded to written discovery; noticed and conducted depositions of two witnesses; ordered medical records; HFL facilitated a private autopsy; consulted experts and retained one expert on the subject of police excessive force; and reviewed thousands of pages of records and hours of video. (*Id.* ¶7.). HFL also incurred several significant expenses for Respondents' benefit, including assisting the family with ancillary matters including probate, memorials, grief support and management, and family law, among other

services. *Id.* Those expenses are, at a minimum, $65,136.95. Respondents have not repaid these expenses. (*Id.* ¶9.).

On March 24, 2023, without any notice whatsoever, HFL received a letter from the Marconi Firm informing HFL that Respondents intended to discharge HFL effective April 7, 2023, and transfer their representation to Mr. Puckett and his new employer, the Devlin Law Firm LLC. Respondents discharge of HFL was without cause. (*Id.* ¶8.). HFL subsequently withdrew and transferred the file to the Devlin Law Firm on April 24, 2023, and this Court granted HFL's motion to withdraw on May 2, 2023. (*Id.*).

On May 23, 2022, HFL received correspondence from Respondents' counsel, demanding that HFL withdraw its Motion for Leave to Intervene, accusing HFL of violating FRCP 11 and Texas Disciplinary Rule 1.08(h), and threatening to file a FRCP 11 Motion for Sanctions against HFL. (*Id.* ¶13.).

C. ARGUMENT AND AUTHORITIES

HFL has a right to intervene in accordance with FRCP 24(a)(2):

> **Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
> . . .
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Fifth Circuit breaks down Rule 24(a) into four requirements. To be entitled to intervene as of right, HFL must demonstrate that it: (1) it timely applied; (2) it has an interest relating to the property or transaction that is the subject of the case; (3) disposition of the case may practically impair or impede its ability to protect its interest; and (4) it is inadequately represented by the existing parties. *Adam Joseph Res. v. CNA Metals Ltd.*, 919 F.3d 856, 865 (5th Cir. 2019).

Intervenor timely filed its initial motion for leave to intervene 35 days after the April 7,

2023, termination of its representation of Respondents and one day after this Court granted Intervenor's motion to withdraw from the matter in accordance with Respondents' request. *See* Dkt. 27.

Intervenor's interest in any monetary recovery arises from a written contingent fee contract with Intervenor that Respondents signed, entitling Intervenor to a fee equal to forty percent of any monetary recovery Respondents obtains in this litigation. (Ex. A, ¶¶3-5.) An attorney's right to assert a lien against client property to ensure payment of professional fees has been recognized at common-law since the early eighteenth century. *See, e.g.*, *Everett, Clarke & Benedict v. Alpha Portland Cement Co.*, 225 F. 931, 935 (2d Cir. 1915) (summarizing history of attorney liens); *see also United States v. Betancourt*, 2005 WL 3348908, at *3 (S.D. Tex. Dec. 8, 2005) ("Under Texas law, a contract may establish an attorney's lien for money received in judgment or settlement of a matter." (citing *Thomson v. Findlater Hardware Co.*, 205 S.W.3d 831, 832 (Tex. 1918))). The charging lien that Respondents contractually agreed to in the Retainer Agreement they signed retaining Intervenor applies to the proceeds of a recovery (it does not purport to create a security interest in the underlying case). The contractually agreed to charging lien protects the attorney's fees and expenses from the proceeds of any judgment, decree or other order entered in the former client's favor in the proceeding at issue.

Texas common law establishes charging liens as a way for attorneys to secure recovery of their fees and expenses. *See, e.g.*, *Rotella v. Cutting*, No. 02-10- 00028-CV, 2011 WL 3836456, at *5 (Tex. App.—Fort Worth Aug. 31, 2011, no pet.); *Tarrant Cty. Hosp. Dist. v. Jones*, 664 S.W.2d 191, 196 (Tex. App.—Fort Worth 1984, no pet.). In Texas, when a client employs an attorney on a contingent-fee basis and then discharges the attorney without cause before the attorney completes the representation, the attorney may sue to enforce the contract and recover the amount of the contracted compensation from any monetary damages that the client subsequently recovers. *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561 (Tex. 2006) (citing *Mandell & Wright v.*

Thomas, 441 S.W.2d 841, 847 (Tex. 1969)). The ability of an attorney discharged without cause to recover for the services he rendered dates back at least as far as 1855. *Myers v. Crockett*, 14 Tex. 257 (1855). Respondents discharged HFL without notice and without good cause.

Disposition of the case through a negotiated agreement will almost certainly involve payment of a money recovery to Respondents. In that event, it will become exponentially difficult if not impossible for Intervenor to recover its fee. This is because the funds could be put out of reach through a structed settlement—a type of annuity for personal injury plaintiffs only—that will pay Respondents over a long period of time; alternatively, Respondents may spend the funds and deplete them before Intervenor can recover its fees and expenses from the recovery, or Respondents may otherwise dispose of the funds before Intervenor could obtain its monetary interest through legal action.

Respondents have no incentive to protect HFL's interest in any monetary recovery they obtain in this matter because it will likely reduce their net recovery. That is because Respondents have hired replacement counsel who they purport to compensate through a percentage of any monetary recovery they obtain through the litigation. Similarly, none of the Defendants have any incentive to protect HFL's contingent fee interest in the recovery. In fact, if the matter is resolved through a negotiated agreement either before or after a verdict, it is standard practice for a Defendant to require a plaintiff (Respondents in this case) to assume all responsibility for any party claiming an interest in the settlement funds. As such, Defendants have no incentive to protect HFL's interests in the recovery, and Respondents' interests now conflict with HFL's because payment of HFL's fee risks reducing Respondents' recovery on top of the fee that Respondents have agreed to pay its replacement counsel.

The Fifth Circuit has repeatedly recognized that "a law firm that ha[s] been discharged by its client must be allowed to intervene as of right in a suit to protect its contingent fee interest in any recovery by its former client." *Adam Joseph Res.*, 919 F.3d at 866 (citing *Gaines v. Dixie*

Carriers, Inc., 434 F.2d 52 (5th Cir. 1970)). In *Gaines v. Dixie Carriers, Inc.*, plaintiff signed a contingent fee contract with a law firm whom he later discharged without cause after the firm "spent considerable time working on" his claim. *Id.* at 53. While the underlying litigation was still pending, the law firm filed a motion to intervene to protect its contingent fee interest in any potential recovery. Addressing the Rule 24(a) requirements for intervention as of right, the court held that the discharged firm claimed an interest in the action, the firm was so situated that the final disposition of the action may as a practical matter impair or impede the firm's ability to protect that interest, and neither of the existing parties was "concerned with protecting the [law firm's] interest." *Id.* at 54.

From *Gaines* forward, the Fifth Circuit has consistently held that a contingent attorney's fee suffices as an "interest relating to the property or transaction that is the subject of the action" and that a law firm discharged without cause after performing work for the client "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." *Adam Joseph Res.*, 919 F.3d at 866-67. *Gaines* and the cases following it also recognize that after an attorney has been discharged without cause, the parties to the underlying case will not concern themselves with protecting the former attorney's interest. *Id.* at 868.

Here, under *Gaines* and its progeny, HFL has an interest "relating to the property or transaction that is the subject matter of" this litigation. HFL represented Respondents in this matter from January 7, 2020, to April 7, 2023, over three years. HFL earned its negotiated fee interest in any recovery. The contractual lien does not equate to a security interest in the case, but it does entitle HFL to a lien on any recovery Respondents receive in this litigation. And Respondents should repay HFL's expenses per the terms of the Retainer Agreement, should they recover in the case that HFL brought for them.

In accordance with Rule 24(a) of the Federal Rules of Civil Procedure, Intervenor HFL moves for leave to intervene as of right as a party with an interest in any recovery made the subject of this action. Intervenor attaches as Exhibit B its proposed Plea in Intervention by Hendler Flores

Law, LLP (Complaint) and seeks leave of Court to file the Complaint.

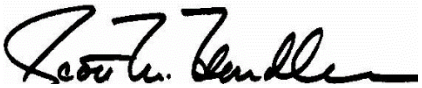
D. CONCLUSION

WHEREFORE, Intervenor HFL asks that the Court grant its Motion for Leave to Intervene, allow it to file its Plea in Intervention, and grant it such other and further relief to which Intervenor may be entitled at law or in equity.

Dated: June 12, 2023

Respectfully submitted,

HENDLER FLORES LAW, PLLC



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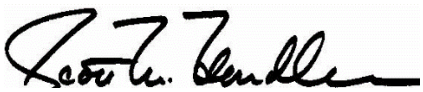
shendler@hendlerlaw.com
901 S. MoPac Expressway
Bldg. 1, Suite #300
Austin, Texas 78746
Telephone: (512) 439-3200
Facsimile: (512) 439-3201

CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Court's CM/ECF system on June 12, 2023.



Scott M. Hendler

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

ALEX GONZALES, Sr. and **ELIZABETH HERRERA**, Plaintiffs. v. **CITY OF AUSTIN, LUIS SERRATO, and GABRIEL GUTIERREZ,** Defendants. **Hendler Flores Law, PLLC,** Intervenor.	§ § § § § § § § § § § § §	**Case Nos. 22-CV-655, 23-CV-9-RP**

FIRST AMENDED DECLARATION OF SCOTT M. HENDLER IN SUPPORT OF INTERVENOR'S FIRST AMENDED MOTION FOR LEAVE TO INTERVENE AND PLEA IN INTERVENTION

I, SCOTT M. HENDLER, do declare upon personal knowledge and under penalty of perjury in the State of Texas, that I am an attorney duly licensed to practice law in the State of Texas, and that the following is true and correct:

1. I am the Chief Executive Officer and firm principal of Hendler Flores Law, PLLC (HFL), with offices at 901 S. MoPac Expressway, Bldg. 1, Suite #300, Austin, Texas 78746.

2. On January 7, 2020, Alex Gonzales, Sr, and Elizabeth Herrera (aka Elizabeth Gonzales (collectively, Respondents), signed a written Attorney Retainer Agreement (Retainer Agreement) with HFL employing HFL to represent them and provide legal services in connection with the death of their son, Alex Gonzales, Jr.

3. The Retainer Agreement set forth the basis for the payment of legal fees as a contingent percentage of any recovery obtained in the litigation by settlement, judgment, or otherwise as follows, "I agree to pay [HFL] an attorneys' fee of 40% of any settlement, verdict, or recovery obtained in the matter for which [Respondents] retained [HFL] for their legal services performed during investigation, pretrial, and trial proceedings related to the claim[s] [for the death of their son, Alex Gonzales, Jr.]."

EXHIBIT A

4. The Retainer agreement also provided that HFL would recover expenses as follows, "I understand that attorneys' fees will be calculated based on the gross amount of settlement, verdict or recovery, and the expenses which have been advanced will be deducted from the net proceeds payable to the Client after deduction of the attorneys' fees."

5. The Retainer Agreement further granted HFL a lien:

> In recognition of [HFL]'S interest in the proceeds of this legal matter, and to secure payment to [HFL] of all expenses, court costs, and attorney's fees Client is obligated to pay under this retainer agreement, Client hereby grants to [HFL] a charging lien immediately applicable to this matter and any and all recoveries on his/her claims or causes of action, whether by settlement, collection of a judgment, or otherwise. Client understands that this charging lien may be used to protect [HFL]'S fee and right to reasonable compensation for work done in the event Client discharges [HFL] without cause.

6. With respect to termination, the Retainer Agreement reads:

> **Should Client elect to terminate [HFL]'S representation without sufficient legal cause prior to the full conclusion of [HFL]'S services under this contract, Client understands and agrees that [HFL] has a claim for all expenses of litigation incurred up to that time and its full percentage contingent attorneys' fee of 40% of the recovery which will become due upon receipt by me or by any successor attorney of any proceeds for any remaining portion of my personal injury or wrongful death claim.** In the event of such termination, **Client agrees that Texas law will apply to the rights of the parties to this agreement.** Texas law provides that unless [HFL] is terminated "for cause" as that term is understood under Texas law, [HFL] will retain its full contingent fee interest in this matter unless the parties agree otherwise.

7. While representing Respondents, HFL has investigated the facts surrounding the shooting death of Alex Gonzales, Jr.; HFL conducted legal research related to the law applicable to the death of Alex Gonzales, Jr.; HFL engaged probate counsel and advanced the costs of such counsel and his expenses to open probate for the estate of Alex Gonzales, Jr.; HFL filed two separate lawsuits on behalf of Respondents for damages from the death of Alex Gonzales, Jr.; HFL represented Respondents in family law proceedings regarding the welfare of their grandchild Z.A.G.; HFL drafted, served, and responded to written discovery to the City of Austin; HFL noticed and conducted three depositions of the officers involved in Alex Gonzales's shooting; HFL ordered, paid for , and obtained medical records; HFL paid for and facilitated a private autopsy of Alex Gonzales, Jr.,; HFL, consulted

experts and retained one expert on the subject of the use of force by police and police tactical conduct; and HFL assisted the family with ancillary matters including probate, memorials, grief support and management, and family law matters, and assisting with procuring reliable transportation for Elizabeth Herrera to attend work and school, among other services.

8. On March 24, 2023, HFL received a letter from Michael Marconi from the Marconi Firm—claiming to represent the Respondents. Mr. Marconi's letter stated that Respondents intended to terminate HFL's representation but requested that HFL's representation continue until April 7, 2023. The Marconi letter requested that HFL transfer the Gonzales case file to Mr. Puckett's new employer, the Devlin Law Firm LLC. A true and correct copy of the letter received on March 24, 2023, is attached hereto as Exhibit A. Respondents discharge of HFL was without cause under Texas law.

9. HFL continues to compile expenses incurred on Respondents' behalf during HFL's representation. HFL's records currently show that HFL has incurred $65,136.95, however, this amount could change as HFL accountants identify additional expenses. Respondents have not repaid any of these expenses.

10. By this intervention, HFL seeks to protect its interest in the proceeds of any recovery Respondents obtain up to and through final judgment in this matter, to ensure payment of its contingent fee as well as its right to reimbursement for all expenses advanced on Respondents' behalf.

11. HFL has an interest in the property that is the subject matter and objective of the assertion of the claim that forms the basis of Respondents' action—namely money damages arising from the death of Alex Gonzales, Jr. and the expenses HFL incurred on Respondents' behalf.

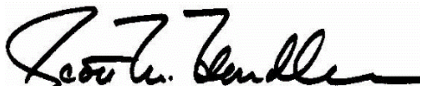
12. Because HFL no longer counsel of record in this matter, it cannot, as a practical matter, protect this interest without intervention. A settlement, verdict, or other recovery will ordinarily be in the form of money paid to Respondents and its replacement counsel of record. Neither will adequately protect HFL's interests without this Court's order that it do so.

13. On May 23, 2022, HFL received correspondence from Respondents' counsel, demanding that HFL withdraw its Motion for Leave to Intervene, accusing HFL of violating FRCP 11 and Texas Disciplinary Rule 1.08(h), and threatening to file a FRCP 11 Motion for Sanctions against HFL.

I declare under penalty of perjury that the foregoing is true and correct.

EXHIBIT A

DATED: June 9, 2023, in Austin, Texas.



Scott M. Hendler

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

ALEX GONZALES, Sr. and ELIZABETH HERRERA, Plaintiffs. v. **CITY OF AUSTIN, LUIS SERRATO, AND GABRIEL GUTTIEREZ**, Defendants. Hendler Flores Law, PLLC, Intervenor.	§ § § § § § § § § § § § §	**Case Nos. 22-CV-655, 23-CV-9-RP**

FIRST AMENDED PLEA IN INTERVENTION
BY HENDLER FLORES LAW, PLLC

Hendler Flores Law, PLLC (HFL or Intervenor) files, pursuant to Federal Rule of Civil Procedure 24(a)(2), this Plea in Intervention and shows the Court the following:

I.

PARTIES AND SERVICE OF PROCESS

1. **Intervenor Hendler Flores Law, PLLC** (HFL) is a professional limited liability company with its principal place of business in Travis County, Texas.

2. **Respondent Alex Gonzales, Sr.** is a citizen of Texas and a resident of Bastrop County, Texas. Alex Gonzales, Sr. is the father and next of kin of Alex Gonzales, Jr. Alex Gonzales, Sr. may be served with process by serving counsel of record via the Court's CM/ECF system.

3. **Respondent Elizabeth Herrera** (aka Elizabeth Gonzales) is a citizen of Texas and a resident of Bastrop County, Texas. Elizabeth Herrera is the mother and next of kin of Alex

Gonzales, Jr. Elizabeth Herrera may be served by serving her counsel of record via the Court's CM/ECF system.

4. **Minor child Z.A.G.** is a person under the age of eighteen (18) who is a citizen of Texas and, on information and belief, is a resident of Travis County, Texas. This action is brought on behalf of Z.A.G. by Alex Gonzales, Sr. and Elizabeth Herrera as "Next Friends." Z.A.G. may be served with process through service on counsel for Alex Gonzales, Sr. and Elizabeth Herrera as well as on counsel for **Z.A.G.'s** custodial parent's attorney, Jeff Edwards, The Edwards Law Firm, 603 West 17th Street, Austin, Texas 78701.

II.

FACTS

5. On January 7, 2020, Respondents retained HFL as memorialized by a signed, written Attorney Retainer Agreement (Retainer Agreement) employing HFL to represent them in connection with the instant litigation.

6. The Retainer Agreement includes the basis for the charging of legal fees as a contingent percentage of any monetary recovery in the litigation by settlement, judgment, or otherwise. It provides that the plaintiffs agreed to pay a contingent attorneys' fee of 40% of any settlement, verdict, or recovery obtained in the matter to compensate HFL for its legal services in the case. The Retainer Agreement also set forth that HFL would recover the expenses it advanced on the Respondents' behalf from the Respondents' net amount of any monetary settlement, verdict, or recovery, after the deduction of the 40% attorney's fee.

7. The Retainer Agreement also provides, and the Respondents agreed, that HFL has a charging lien to secure recovery of its fees and expenses in the matter, and that if Respondents terminated HFL without cause, HFL would continue to have a claim for its full

percentage contingent attorneys' fee of 40% of the gross recovery, including its expenses incurred up to the time of termination. The Retainer Agreement states that if Respondents were to terminate HFL without cause and later obtain a recovery, the full percentage of the contingent fee would remain due, in addition to expenses incurred prior to the date of termination from that recovery.

8. While representing Respondents, HFL investigated, researched, and filed two separate lawsuits on behalf of the Respondents; served and responded to written discovery; noticed and conducted depositions of two witnesses; ordered medical records; HFL facilitated a private autopsy; consulted experts and retained one expert on the subject of police excessive force; and reviewed thousands of pages of records and hours of video. HFL also incurred several significant expenses for Respondents' benefit, including assisting the family with ancillary matters including probate, memorials, grief support and management, and family law, among other services. Those expenses are, at a minimum, $65,136.95. Respondents have not repaid these expenses.

9. On March 24, 2023, without any notice whatsoever, HFL received a letter from the Marconi Firm informing HFL that Respondents intended to discharge HFL effective April 7, 2023, and transfer their representation to Mr. Puckett and his new employer, the Devlin Law Firm LLC. Respondents discharge of HFL was without cause. HFL subsequently withdrew and transferred the file to the Devlin Law Firm on April 24, 2023, and this Court granted HFL's motion to withdraw on May 2, 2023.

III.

CLAIM

10. Intervenor's interest in any monetary recovery arises from a written contingent

fee contract with Intervenor that Respondents signed providing for a fee equal to forty percent of any monetary recovery Respondents obtained in this litigation. An attorney's right to assert a lien against client property to ensure payment of professional fees has been recognized at common-law since the early eighteenth century. *See, e.g.,* Everett, Clarke & Benedict v. Alpha Portland Cement Co., 225 F. 931, 935 (2d Cir. 1915) (summarizing history of attorney liens). The charging lien that Respondents contractually agreed to in the Retainer Agreement retaining Intervenor applies to the proceeds of a recovery and contrary to Respondents' current attorneys, does not provide for a security interest in the underlying case.[1] The contractually agreed to charging lien protects the attorney's fees and expenses from the proceeds of any judgment, decree or other order in his client's favor entered or made in such proceeding.

11. Texas common law establishes charging liens as a way for attorneys to secure recovery of their fees and expenses. *See, e.g.*, *Rotella v. Cutting*, No. 02-10- 00028-CV, 2011 WL 3836456, at *5 (Tex. App.—Fort Worth Aug. 31, 2011, no pet.); *Tarrant Cty. Hosp. Dist. v. Jones*, 664 S.W.2d 191, 196 (Tex. App.—Fort Worth 1984, no pet.). In Texas, when a client employs an attorney on a contingent-fee basis and then discharges the attorney without cause before the attorney completes the representation, the attorney may sue to enforce the contract and recover the amount of the contracted compensation from any monetary damages that the client subsequently recovers. *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561 (Tex. 2006) (citing *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969)). The ability of an attorney discharged without cause to recover for the services he rendered dates back at least as far as 1855. *Myers v. Crockett*, 14 Tex. 257 (1855). Respondents discharged HFL without

[1] To the extent a court interprets the contractual language describing the charging lien as providing for a security interest in the underlying claim as opposed to the proceeds from a recovery on the underlying claim, Intervenors expressly disavow any such interest in the Respondents' underlying claim.

notice and without good cause.

12. Disposition of the case through a negotiated agreement will almost certainly involve payment of a money recovery to Respondents. In that event, it will become exponentially difficult if not impossible for Intervenor to recover its fee. This is because the funds could be put out of reach through a structed settlement—a type of annuity for personal injury plaintiffs only—that will pay Respondents over a long period of time; alternatively, Respondents, may spend the funds and deplete them before Intervenor can recover its fees and expenses from the recovery, or Respondents may otherwise dispose of the funds before Intervenor could obtain its monetary interest through legal action.

13. Respondents have no incentive to protect HFL's interest in any monetary recovery they obtain in this matter because it will likely reduce their net recovery. That is because Respondents have hired replacement counsel who they purport to compensate through a percentage of any monetary recovery they obtain through the litigation. Similarly, none of the Defendants have any incentive to protect HFL's contingent fee interest in the recovery. In fact, if the matter is resolved through a negotiated agreement either before or after a verdict, it is standard practice for a Defendant to require a Plaintiff (Respondents in this case) to assume all responsibility for any party claiming an interest in the settlement funds. As such, Defendants have no incentive to protect HFL's interests in the recovery, and now Respondents interests conflict with HFL's because payment of HFL's fee risks reducing Respondents recovery on top of the fee that Respondents have agreed to pay its replacement counsel.

IV.

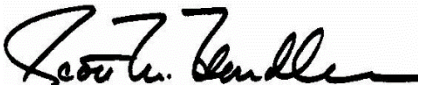
PRAYER

WHEREFORE, Intervenor requests citation and service be made as requested and that the Court award directly to Intervenor the expenses it has advanced and its share of any settlement, verdict, or other recovery to be paid by Defendants or judgment awarded against Defendants, in addition to such other and further relief to which Intervenor may be entitled at law or in equity.

Dated: June 12, 2023

Respectfully submitted,

HENDLER FLORES LAW, PLLC



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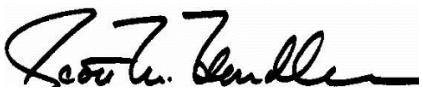
CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Court's CM/ECF system on June 12, 2023.



Scott M. Hendler

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

ALEX GONZALES, SR., Individually and as "Next Friend" to minor child Z.A.G. and **ELIZABETH HERRERA** (aka Elizabeth Gonzales), Individually and as "Next Friend" to minor child Z.A.G.,	§	**Case No. 1:23-cv-00009-RP**
Plaintiffs,	§	**JURY TRIAL REQUESTED**
v.	§	
LUIS SERRATO, and **GABRIEL GUTIERREZ**,	§	
Defendants.	§	

NOTICE OF NON-REPRESENTATION CONCERNING MINOR CHILD Z.A.G.

Plaintiff Alex Gonzales, Sr. and Plaintiff Elizabeth Herrera (collectively "Plaintiffs"), along with their counsel the Devlin Law Firm, hereby file this Notice of Non-Representation Concerning Minor Child Z.A.G. For the avoidance of any doubt, Plaintiffs and Devlin Law Firm want to make clear, as they have stated in previous filings, that none of them presently represent the interests of Z.A.G. in this lawsuit or with respect to Z.A.G.'s claims or causes of action arising from the set of facts that give rise to this lawsuit.

Plaintiffs and Devlin Law Firm hereby advise the Parties and the Court of the following:

1. Plaintiffs asserted the wrongful death claim of Z.A.G. in this lawsuit in order to meet the requirements of the "one action" rule for Texas wrongful death actions. *See* Dkt. 12 at ¶5 and fn. 1; Dkt. 17 at 7-8. As wrongful death claimants themselves, Plaintiffs have statutory standing to assert Z.A.G.'s wrongful death claims on his behalf in this lawsuit. *See* Dkt. 12 at ¶5;

Dkt. 17 at 8-9.

2. Almost immediately after asserting Z.A.G.'s wrongful death claims in this lawsuit, Plaintiffs filed an Unopposed[1] Motion for Appointment of Guardian Ad Litem for Z.A.G. *See* Dkt. 17. The motion remains pending at this time.

3. In the Motion for Appointment of Guardian Ad Litem, Plaintiffs advised the Court that they are aware of certain confidential facts that may give rise to an actual conflict of interest between themselves and Z.A.G. *See* Dkt. 30 at 9. Plaintiffs and their counsel, the Devlin Law Firm, therefore do not purport (and have never purported) to represent the interests of Z.A.G. in this lawsuit. *See* Dkt. 17 at 1 fn.3 and 9.

4. In the Motion for Appointment of Guardian Ad Litem, Plaintiffs asserted that consolidation of this case with the related 1:23-cv-00008 case ("the -008 case") will not provide representation to Z.A.G. because both (1) the Plaintiffs in this case and (2) Z.A.G.'s mother (Plaintiff Jessica Arellano in the -008 case) have actual and/or potential conflicts of interest with Z.A.G., and therefore are unable to serve as "Next Friend" to Z.A.G. under Texas Law. *See* Dkt. 17 at 10-14.

5. Plaintiffs and Devlin Law Firm want to make it clear to the Court and the parties that, at this time, Plaintiffs are not preparing Z.A.G.'s case for trial. As Plaintiffs retain experts, engage in pretrial discovery, and otherwise litigate this case, they are not at this time doing so for the benefit of Z.A.G. or purporting to represent Z.A.G.'s interests in any way.

6. At this time, the Alex Gonzales, Jr. survival claims that belong to his estate have not been asserted in this lawsuit or in any of the related lawsuits. Z.A.G., as Alex Gonzales, Jr.'s

[1] The parties in *this* case are not opposed to the relief requested. Ms. Arellano's counsel (Mr. Jeff Edwards) indicated that Ms. Arellano opposes appointment of a guardian ad litem. *See* Dkt. 17 at p. i fn.1.

presumptive and only child, appears to be the sole beneficiary of the Estate of Alex Gonzales, Jr. The Alex Gonzales, Jr. survival claims should be asserted as soon as possible to avoid any possible statute of limitations issues, and so that the survival claims can be joined in the expected consolidated case.

7. Plaintiffs and the Devlin Law Firm do not represent the Estate of Alex Gonzales, Jr. and they do not purport to represent the interests of Z.A.G. in this lawsuit (or otherwise) with respect to the Estate of Alex Gonzales, Jr. and/or Alex Gonzales, Jr.'s survival claims.

8. Plaintiffs maintain their position Z.A.G. currently is not represented in this lawsuit, that consolidation of the related cases will not provide representation to Z.A.G., and that the Court should appoint a guardian ad litem to ensure that the best interests of the minor child Z.A.G. are protected. *See* Dkt. 17 at 9-16.

9. Plaintiffs respectfully request that the Court hold a hearing on the pending Motion for Appointment of Guardian Ad Litem if necessary, and that the Court expedite its ruling on the motion to ensure the best interests of Z.A.G. are protected in this lawsuit.

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Dated: June 21, 2023

Respectfully Submitted,

/s/ Donald Puckett
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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2023, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

/s/ *Donald Puckett*
Donald Puckett

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

ALEX GONZALES, SR., Individually and as "Next Friend" to minor child Z.A.G. and **ELIZABETH HERRERA** (aka Elizabeth Gonzales), Individually and as "Next Friend" to minor child Z.A.G., *Plaintiffs*, v. **CITY OF AUSTIN** *Defendant*.	§	**Case No. 1:22-cv-00655-RP** **JURY TRIAL REQUESTED**
ALEX GONZALES, SR., Individually and as "Next Friend" to minor child Z.A.G. and **ELIZABETH HERRERA** (aka Elizabeth Gonzales), Individually and as "Next Friend" to minor child Z.A.G., *Plaintiffs*, v. **LUIS SERRATO**, and **GABRIEL GUTIERREZ** *Defendants*.	§	**Case No. 1:23-cv-00009-RP** **JURY TRIAL REQUESTED**

PLAINTIFFS' RESPONSE TO
HENDLER FLORES LAW, PLLC'S FIRST AMENDED MOTION FOR LEAVE TO INTERVENE AS OF RIGHT AND BRIEF IN SUPPORT

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I. SUMMARY OF RESPONSE

Plaintiff Alex Gonzales, Sr. and Plaintiff Elizabeth Herrera Gonzales (collectively "Plaintiffs") oppose the proposed First Amended Plea in Intervention[1] of Hendler Flores Law, PLLC (herein "HFL") on both substantive and procedural grounds.

Substantively, Plaintiffs dispute HFL's contention that Plaintiffs terminated HFL and attorney Scott Hendler without cause. To the contrary, Plaintiffs insist that HFL is not entitled to enforce its contingent fee agreement because Plaintiffs terminated Hendler and HFL for good and sufficient cause.[2] After the present lawsuit concludes, Plaintiffs expect to file claims against HFL and attorney Scott Hendler for professional negligence, breach of contract, and breach of fiduciary duty arising from Hendler's and HFL's prior representation of them in this lawsuit.[3]

Significantly, however, Plaintiffs will be required to use and disclose otherwise privileged information in order to prove that they fired Hendler and HFL for cause.[4] Plaintiffs should not be required to do so now—especially not in the context of this same pending lawsuit. Plaintiffs' have requested that HFL withdraw this motion to intervene and litigate HFL's dispute with Plaintiffs in any other proper forum, but HFL has refused. HFL insists on having this dispute with its former clients right here in this case, in the forum where disclosure of privileged information regarding Hendler's and HFL's misdeeds ***would be most prejudicial to Plaintiffs***. By insisting on intervention here, HFL seeks a litigation advantage against its own former clients by making it burdensome and prejudicial for Plaintiffs to disclose the privileged information that they intend to use to prove that they terminated Hendler and HFL for good and sufficient cause.

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[1] Plaintiffs file this Response to [Dkt. 43] in Case No. 1:22-cv-00655 (herein the "-655 Case") and [Dkt. 32] in Case No. 1:23-cv-00009 (herein the "-009 Case").
[2] *See* Declaration of Donald Puckett ("Puckett Declaration"), Exh. A at ¶30.
[3] *See id.* at ¶30.
[4] *See id.* at ¶31.

HFL's proposed First Amended Plea in Intervention against its former clients is not only distasteful; it also is improper procedurally. Under Texas law, HFL's proposed intervention claim is premature because it is not ripe. In Texas, a fired contingent fee lawyer has no legal rights against the former client until the client actually receives money or property that is subject to the contingent fee agreement. This substantive Texas legal rule is intended, in part, to protect the clients' important interest in not being forced prematurely to disclose privileged information in a dispute against the terminated contingent-fee lawyer.

HFL's proposed First Amended Plea in Intervention also is procedurally defective under federal law. First, the Court lacks an independent basis for Article III jurisdiction over HFL's intervention claim, which is required when the proposed intervention claim seeks relief that is different than the relief Plaintiffs seek. Second, HFL has not met the requirements for intervention under Fed. R. Civ. P. 24(a)(2), for several reasons. HFL does not, as required by FRCP 24(a)(2), "claim[] an interest relating to the property or transaction that is the subject of [this] action" because: (1) under Texas law, attorneys and law firms are *ethically prohibited* from obtaining a charging lien on a client's cause of action or a client's future lawsuit recovery; and (2) HFL, at most, has an indirect interest in this litigation because HFL's alleged legal rights are contingent upon certain disputed facts (such as whether HFL was terminated for cause) that do not overlap with the disputed facts in the existing -655 and -009 Cases. Additionally, HFL has not shown, as required by FRCP 24(a)(2), that "disposing of the action may as a practical matter impair or impede [HFL's] ability to protect its interests." HFL's assertions on this point are entirely hypothetical and speculative; and HFL has adequate means for protecting its alleged contractual rights apart from intervention in this case.

If the Court is inclined to grant any part of HFL's request to intervene, the Court should at least: (1) sever HFL's proposed intervention claim and stay litigation until conclusion of

litigation over Plaintiffs' Section 1983 claims, and (2) make clear in the Court's order that HFL has no discovery rights or procedural rights with respect to Plaintiffs' Section 1983 claims.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed the -655 Case against the City of Austin on July 6, 2022.[5] At that time, attorney Donald Puckett was an employee of HFL and appeared as attorney of record on the Original Complaint (along with attorney Scott Hendler).[6] On August 4, 2022, Plaintiffs served requests for production of documents on the City of Austin that were signed and served by attorney Puckett.[7] In September 2022 through November 2022, Plaintiffs took third-party fact witness depositions of APD Officer Gabrielle Gutierrez, APD Officer Luis Serrato and APD Officer Brian Nenno in the -655 Case; and each of these three depositions was taken by attorney Puckett on behalf of Plaintiffs.[8]

On December 28, 2022, attorney Puckett was fired from the HFL law firm by Scott M. Hendler, suddenly and without warning.[9] On December 29, 2022, Hendler and HFL filed a

[5] *See* Original Complaint, -655 Case [Dkt. 1].
[6] *See id.* at p. 35.
[7] *See* Puckett Declaration, Exh. A at ¶6.
[8] *See id.* at ¶6. Because the -009 Case had not yet been filed, and no claims had yet been asserted against Officer Gutierrez or Officer Serrato, these were third-party fact witness depositions only in the -655 Case.
[9] *See id.* at ¶¶7-16. In their reply on their motion to withdraw, Hendler and HFL informed the Court that Puckett "abruptly resigned" from his employment with HFL. *See* Reply Brief, -665 case [Dkt. 29 at p.1 and fn.1], -009 Case [Dkt. 16 at p.1 and fn.1]. Hendler's and HFL's assertion is completely inaccurate. *See* Puckett Declaration, Exh. A at ¶16. Puckett is in possession of a video recording of the December 28, 2022 Zoom meeting in which HFL and Hendler falsely allege that Puckett resigned. *See id.* at ¶7. The recording demonstrates that Puckett repeatedly insisted he was not resigning, to which Hendler responded by saying that he (Hendler) was terminating Puckett's employment immediately. *See id.* at ¶¶8-9, ¶¶11-12. HFL then terminated Puckett's email and electronic computer access to HFL's systems within 30 minutes after the meeting. *See id.* at ¶10. HFL and Hendler filed motions to withdraw Puckett from all of the firm's active civil cases the following day. *See id.* at ¶10.

motion to withdraw Puckett as attorney of record from this lawsuit.[10] At no time did Hendler or anyone from HFL request that Puckett hand off his task list or other work product related to the pending -655 Case.[11] In fact, a few days after HFL terminated Puckett's employment, HFL's outside employment lawyer sent a letter to Puckett instructing him to have no further communications with any HFL attorney or employee regarding Puckett's prior work with HFL, precluding Puckett from making a professional hand-off of his work-related responsibilities.[12]

On January 4, 2023, HFL filed the -009 case against Defendant Gutierrez and Defendant Serrato, with attorney Scott M. Hendler listed as the only attorney of record for Plaintiffs on the Original Complaint for the -009 Case.[13]

The Original Complaints in both the -655 and -009 Cases purported to assert claims in Plaintiff Alex Gonzales, Sr.'s capacity as "Administrator of the Estate of Alex Gonzales, Jr."[14] Alex Gonzales, Sr., however, has never been appointed administrator of his deceased son's estate.[15] Moreover, in both the -655 and -009 Cases the Original Complaints did not assert the wrongful death claims of minor child Z.A.G.,[16] whose claims ordinarily should be brought in the same civil action as other statutory wrongful death claimants.[17]

In February, 2023—for a myriad of reasons that will not be fully explained here[18]—Plaintiffs retained attorney Michael Marconi as independent counsel to advise them on their

[10] *See* Plaintiffs' Motion to Withdraw Donald Puckett as Counsel of Record, -655 Case [Dkt. 20] ("Hendler Flores Law . . . respectfully requests that Donald Puckett be permitted to withdraw as counsel of record for Plaintiffs in this matter.").
[11] *See* Puckett Declaration, Exh. A at ¶17.
[12] *See id.* at ¶13 and ¶¶17-18.
[13] *See* Original Complaint, -009 Case [Dkt. 1 at 34].
[14] *See* Original Complaints, -655 Case [Dkt. 1], -009 Case [Dkt. 1].
[15] *See* Puckett Declaration, Exh. A at ¶23.
[16] *See* Original Complaints, -655 Case [Dkt. 1], -009 Case [Dkt. 1].
[17] *See* First Amended Complaints, -655 Case [Dkt. 26 at ¶5], -009 Case [Dkt. 12 at ¶5].
[18] Plaintiffs cannot here explain all of the reasons they sought independent counsel to advise them on their termination rights without revealing privileged information. Plaintiffs emphasize here that

rights with respect to terminating HFL and Hendler under their contingent fee agreement with HFL.[19] On March 24, 2023, Mr. Marconi sent a letter to Hendler and HFL informing them that Plaintiffs had chosen to terminate their attorney-client relationship with HFL.[20] Mr. Marconi's letter further informed HFL that Plaintiffs had retained the Devlin Law Firm ("DLF") and attorney Puckett as replacement counsel for this lawsuit, and instructed HFL to forward the clients' file to DLF and to withdraw from the pending cases no later than April 7, 2023.[21]

Within days of filing a notice of appearance, DLF filed a First Amended Complaint in both the -655 and -009 Cases.[22] Each amended complaint removed references to claims that purportedly had been asserted in Alex Gonzales, Sr.'s capacity as administrator of Alex Gonzales, Jr.'s estate.[23] Each amended complaint also asserted wrongful death claims on behalf of minor child Z.A.G., in Plaintiffs' capacity as "next friend" to Z.A.G.[24] Shortly thereafter, Plaintiffs filed a Motion for Appointment of Guardian Ad Litem in an effort to ensure that the interests of Z.A.G. are adequately protected in these lawsuits.[25]

Mr. Hendler filed a motion to withdraw as counsel of record from the -655 and -009 Cases on April 11, 2023.[26] But Plaintiffs were forced to oppose the motion to withdraw because Hendler and HFL *had not yet begun* to transfer the client file to Plaintiffs' replacement counsel.[27]

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their reasons for seeking independent counsel and their decision to terminate Hendler and HFL for cause were not limited to the facts and reasons set forth in this response brief.

[19] *See* Puckett Declaration, Exh. A at ¶20.

[20] *See* Puckett Declaration, Exh. A at ¶22. *See also* Exh. B, Termination Letter from Michael Marconi to HFL dated March 24, 2023 ("Marconi Termination Letter).

[21] *See* Exh. B, Marconi Termination Letter.

[22] *See* First Amended Complaints, -655 Case [Dkt. 26], -009 Case [Dkt. 12].

[23] *See id.*

[24] *See id.*

[25] *See* Motions for Appointment of Guardian Ad Litem Pursuant to FRCP17(C)(2), -655 Case [Dkt. 30], -009 Case [Dkt. 17].

[26] *See* Motions to Withdraw Scott M. Hendler as Counsel of Record for Plaintiffs, -655 Case [Dkt. 27], -009 Case [Dkt. 14].

[27] *See* Plaintiffs' Responses to Motions to Withdraw, -655 Case [Dkt. 28], -009 Case [Dkt. 15].

HFL filed a reply, arguing that its delay in transferring the client's file to replacement counsel was not prejudicial because "[t]here are no immediate deadlines in this case that warrant the Court's involvement or otherwise jeopardize the interests of the clients or the case in any way."[28] On April 27, 2023, Plaintiffs filed a notice withdrawing their opposition to Hendler's motion to withdraw, informing the Court that HFL had finally transferred the "reasonably complete" client file to replacement counsel.[29]

DLF's inspection of HFL's litigation file confirmed that, after Puckett was terminated from his employment on December 28, 2022, HFL and Hendler had performed no substantial work related to the -655 Case, and they had performed no substantial work related to the -009 Case other than filing the Original Complaint.[30] Hendler and HFL had allowed the cases to lie dormant for months, even though it was well-known publicly that critical case-related events had occurred. To wit:

- On December 27, 2022, it was announced that a Travis County grand jury had failed to return criminal indictments against either Officer Gutierrez or Officer Serrato.[31]
- In January, 2023, it also was publicly reported that APD would complete its internal affairs review within the 30 days following the grand jury's decision, as required by APD's employment contract with the police union.[32]

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[28] *See* Reply on Motions to Withdraw, -655 Case [Dkt. 29 at p.4], -009 Case [Dkt. 16 at p. 4]. At the time Plaintiffs terminated Hendler and HFL, Plaintiffs' expert disclosures in the -655 Case were due on March 30, 2023—a deadline that Hendler and HFL were not prepared to meet—thus requiring Plaintiffs' substitute counsel to immediately file a motion to extend this deadline. *See* Unopposed Motion for Extension of Certain Deadlines, -655 Case [Dkt. 24].

[29] *See* Plaintiffs' Notice of Non-Opposition to Motion to Withdraw, -655 Case [Dkt. 34], -009 Case [Dkt. 21].

[30] Puckett Declaration, Exh. A at ¶24.

[31] *See, e.g.,* https://www.kxan.com/news/local/austin/travis-county-da-says-no-indictment-in-deadly-jan-2021-police-shooting-of-alex-gonzales/?ipid=promo-link-block1 (dated December 27, 2022) (last visited July 10, 2023).

[32] *See, e.g.,* https://www.austinchronicle.com/news/2023-01-20/seeking-justice-for-the-killing-of-alex-gonzales/ (dated January 20, 2023) (last visited July 10, 2023).

- On January 25, 2023, it was publicly reported that the Austin Office of Police Oversight had been briefed on the results of APD's internal investigations and had recommended indefinite suspension of Gutierrez.[33]
- On January 26, 2023, it was publicly reported that the Austin Community Police Review Commission had been briefed on the results of APD's internal investigations and had recommended indefinite suspensions for both Gutierrez and Serrato.[34]
- On January 27, 2023, it was publicly reported that APD had determined no administrative discipline was warranted for either Gutierrez or Serrato, and that both officers would immediately be returning to their previous street patrol duties as APD patrol officers.[35]

Despite the occurrence of these important case-related events, HFL and Hendler took no steps at all to obtain documents or discovery related to these events. Indeed, HFL never even asked the City of Austin to supplement its response to previous requests for production in order to obtain documents related to APD's internal affairs investigation or APD's decision to return Gutierrez and Serrato to patrol duty.[36]

On May 23, 2023, after DLF replaced HFL as counsel of record, attorney Puckett made a formal request for the City of Austin to supplement its document production to outstanding requests for production (the same RFPs that Puckett had signed and served when he previously was an employee of HFL), to include all documents related to APD's complete internal affairs investigation.[37] On June 23, 2023, in response to Puckett's request, the City of Austin

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[33] *See, e.g.,* https://www.austintexas.gov/sites/default/files/files/Office%20of%20Police%20Oversight/Reports%20and%20Recommendations/OPO%20Discipline%20Recommendation%202021-0036_final.pdf (dated January 25, 2023) (last visited July 10, 2023).
[34] *See, e.g.,* https://www.austintexas.gov/sites/default/files/files/Community_Police_Review_Commission/Official%20Documents/CPRC%20Review%20of%20Case%202021-0036.pdf (dated January 26, 2023) (last visited July 10, 2023).
[35] *See, e.g.,* https://www.statesman.com/story/news/crime/2023/01/26/austin-police-officers-not-punished-alex-gonzales-death-2021-shooting/69841113007/ (dated January 27, 2023) (last visited July 10, 2023).
[36] *See* Puckett Declaration, Exh. A at ¶24.
[37] *See id.* at ¶25.

supplemented its document production by producing more than 1,600 additional pages of documents along with additional videos and audio recordings.[38]

Immediately after HFL and Hendler were terminated by Plaintiffs, HFL began taking a series of retaliatory steps against Plaintiffs and their current attorneys.

On March 27, 2023—the very next business day after being informed of Plaintiffs' decision to terminate their attorney-client relationship with HFL—HFL filed a Texas state court lawsuit asserting one claim of tortious interference with contract against Puckett individually and against DLF and the Marconi Law Firm.[39] Significantly, HFL's complaint did not allege any specific wrongful act committed by any of the defendants in furtherance of the alleged tortious interference.[40] Each defendant filed an answer to HFL's tortious interference lawsuit on or about June 5, 2023.[41] Unbeknownst to the defendants to HFL's lawsuit, however, HFL had voluntarily non-suited the state court lawsuit on June 2, 2023, without telling them.[42] Also on June 2, 2023, HFL filed a similar lawsuit for tortious interference, this time in federal court, naming the Devlin Law Firm as the only defendant.[43] HFL's federal lawsuit again asserts just one claim for tortious interference; and again, HFL's federal complaint does not allege any specific wrongful act in furtherance of the alleged tortious interference claim.[44]

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[38] *See id.* at ¶25.
[39] *See id.* at ¶26. *See also* Exh. C, HFL Original Petition dated March 27, 2023.
[40] *See* Exh. C, HFL Original Petition at ¶16, ¶¶23-24 (alleging "on information and belief" that defendants engaged in unspecified acts of tortious interference).
[41] *See* Puckett Declaration, Exh. A at ¶26. *See also* Exh. D, Answers to HFL Original Petition.
[42] *See* Puckett Declaration, Exh. A at ¶26.
[43] *See id.* at ¶26. *See also* Exh. E, HFL Original Complaint dated June 2, 2023.
[44] *See* Exh. E, HFL Original Complaint at ¶2, ¶16, ¶24 (alleging generally that DLF made "false accusations" about HFL and its attorneys without providing any specifics regarding when or by whom the false statements allegedly were made, and without specifying the content of the alleged false accusations).

On May 12, 2023, HFL filed a Motion for Leave to Intervene as of Right in both the -655 and -009 Cases.[45] HFL's motions for leave asserted HFL's right to intervene in each lawsuits on the basis of HFL's purported lien rights arising under HFL's contingent-fee Retainer Agreement with Plaintiffs.[46] On May 23, 2023, Plaintiffs' current counsel sent HFL a letter pursuant to Fed. R. Civ. P. 11 informing HFL that its assertion of contractual attorney lien rights was frivolous and sanctionable in light of State Bar of Texas Professional Ethics Committee Opinion No. 610, which unambiguously holds: "Under the Texas Disciplinary Rules of Professional Conduct, a lawyer representing a client in litigation may not acquire, by agreement with his client, a lien upon the subject matter of the litigation as a means of securing payment of the lawyer's fee with respect to the litigation."[47]

On June 12, 2023, HFL filed an Amended Motion for Leave to Intervene as of Right in both the -655 and -009 Cases, with each supported by a First Amended Declaration of Scott Hendler and a proposed First Amended Plea in Intervention.[48] HFL's amended motions state that the motions were amended "to clarify the basis of its lien in light of correspondence received from Respondents' Counsel demanding withdrawal of the Motion to Intervene on the ground that the motion violates Fed. R. Civ. P. 11."[49] As just one example of the significant revisions HFL made in its amended motions, the proposed First Amended Plea in Intervention now states: "To the extent a court interprets the contractual language describing the charging lien as providing for a security interest in the underlying claim as opposed to the proceeds from a recovery of the

[45] *See* Motions for Leave to Intervene, -655 Case [Dkt. 38], -009 Case [Dkt. 27].
[46] *See id.*
[47] *See* Puckett Declaration, Exh. A at ¶28. *See also* Exh. F, Rule 11 Letter from Puckett to Hendler and HFL dated May 23, 2023.
[48] *See* First Amended Motions for Leave to Intervene, -655 Case [Dkt. 43, 43-1, 43-2], -009 Case [Dkt. 32, 32-1, 32-2].
[49] *See id.*, -655 Case [Dkt. 43 at 1], -009 Case [Dkt. 32 at 1].

underlying claim, Intervenors expressly disavow such interest in the Respondents' underlying claim."[50]

III. LEGAL STANDARDS

When considering a motion for leave to intervene under Fed. R. Civ. P. 24, "[f]ederal courts should allow intervention ***when no one would be hurt*** and the greater justice could be attained." *Wal-Mart Stores, Inc. v. Tex. Alcoholic Bev. Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016). *See also Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994); *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970).

When a party moves to intervene in order to pursue relief that is different than the relief sought by the parties to the existing lawsuit, the proposed intervenor must establish an independent basis for the court's Article III jurisdiction over the proposed intervention claim. *See Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 435 and 439-40 (2017). *See also Russell v. Harris County*, 2020 U.S. Dist. LEXIS 215333 at *11, 2020 WL 6784238 (S.D. Tex. Nov. 18, 2020); *Defense Distributed v. United States Dep't of State*, 2018 U.S. Dist. LEXIS 126388 at *9-10, Case No. 1:15-cv-372 (W.D. Tex. July 27, 2018) (Hon. Robert Pitman).

A party seeking to intervene in a pending civil action under Fed. R. Civ. P. 24 bears the burden of establishing its right to intervene under the requirements of the rule. *See Wal-Mart Stores*, 834 F.3d at 565. A party seeking to intervene as of right under FRCP 24(a)(2) must satisfy a four-prong test, articulated by the Fifth Circuit as follows:

> (1) the application must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; [and] (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

[50] *See* -655 Case [Dkt. 43-2 at p. 4, fn.1], -009 Case [Dkt. 32-2 at p. 4, fn.1].

Id. at 565. *See also New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (*en banc*). "If a party seeking to intervene fails to meet any one of those requirements, it cannot intervene as a matter of right." *Sierra Club,* 18 F.3d at 1205. *See also Kneeland v. National Collegiate Athletic Assoc.*, 806 F.2d 1285, 1287 (5th Cir. 1987).

IV. ARGUMENT AND AUTHORITIES

A. Under Texas Law, HFL's Proposed Intervention Claim is not Ripe. Plaintiffs Will Be Severely Prejudiced If HFL is Allowed to Intervene at This Time.

HFL's proposed intervention should be denied because allowing the dispute between HFL and Plaintiffs to go forward now, in the context of this pending lawsuit, would be severely prejudicial to Plaintiffs. To avoid this very type of prejudice, Texas law makes HFL's proposed intervention claim not ripe for judicial resolution at this time.

Under Texas law, "[w]hen interpreting and enforcing attorney-client fee agreements, it is not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship." *Hoover Slovacek LLP v. Watson*, 206 S.W.3d 557, 560 (Tex. 2006). "The attorney's special responsibility to maintain the highest standards of conduct and fair dealing establishes a professional benchmark" that must inform the Court's interpretation and application of a contract between attorney and client. *Id.* at 561.

"Public policy strongly favors a client's freedom to employ a lawyer of his choosing and, except in some instances where counsel is appointed, to discharge the lawyer during the representation for any reason or no reason at all." *Hoover Slovacek*, 206 S.W.3d at 562. *See also* TEX. DISCIPLINARY R. PROF'L CONDUCT §1.15, Comment 4 ("[a] client has the power to discharge a lawyer at any time, with or without cause . . ."). At the same time, Texas law also recognizes that a contingent fee attorney who is terminated prior to the conclusion of the representation may have a valid interest in seeking compensation for the legal services provided prior to termination. *See Hoover Slovacek*, 206 S.W.3d at 563.

To balance the competing interests of a client and a terminated contingent-fee lawyer, the Texas Supreme Court long ago established rules applicable in this context. *See id.* at 563 ("Striving to respect both interests, *Mandell* provides remedies to the contingent-fee lawyer who is fired without cause") (discussing *Mandell & Wright v. Thomas*, 441 S.W.2d 841 (Tex. 1969)). Under Texas law, a contingent fee lawyer may seek to enforce the agreement and recover the full contingent fee *only if* the lawyer was fired without cause, and *only if* doing so would not result in an unconscionable fee. *See Hoover Slovacek*, 206 S.W.3d at 561-62 (citing TEX. DISCIPLINARY R. PROF'L CONDUCT §1.04(a)). *See also Mandell*, 441 S.W.2d at 847.

An important component of this careful balance of interests is that the lawyer's claim for breach of contract does not become ripe until the client actually recovers money or property that is subject to the contingent fee. *See Hoover Slovacek*, 206 S.W.3d at 562. "In allowing the discharged lawyer to collect the contingent fee from any damages the client recovers, *Mandell* complies with the principle that a contingent-fee lawyer 'is entitled to receive the specified fee *only when and to the extent the client receives payment*.'" *Id.* at 562 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §35(2) (2000)) (emphasis added).[51]

This substantive rule of ripeness, which prevents a terminated contingent-fee lawyer from prematurely bringing a claim against a former client, is driven in part by the prejudice and unfairness that would result from forcing the client to divulge privileged information in responding to the terminated lawyer's claim. *See Hoover Slovacek*, 206 S.W.3d at 562 (describing the strong public policy in favor of allowing a client to terminate the attorney-client

[51] *See also Levine v. Bayne, Snell & Krause, Ltd.,* 40 S.W.3d 92, 94 (Tex. 2001); *Wilkinson v. Susman*, 2020 Tex. App. LEXIS 8953 at *17-18, 2020 WL 6791057 (Tex. App.—Houston [14th] Nov. 19, 2020); *Wood v. Tran*, 2019 Tex. App. LEXIS 6756, at *8-9, 2019 WL 3559001 (Tex. App.—Houston [1st] Aug. 6, 2019); *Douglas-Peters v. Cho, Choe & Holen, P.C.*, 2017 Tex. App. LEXIS 1836, at *39-40, 2017 WL 836848 (Tex. App.—Dallas [5th] Mar. 3, 2017); *Grantham v. J&B Sausage Co.*, 2016 Tex. App. LEXIS 5168 at *13-14, 2016 WL 2935874 (Tex. App.—Houston [14th] May 17, 2016).

relationship at any time as "a 'firmly established rule which springs from the personal and confidential nature' of the attorney client relationship") (quoting *Martin v. Camp*, 114 N.E. 46, 48 (N.Y. 1916)). HFL's proposed intervention in this case perfectly illustrates the potential for prejudice to the client if a terminated lawyer's claim is allowed to proceed prematurely.

In the -655 Case, Defendant City of Austin served a request for production seeking "[t]he attorneys' fee agreement between you and your legal counsel relating to this Litigation." While they were represented by HFL law firm, Plaintiffs objected on the basis of privilege and withheld production of the HFL contingent fee agreement.[52] HFL's motion for leave and the supporting exhibits, however, each make extensive public disclosures of portions of the contingent fee agreement and its terms.[53] HFL did not even utilize the protective order procedures or file these papers under seal.[54] Plaintiffs did not authorize HFL to disclose this privileged and confidential information.[55]

As discussed above, Plaintiffs contend that they terminated HFL and attorney Scott Hendler for good cause, and that they had compelling reasons to do so. But Plaintiffs will be required to use privileged and confidential information to defend against HFL's proposed

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[52] *See* Puckett Declaration, Exh. A at ¶32; Exh. G, Plaintiffs' Response to City of Austin Request for Production No. 17.

[53] *See* First Amended Motions for Leave, -655 Case [Dkt. 43 at p.2, 4], -009 Case [Dkt. 32 at p. 2, 4]; First Amended Declarations of Scott M. Hendler, -655 Case [Dkt. 43-1 at ¶3-6], -009 Case [Dkt. 32-1 at ¶3-6]; proposed First Amended Pleas in Intervention, -655 Case [Dkt. 43-2 at ¶¶5-7, ¶10], -009 Case [Dkt 32-2 at ¶¶5-7, ¶10].

[54] HFL's unauthorized disclosures of Plaintiffs' privileged and confidential information is troubling in light of HFL's ongoing fiduciary responsibilities. "Certain privileges and duties applicable to an attorney client relationship . . . continue after the relationship's termination. The general rule is that confidential information received during a fiduciary relationship may not be used or disclosed to the detriment of the one from who the information is obtained, even after termination of the relationship." *Jetall Cos. v. Hoover Slovacek LLP*, 2022 Tex App. LEXIS 2010 at *17, 2022 WL 906218 (Tex. App.—Houston[14th] March 29, 2022) (internal citations omitted). *See also Owens-Corning Fiberglas Corp. v. Caldwell*, 818 S.W.2d 749, 751-52 (Tex. 1991); *Md. Am. Gen. Ins. Co. v. Blackmon*, 639 S.W.2d 455, 458 (Tex. 1982); *Bigham v. Southeast Tex. Envtl., LLC*, 458 S.W.3d 650, 662-63 (Tex. App.—Houston[14th] 2015).

[55] *See* Puckett Declaration, Exh. A at ¶32.

intervention claim, and to assert their counterclaims for professional negligence, breach of contract, and breach of fiduciary duty.[56] This would be highly prejudicial to Plaintiffs,[57] and this is precisely why HFL's proposed intervention claim should not go forward at this time. *See, e.g., Lake Eugenie Lan & Dev., Inc. v. BP Exploration & Prod.*, 546 Fed. Appx. 502, 506 (5th Cir. 2013) (affirming denial of intervention under FRCP 24 because proposed intervention claims, which dealt with hypothetical future settlement distribution, were not ripe). *See also Wal-Mart*, 834 F.3d at 565; *Sierra Club*, 18 F.3d at 1205; *McDonald v. E.J. Lavino Co.*, 430 F.2d at 1074.

B. The Court Lacks Jurisdiction Over the Proposed Intervention Claim

Under unambiguous U.S. Supreme Court precedent, when a proposed intervenor seeks relief that is different than the relief sought by the parties to an existing lawsuit, the Court must have an independent basis for Article III jurisdiction over the proposed intervention claim. *See Town of Chester*, 581 U.S. at 439-40. *See also Russell*, 2020 U.S. Dist. LEXIS 215333 at *11; *Defense Distributed*, 2018 U.S. Dist. LEXIS 126388 at *9-10. This rule applies to HFL's proposed intervention because HFL seeks relief that is different than the relief sought by Plaintiffs in this lawsuit. Plaintiffs seek a judgment for money damages against Defendants City of Austin, Gutierrez and Serrato on Plaintiffs' claim for wrongful death under 42 U.S.C. §1983.[58] HFL's proposed intervention claim, by contrast, seeks to assert HFL's alleged rights arising under Texas contract law.[59] This Court simply does not have subject matter jurisdiction over HFL's proposed state law "Claim" against non-diverse parties.

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[56] *See* Puckett Declaration, Exh. A at ¶31.
[57] *See id.* at ¶31.
[58] *See* First Amended Complaints, -655 Case [Dkt. 26 at ¶¶93-98], -009 Case [Dkt. 12 at ¶¶95-101].
[59] *See* proposed First Amended Pleas in Intervention, -655 Case [Dkt. 43-2 at ¶¶5-13 and Prayer], -009 Case [Dkt. 32-2 at ¶¶5-13 and Prayer]. HFL's proposed pleadings would assert one generic "Claim" that depends on HFL's alleged contract rights; but HFL never alleges that Plaintiffs have actually breached the agreement. Instead, HFL's pleading seeks relief in some future hypothetical scenarios that may or may not ever come to pass. *See id.* at ¶¶12-13. The fact that HFL's proposed

First, the Court does not have federal question jurisdiction over HFL's proposed intervention claim because a claim to enforce state law contract rights does not "aris[e] under the Constitution, laws, or treaties of the United States." *See* 28 U.S.C. §1331. *See also Box v. PetroTel, Inc.*, 33 F.4th 195, 202 (5th Cir. 2022). *See also Gunn v. Minton*, 568 U.S. 251, 257-65 (2013); *Singh v. Duane Morris LLP*, 538 F.3d 334, 337-40 (5th Cir. 2008).

Second, the Court does not have diversity jurisdiction over HFL's proposed intervention claim because HFL and Plaintiffs are all citizens of Texas.[60] *See* 28 U.S.C. §1332. *See also Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990) ("Since its enactment, we have interpreted the diversity statute [§1332] to require 'complete diversity' of citizenship") (citing and quoting *Strawbridge v. Curtiss*, 3 Cranch. 267 (1806)). *See also Mitchell v. Bailey*, 982 F.3d 937, 943 (5th Cir. 2020).

Third, the Court does not have supplemental jurisdiction over HFL's proposed intervention claim because HFL's claims are not "so related [to Plaintiffs' asserted claims] that they form part of the same case or controversy under Article III of the United States Constitution." *See* 28 U.S.C. §1367(a). As discussed above, HFL's proposed intervention claim arises from disputed facts that do not overlap substantially with the disputed facts involved with Plaintiffs' asserted claims under 42 U.S.C. §1983, and HFL seeks relief that is different than the relief sought by Plaintiffs. HFL's proposed intervention claim simply does not arise from the same nucleus of common facts as Plaintiffs asserted §1983 claims, and therefore the Court does not have supplemental jurisdiction over HFL's proposed intervention claim.

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intervention claim, even as plead, depends on such future hypothetical facts demonstrates quite plainly that HFL's claim is not ripe at this time. *See Lake Eugenie*, 546 Fed. Appx. at 506 ("A request for relief is unripe if it rests upon future events that may not occur as anticipated, or indeed may not occur at all.").

[60] *See* proposed First Amended Pleas in Intervention, -655 Case [Dkt. 43-2 at ¶¶1-4], -009 Case [Dkt. 32-2 at ¶¶1-4].

Courts within the Fifth Circuit have frequently denied intervention to a terminated contingent-fee lawyer who cannot establish federal jurisdiction over the proposed intervention claim. *See, e.g. Samuels v. Twin City*, 602 Fed. Appx. 209, 210-11 (5th Cir. 2015) (affirming district court's denial of attorney's motion to intervene due to lack of jurisdiction); *Griffin v. Lee*, 621 F.3d 380, 388 (5th Cir. 2010) (reversing decision to permit attorney intervention where district court lacked diversity jurisdiction over the intervention claim); *Patterson v. Corvel Corp.*, 2021 U.S. Dist. LEXIS 168456 at *5-7, Case No. 21-cv-1305 (W.D. La. Aug. 12, 2021) (denying attorney's intervention for lack of diversity jurisdiction); *Causey v. State Farm Section I*, 2018 U.S. Dist. LEXIS 99855 at *5-7, 2018 WL 2980066 (E.D. La. 2018) (same); *Tolliver v. U-Haul Co.*, 2017 U.S. Dist. LEXIS 221223 at *3-4, Case No. 09-cv-313 (W.D. La. June 8, 2017) (same). When "[a]n attorney who has formerly represented the plaintiff and intervenes for recovery of attorney's fees from the underlying suit . . . [s]uch claims are not entitled to supplemental jurisdiction under 28 U.S.C. §1367 and the claim must independently satisfy the requirements for federal diversity jurisdiction under 28 U.S.C. §1332." *Tolliver*, 2017 U.S. Dist. LEXIS 221223 at *3-4. *See also Samuels*, 602 Fed. Appx. at 210-11; *Griffin*, 621 F.3d at 388.[61]

C. HFL Has Not Met the Requirements for Intervention Under FRCP 24(a)(2)

1. HFL Does Not Have an Interest in the Property or Transaction That is the Subject of This Litigation

HFL does not have an interest in the property or transaction that is the subject of this litigation, as required by FRCP 24(a)(2), for two independent reasons.

First, HFL's alleged contractual charging lien is prohibited by the Texas rules of attorney ethics, and any such lien is void under Texas law. HFL's proposed intervention claim is predicated on its alleged right to enforce a "contractually agreed to charging lien" on the

[61] In addition to the reasons set forth here, the Court also lacks Article III jurisdiction because HFL's proposed intervention claim is not ripe, as discussed in Section IV(A), *supra.*

proceeds of a recovery in the instant action, which HFL asserts arises under Texas common law.[62] HFL significantly misunderstands the applicable law. Texas common law recognizes an attorney *retaining* lien over property that actually comes into the attorney's possession, but Texas law *does not* allow an attorney to hold a charging lien over the subject matter of a client's lawsuit or the future proceeds of a client's lawsuit.[63] None of the Texas cases cited by HFL in its amended motion (at pp. 4-5) authorize an attorney "charging lien" at all. Instead, each of HFL's cited cases recognize only an attorney *retaining* lien on property actually in possession of the attorney.[64] Indeed, the Texas Commission on Professional Ethics issued an opinion in 2011 holding that the Texas rules of ethics strictly prohibit an attorney from obtaining a contractual charging lien from a client.[65] In its proposed First Amended Pleas in Intervention, HFL unilaterally attempts to rewrite the language of the contingent fee agreement[66] by purporting to disclaim any charging lien in the subject matter of Plaintiffs' lawsuits (as opposed to the future

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[62] *See* -655 Case [Dkt. 43 at 4], -009 Case [Dkt. 32 at 4]. As discussed above, HFL amended its motion to clarify the basis for its intervention, and the amended motion did not include any alternative basis for intervention apart from the alleged charging lien.

[63] *See Casey v. March*, 30 Tex. 180 (1867) (holding that in Texas, there is no common law or statutory lien on a judgment, and a common law lien on the proceeds of the judgment requires that those proceeds be in the attorney's possession). *See also Thomson* v. *Findlater Hardware Co.,* 205 S.W. 831, 832 (Tex. 1918) (quoting MECHEM ON AGENCY).

[64] *See United States v. Betancourt*, 2005 U.S. Dist. LEXIS 40483 at *8-9, 2005 WL 3348908 (S.D. Tex. Dec. 8, 2005) (distinguishing Texas common law retaining lien and holding that a charging lien for attorney services does not exist under Texas common law); *Rotella v. Cutting*, 2011 Tex. App. LEXIS 7116 at *12-13, 2011 WL 3836456 (Tex. App.—Fort Worth Aug. 31, 2011) (holding that no "common law lien" or "possessory lien" existed because the attorney never possessed the funds at issue); *Tarrant Cty. Hosp. Dist. v. Jones*, 664 S.W.2d 191, 195-96 (Tex. App.—Fort Worth 1984) (recognizing an attorney lien "on money *collected by him* for his client") (emphasis added, citing *Thomson v. Findlater Hardware Co.*, 156 S.W. 301 (Tex. Civ. App.—Austin 1913). As *Thomson* makes clear, "[w]hile an attorney has a lien on money collected by him for his client, he has no such lien for the debt in the hands of the debtor before such money has been collected." *Thomson*, 156 S.W.3d at 303.

[65] *See* Tex. Comm. On Professional Ethics, Op. 610 (2011) (citing Professional Ethics Committee Op. 395 (May 1979, corrected June 1980) and Op. 411 (January 1984)).

[66] *See* -655 Case [Dkt. 43-1 at ¶5], -009 Case [Dkt. 32-1 at ¶5] (quoting the agreement to establish a "charging lien *immediately applicable to this matter* and any and all recoveries . . ." (emphasis added)).

proceeds of the lawsuits).[67] HFL's unilateral attempt to rewrite the agreement is properly viewed as a request to reform the contract, and it nonetheless would fail to save the validity of HFL's alleged charging lien.[68]

Second, HFL fails to meet the requirements of FRCP 24(a)(2) because HFL has, at most, an indirect interest in the subject of this litigation. "The interest required to intervene as of right is a 'direct' interest. By definition, an interest is not direct when it is contingent on the outcome of a subsequent lawsuit." *Ross v. Marshall*, 456 F.3d 442, 443-44 (5th Cir. 2006). Here, HFL's alleged interest in this lawsuit is contingent on numerous disputed facts that require resolution apart from this lawsuit, such as whether Plaintiffs terminated HFL for cause, whether HFL's contingent fee agreement was void when made, and whether HFL's collection of a full contingent fee would be unconscionable. Thus, HFL's interest in the subject of this litigation is indirect (at best), which is insufficient to meet HFL's burden to show entitlement to intervene under FRCP 24(a)(2). *See Ross*, 456 F.3d at 443-44. *See also Wal-Mart*, 834 F.3d at 568 ("[A]n economic interest is not sufficiently direct when the intervenor's interest will only be vindicated be a separate legal action . . ."); *Citadel Recovery Servs., LLC v. T.J. Sutton Enters., LLC*, 2021 U.S. Dist. LEXIS 229250 at *17-18, 2021 WL 5505533 (E.D. La. March 15, 2021); *Catlin Specialty Ins. Co. v. Ward*, 2020 U.S. Dist. LEXIS 250696 at *3, Case No. 1:20-cv-92 (N.D. Miss. Aug. 24, 2020).

2. Disposition of This Case Will Not Impair HFL's Rights or Interests Because HFL Has Other Adequate Ways to Enforce Its Rights

HFL has not met its burden to show that disposition of this case will impair its alleged legal rights under the contingent fee agreement. HFL's amended motion and supporting

[67] *See*-655 Case [Dkt. 43-2 at 4 fn.1], -009 Case [Dkt. 32-2 at 4 fn.1].
[68] Under Texas law, the question of whether a contingent fee contract is unconscionable or against public policy is adjudged from the time the contract is made. *See Hoover Slovacek*, 206 S.W. 3d at 562.

documents assert nothing more than hypothetical future scenarios involving a hypothetical settlement that may be structured in hypothetical ways and that might, in theory, impair HFL's rights in the future in some unspecified way.[69] HFL's speculation and conjecture are insufficient to meet HFL's burden under FRCP 24(a).

The question of whether HFL's interests will be impaired by resolution of this lawsuit "focuses on practical consequences."[70] Unless HFL "can show actual collusion between his clients and other parties or an actual attempt to deny him his fee . . . the refusal of intervention cannot, as a matter of law, impair or impede his ability to protect his interest."[71] Here, HFL has sufficient ways, apart from intervention in these cases, to protect its alleged contractual rights. HFL "may file its own lawsuit to collect its purported debt, and nothing decided in this case will operate to estop it from fully pressing its claims."[72] Indeed, HFL has *already* filed at least two separate lawsuits, against Plaintiffs' replacement lawyers, seeking to recover HFL's alleged damages as a result of HFL's termination by Plaintiffs. HFL apparently has no qualms seeking to enforce its alleged contractual rights in forums other than intervention in the -655 and -009 Cases. HFL has not shown, apart from pure speculation, that its alleged rights will be impaired by resolution of this lawsuit.

D. The Proposed Intervention Claim Would Create an Unnecessary Sideshow That Would Distract From Discovery and Litigation of Plaintiffs' Originally Filed Claims

If HFL is permitted to intervene and allowed immediately to litigate its proposed intervention claim, it will create a sideshow distraction that will complicate litigation of this case.

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[69] *See* -655 Case [Dkt. 43 at 5, Dkt. 43-1 at ¶12, Dkt. 43-2 at ¶¶12-13], -009 Case [Dkt. 32 at 5, Dkt. 32-1 at ¶12, Dkt. 32-2 at ¶¶12-13].
[70] *Adam Joseph Res. (M) Sdn. Bhd. v. CNA Metals Ltd.*, 919 F.3d 856, 867 (5th Cir. 2019).
[71] *Valley Ranch Dev. Co. v. Fed. Deposit Ins. Corp.*, 960 F.2d 550, 556 (5th Cir. 1992).
[72] *Alam v. Fannie Mae*, 2007 U.S. Dist. LEXIS 92209, at *12, 2007 WL 4411544 (S.D. Tex. Dec. 12, 2007).

As one relevant example, several of the lawyers involved in this case likely will be fact witnesses in the dispute between Plaintiffs and HFL, potentially subject to discovery and deposition.[73] As previously discussed, Plaintiffs would be required to use otherwise privileged information to defend against HFL's intervention claim. These and other similar issues potentially would turn this already complicated, multi-party dispute into an unmanageable three-ring circus.

If the Court is inclined to permit HFL's intervention in these cases at all, it has the authority to sever and stay the intervention claim and/or enter other appropriate orders to avoid complication and distraction from the underlying lawsuit.[74] At a minimum, Plaintiffs request that the Court: (1) sever HFL's proposed intervention claim from the pending cases, (2) stay HFL's proposed intervention claim until the conclusion of the pending cases, and (3) order that HFL has no discovery rights or other procedural rights with respect to litigation of Plaintiff's claims against the party Defendants to the -655 and -009 Cases.

V. CONCLUSION

For the foregoing reasons, Plaintiffs ask the Court to deny HFL's First Amended Motion for Leave to Intervene as of Right.

[73] *See* Puckett Declaration, Exh. A at ¶33.

[74] *See, e.g. Campbell Harrison & Dagley, L.L.P. v. PBL Multi-Strategy Fund, L.P.*, 744 F. App'x 192, 194 (5th Cir. 2018); *Texas v. Real Parties*, 259 F.3d 387, 390 (5th Cir. 2001); *Desilva v. Taylor*, 2022 U.S. Dist. LEXIS 171318 at *3-4, Case No. 1:21-cv-00129-RP (W.D. Tex. Sep. 22, 2022); *Slim v. Abuzaid*, 2018 U.S. Dist. LEXIS 155488, at *2-3, Case No. 3:16-CV-1769-S-BH (N.D. Tex. Aug. 9, 2018); *Saacks v. Privilege Underwriters Reciprocal Exch.*, 2017 U.S. Dist. LEXIS 14531, at *11-13, Case No. 16-1149 (E.D. La. Feb. 2, 2017). *Bibles v. City of Irving*, 2009 U.S. Dist. LEXIS 67462, at *17, Case No. 3:08-CV-1795-M (N.D. Tex. July 28, 2009).

Dated: July 10, 2023

/s/ Donald Puckett
Donald Puckett (Texas Bar No. 24013358)
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2023, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

/s/ Donald Puckett
Donald Puckett

EXHIBIT A

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

ALEX GONZALES, SR., Individually and as "Next Friend" to minor child Z.A.G. and **ELIZABETH HERRERA** (aka Elizabeth Gonzales), Individually and as "Next Friend" to minor child Z.A.G., *Plaintiffs*, v. **CITY OF AUSTIN** *Defendant*.	§	**Case No. 1:22-cv-00655-RP** **JURY TRIAL REQUESTED**
ALEX GONZALES, SR., Individually and as "Next Friend" to minor child Z.A.G. and **ELIZABETH HERRERA** (aka Elizabeth Gonzales), Individually and as "Next Friend" to minor child Z.A.G., *Plaintiffs*, v. **LUIS SERRATO**, and **GABRIEL GUTIERREZ** *Defendants*.	§	**Case No. 1:23-cv-00009-RP** **JURY TRIAL REQUESTED**

DECLARATION OF ATTORNEY DONALD PUCKETT
IN SUPPORT OF PLAINTIFFS' RESPONSE TO HENDLER FLORES LAW, PLLC'S FIRST AMENDED MOTION FOR LEAVE TO INTERVENE AS OF RIGHT

I, Donald Puckett, hereby declare as follows:

1. I am an adult over the age of 18 and I am otherwise competent to make this Declaration. I have personal knowledge of the facts set forth in this declaration and, if called to testify as a witness, I would provide the same testimony under oath.

2. Currently I am counsel of record and lead attorney-in-charge representing Plaintiff Alex Gonzales, Sr. and Plaintiff Elizabeth Herrera (aka Elizabeth Gonzales) (collectively "Plaintiffs") in each of the above-styled lawsuits, which I will refer to herein as the -655 Case and the -009 Case.

3. I have been licensed to practice law by the State Bar of Texas since November, 1999. Following my graduation from the University of Texas School of Law, I served as a law clerk to the Hon. Jon Phipps McCalla, United States District Judge for the Western District of Tennessee. Since 2000, I have practiced law in Dallas, Texas, and I have maintained a national litigation practice consisting of patent infringement cases and other complex commercial cases. I was selected as a Barrister member of the Barbara M.G. Lynn IP Inn of Court in Dallas from 2013 through 2016; and I was promoted to a Master member of the Lynn Inn of Court from 2016 through 2022. I was named a Texas Super Lawyer for Intellectual Property Litigation each year from 2014 through 2020. I was named to the IAM Patent 1000 list of the world's leading patent professionals each year from 2015 through 2018.

4. Following a brief sabbatical from practicing law in 2021, I decided to move my litigation career in a different direction with the intention of handling cases in other practice areas. On or about March 14, 2022, I began working as an employee attorney of the Austin law firm Hendler Flores Law, PLLC ("HFL"). I joined HFL with the intention of becoming substantially involved with litigating the firm's docket of civil rights cases. While I was an employee of HFL, I made litigation appearances in approximately eight of HFL's federal civil

rights (Section 1983) cases, all pending in the United States District Court for the Western District of Texas.

5. On July 6, 2022, Plaintiffs filed a lawsuit arising from the death of their son Alex Gonzales, Jr., with Plaintiffs asserting a wrongful death claim under 42 U.S.C. §1983 against the City of Austin (the "-655 Case"). Plaintiffs were represented by HFL at the time they filed this lawsuit. Attorney Scott Hendler and I were the two attorneys of record for Plaintiffs at the time the -655 Case was filed.

6. I personally performed substantially all of the discovery work on the -655 Case while I was an employee of HFL. On August 4, 2022, Plaintiffs served requests for production of documents on the City of Austin, and I was the attorney that signed and served the discovery requests. On September 27, 2022, I personally took the deposition of APD Officer Gabrielle Gutierrez in the -655 Case. On October 13, 2022, I personally took the deposition of Officer Brian Nenno in the -655 Case. On November 1, 2022, I personally took the deposition of Officer Luis Serrato in the -655 Case. In December, 2022, I personally was tasked with the responsibility of drafting and filing a second lawsuit complaint for Plaintiffs against Defendant Gutierrez and Defendant Serrato, with an internal deadline for filing by January 5, 2023.

7. On December 28, 2022, I had a Zoom meeting with Scott M. Hendler, who is the founder and CEO of the HFL law firm. I had requested the meeting to discuss the year-end bonus that I had been promised in writing by Hendler when I was hired by HFL earlier that year. I anticipated that the meeting might become contentious, so I captured a video recording of the meeting in real-time. I did not inform Hendler (or HFL attorney Stephen Demik, who also was present) that I was recording the meeting, and legally I was not required to do so under Texas law. Hendler was the host for this Zoom meeting, so I used the built-in Windows screen recorder by pressing [Windows Key + ALT + R] on my keyboard. This allowed me to use the Windows

screen-record tool to capture a video recording of the meeting in real-time, which was stored on my local hard drive in the .mp4 file format. I have maintained the original and unaltered file on my hard drive since it was captured, with all metadata intact, and I have made backup archival copies of the original .mp4 file. I subsequently provided a copy of the video recording and a transcript to HFL and its outside employment law attorney (Ms. Jennifer Ward) in March 2023.

8. During the December 28, 2022 Zoom meeting, a dispute ensued regarding my year-end bonus compensation. I learned for the first time during this meeting that I would not be paid any year-end bonus. I was told that the firm could not afford to pay a bonus because the firm had not been profitable for the year. When I tried to initiate a conversation about potential non-cash bonus alternatives in lieu of a cash bonus, a heated argument ensued between myself and Hendler.

9. During the heated argument, Hendler multiple times attempted to mischaracterize my statements as a resignation, even though I insisted repeatedly that I had not offered a resignation, and I made clear that I did not intend to turn in a resignation that day. When I asked for some time to think about things, Hendler told me I was not allowed to take any time to think about it, that he had decided we needed to part ways that very day, and that I should consider this meeting to be my termination. Throughout all of this discussion, I repeatedly insisted that I had not resigned and I was not resigning.

10. Within less than 30 minutes following the conclusion of the December 28 meeting, my work email address was disabled and my access to HFL's electronic systems and litigation tools was disconnected. The next day, on December 29, 2022, HFL filed motions for my withdrawal as attorney of record in every HFL case in which I previously had made an appearance.

11. On December 29 and December 30, I sent emails to HFL inquiring about the status of my employment and insisting yet again that I had not tendered a resignation. HFL did not immediately respond to my emails, and I received no communication from Hendler or HFL management after the December 28 meeting until the afternoon of December 30, 2022, when I received a formal end-of-employment letter from Hendler sent via email.

12. Hendler's December 30, 2022, letter stated that HFL had retained and consulted with outside employment law counsel (Austin attorney Jennifer D. Ward). It further stated that HFL allegedly had accepted my resignation at the December 28 Zoom meeting. Hendler's recitation of facts in the letter was grossly inaccurate, as plainly demonstrated by the video recording of the meeting—although Hendler did not know that the video existed at the time. Hendler's letter inaccurately declared that I had stated an unambiguous intention to resign on December 31, 2022; but the video shows that I repeatedly insisted I was not resigning at all, and at one point I stated that I *certainly would not* resign prior to December 31.

13. On January 5, 2023, I received a formal letter (via email) from attorney Jennifer D. Ward. Ms. Ward's letter confirmed that she had been retained as HFL's outside employment law attorney with respect to my employment separation from HFL. Ms. Ward's letter instructed me to direct all future communications to her office, and it directed me to cease and desist further contact with HFL employees. I have provided an excerpt of the letter below:

January 5, 2023

VIA E-MAIL

Mr. Donald Puckett
Donald.Puckett@outlook.com

Re: Letter of Representation and Reminder of Obligations

Dear Mr. Puckett:

As you were informed by my client via email on December 30, 2022, this firm has been retained by Scott Hendler and Hendler Flores Law ("the Firm") to represent them related to your former employment at that firm.

As you have already been instructed, please direct all future communications to my office at the above address. **You should have no further contact directly with firm representatives regarding your employment or separation**.

I have reviewed a series of emails you directed to firm representatives in the last few days and offer the following response:

1. Your separation has been processed as a resignation effective December 28, 2022. You

14. Prior to the December 28, 2022 Zoom meeting, I was the attorney in charge of day-to-day litigation responsibilities for each of HFL's then-pending federal Section 1983 civil rights lawsuits (approximately eight total cases, including this -655 Case). I personally was the attorney responsible for keeping the task list for each case, for managing discovery, for developing litigation and trial strategies, and handling all day-to-day tasks. Because other HFL attorneys were involved in other cases with impending trial dates, for several months I had been managing all these responsibilities in HFL's Section 1983 cases with little assistance from or collaboration with other HFL attorneys.

15. I would never, under any circumstances, suddenly or unexpectedly resign from a law firm litigation position in which I presently was handling substantial client responsibilities in ongoing litigation. Without some extraordinary justification, I would consider doing so a violation of an attorney's ethical and professional obligations. Hypothetically, even if my law firm employer stopped paying me altogether, or if the firm suddenly dissolved—whatever the circumstance—I would nonetheless feel professionally obligated to take reasonable steps to

make a professional handoff of my case responsibilities to another attorney and/or make sure that clients were not prejudiced under the circumstances.

16. Mr. Hendler has told the Court in previous filings that I "abruptly resigned" from my employment with HFL,[1] and I take great umbrage at any such suggestion. I was suddenly and involuntarily terminated without warning from my employment with HFL, and any suggestion to the contrary is simply not true. The thought of suddenly resigning and walking away from my job at HFL without any professional handoff of the cases literally never occurred to me—not before, not during, and not until several days after the December 28 meeting in which I was unexpectedly terminated from my job at HFL.

17. Much to my surprise, no one from HFL ever contacted me to request my assistance with transitioning any case responsibilities to a new HFL attorney. No one inquired about my task lists, about case strategies, or about my attorney work product. By disconnecting my email and computer access on December 28, HFL precluded me from taking any steps toward a professional transition on my own. After receiving Ms. Ward's cease and desist letter on January 5, 2023, I did not feel comfortable initiating communications with any HFL attorneys or employees about ongoing cases at all.

18. On or about December 29, 2022, I contacted Plaintiffs in this lawsuit to personally inform them that I had been terminated from my job at HFL and that I was no longer their lawyer. I informed them that I was no longer responsible for drafting and filing a second lawsuit complaint for them, and I urged them to take steps to ensure that HFL would file the second lawsuit on or before January 5, 2023. I took these steps in an effort to ensure, as best I could under the circumstances, that Plaintiffs were not prejudiced by my abrupt termination from

[1] *See, e.g.* -655 Case [Dkt. 29 at 1 and fn. 1]; -009 Case [Dkt. 16 at 1 and fn. 1].

HFL. After I received Ms. Ward's cease and desist letter on January 5, 2023, I no longer felt comfortable contacting HFL's clients that I previously had represented, even to provide case-related information. Accordingly, I did not reach out to initiate contact with any HFL client other than Plaintiffs, in any way.

19. On or about January 4, 2023, HFL filed the -009 Case on behalf of Plaintiffs. No one from HFL asked for my thoughts or assistance related to the drafting of the original complaint in what would become the -009 Case.

20. In or about February 2023, Alex Gonzales, Sr. and Elizabeth Herrera Gonzales began reaching out to contact me to inquire whether they could hire me as replacement counsel for HFL and Hendler in the pending -655 Case and -009 Case. I declined to advise them with respect to their contractual relationship with HFL and/or their termination rights under their HFL agreement because I had a conflict of interest. Plaintiffs asked me to refer them to an attorney who could advise them on these issues, and I referred them to attorney Michael Marconi for that purpose.

21. On or about February 20, 2023, I joined the Devlin Law Firm ("DLF") as a Partner. DLF is a Delaware-based law firm that specializes in intellectual property litigation. DLF maintains a substantial docket of patent infringement cases in Texas federal district courts, including the Western District of Texas. As a firm, DLF also has substantial experience handling other types of litigation matters in federal court, including some limited experience successfully handling federal Section 1983 cases on a *pro bono* basis. *See, e.g. Brathwaite v. Warden Perry Phelps*, Case No. 1:10-cv-00646-SB, in the United States District Court for the District of Delaware.

22. On March 24, 2023, Mr. Marconi sent a letter to HFL and Scott Hendler informing them that Plaintiffs had chosen to terminate their attorney / client relationship with

HFL regarding their pending civil lawsuits (the -655 Case and the -009 Case). Mr. Marconi's letter stated that Plaintiffs had retained DLF and me as replacement counsel in these lawsuits. The letter further instructed HFL to forward the clients' file to DLF and to withdraw from the pending cases no later than April 7, 2023. A true and correct copy of Mr. Marconi's March 24, 2023 letter to HFL is submitted as Exhibit B to Plaintiffs' Response to HFL's First Amended Motion for Leave.

23. Within days of filing notices of appearance as replacement counsel in these lawsuits, DLF filed amended complaints for Plaintiffs in both the -655 Case and -009 Case. The amended complaints corrected procedural errors in the original complaints that had been filed by HFL. First, the amended complaints removed any reference to Alex Gonzales, Sr.'s capacity as administrator of the estate of Alex Gonzales, Jr. because Mr. Gonzales, Sr. has never been appointed administrator of his son's estate. Second, the amended complaints added wrongful death claims on behalf of minor child Z.A.G. in order to avoid any potential objections in light of the Texas "one action" rule for wrongful death lawsuits. Shortly after filing the amended complaints, DLF filed (on behalf of Plaintiffs) a Motion for Appointment of Guardian Ad Litem in an effort to ensure that the interests of Z.A.G. are adequately protected in these lawsuits.

24. Even though HLF received Mr. Marconi's termination letter on March 24, 2023, HFL did not begin transferring the clients' file to DLF until mid-April. Once I received most of HFL's client files and reviewed them in late April, 2023, I came to learn that HFL had performed no substantial work on the -655 Case after I was terminated on December 28, 2022, and that HFL had performed no substantial work on the -009 Case other than filing the original complaint. Even though important case-related events had occurred in December 2022 and January 2023, HFL had not even asked the City of Austin to supplement its document production to include important case-related documents from the events that had occurred during those

months, such as APD's completion of its internal affairs investigation and decision not to discipline Officer Gutierrez or Officer Serrato.

25. On May 23, 2023, I made a formal request to the City of Austin that it supplement its document production in the -655 Case to include investigative materials and other documents related to the events that had transpired in or after December 2022. My request for supplementation was based on requests for production of documents that I previously had served in the -655 Case when I had been an attorney employee of HFL. On June 23, 2023, in response to my request for supplementation, the City of Austin produced an additional 1,600 pages of documents plus additional videos and audio recordings.

26. Almost immediately after HFL and Hendler received Mr. Marconi's March 24, 2023 termination letter, HFL began taking a series of retaliatory steps against Plaintiffs and their new attorneys. On March 27, 2023, HFL filed a Texas state court lawsuit asserting one claim of tortious interference with contract against me individually and against DLF and the Marconi Law Firm. A true and correct copy of HFL's state court original petition is submitted as Exhibit C to Plaintiffs' Response to HFL's First Amended Motion for Leave. Each of the defendants in this lawsuit filed answers on or about June 5, 2023. True and correct copies of these answers to the lawsuit are submitted as Exhibit D to Plaintiffs' Response to HFL's First Amended Motion for Leave. Unbeknownst to me and the other defendants to that lawsuit, HFL had voluntarily non-suited its state court lawsuit on June 2, 2023— the previous business day—without informing the defendants until after the answers had been filed.

27. On June 2, 2023, HFL also had filed a similar lawsuit for tortious interference—this time in federal court, naming DLF as the only defendant. A true and correct copy of HFL's original complaint in federal court is submitted as Exhibit E to Plaintiffs' Response to HFL's First Amended Motion for Leave. DLF's answer to HFL's federal lawsuit is forthcoming.

28. On May 12, 2023, HFL filed a Motion for Leave to Intervene as of Right in both the -655 Case and -009 Case. On May 23, 2023, I sent HFL and Hendler a letter pursuant to Fed. R. Civ. P. 11 informing them that HFL's assertion of contractual attorney lien rights was frivolous and sanctionable in light of State Bar of Texas Professional Ethics Committee Opinion No. 610, which unambiguously holds: "Under the Texas Disciplinary Rules of Professional Conduct, a lawyer representing a client in litigation may not acquire, by agreement with his client, a lien upon the subject matter of the litigation as a means of securing payment of the lawyer's fee with respect to the litigation." A true and correct copy of this Rule 11 letter is submitted as Exhibit F to Plaintiffs' Response to HFL's First Amended Motion for Leave.

29. HFL never responded in writing to the May 23 Rule 11 letter. Instead, on June 12, 2023, HFL filed a First Amended Motion for Leave to Intervene as of Right, supported by a First Amended Declaration of Scott Hendler and a proposed First Amended Plea in Intervention.

30. Plaintiffs dispute HFL's contention, made in the First Amended Motion for Leave and supporting papers, that Plaintiffs terminated HFL and attorney Scott Hendler without cause. To the contrary, Plaintiffs intend to defend against any claim HFL files against them by showing with evidence that Plaintiffs had sufficient cause and compelling reasons to fire HFL and Hendler, and to retain substitute counsel. After the -655 Case and -009 Case are concluded, Plaintiffs expect to file a lawsuit and assert claims against HFL for professional negligence, breach of contract, and breach of fiduciary duty arising from HFL's former representation of Plaintiffs in these lawsuits.

31. In order to defend against HFL's proposed intervention claim and assert their own claims against HFL, Plaintiffs will be required to rely upon otherwise privileged information regarding Hendler's and HFL's acts and/or omissions while HFL represented Plaintiffs in these pending lawsuits. As the current attorney of record for Plaintiffs, I am firmly of the opinion that

forcing Plaintiffs to litigate their disputes with HFL now, in this lawsuit, will be highly prejudicial to Plaintiffs. I cannot further discuss the factual basis for my opinion without revealing Plaintiffs privileged attorney / client information.

32. Plaintiffs contend that the terms of their contingent fee agreement with HFL are privileged and confidential. In the -655 Case, Defendant City of Austin served a request for production of documents on Plaintiffs that sought "[t]he attorneys' fee agreement between you and your legal counsel relating to this Litigation." Plaintiffs, while they were represented by HFL, objected to this request for production on the basis of attorney-client privilege and attorney work-product privilege. A true and correct copy of Plaintiff's response and objections to City of Austin Request for Production No. 17 (with redaction of other unrelated material) is submitted as Exhibit G to Plaintiffs' Response to HFL's First Amended Motion for Leave. HFL's motion for leave to intervene in the -655 and -009 Cases, however, provides numerous disclosures of the terms of the contingent fee agreement. Plaintiffs did not and have not authorized HFL to make these disclosures of Plaintiffs' privileged and confidential information.

33. Several of the attorney participants in the -655 Case and -009 Case are likely to be material witnesses in Plaintiffs' dispute with HFL. At a minimum, attorney Jeff Edwards and attorney Gray Laird (in addition to myself) are likely to be material witnesses in the dispute over whether Plaintiffs terminated Hendler and HFL for good cause, given each person's personal knowledge regarding Hendler's and HFL's acts and omissions during the time HFL represented Plaintiffs in the -655 and -009 Cases.

34. I have provided the declarations above by reference to non-privileged information only, and I have omitted many relevant facts and important details because further discussion of these events would require disclosure of Plaintiffs' privileged and confidential information related to the pending -655 Case and -009 Case.

35. I declare under penalty of perjury that the foregoing statements and declarations are true and correct to the best of my personal knowledge.

This Sworn Declaration is made in Dallas, Texas on July 10, 2023, by:

Donald Puckett

EXHIBIT B

THE MARCONI FIRM

9288 Huntington Square
North Richland Hills, Texas 76108-9475

Telephone: (214) 682-3592
Facsimile: (817) 479-2210
Email: mmarconi416@icloud.com

March 24, 2023

Mr. Scott M. Hendler
Hendler & Flores Law, PLLC
901 S. Mopac Expressway
Building 1, Suite 300
Austin, Texas 78746
shandler@hendlerlaw.com

Re: *Alex Gonzales, Sr. and Elizabeth Herrera v. City of Austin*, Case No. 1:22-cv-655, in the United States District Court for the Western District of Texas (Austin Division); and

Alex Gonzalez, Sr. (individually and as administrator) and Elizabeth Herrera (a/k/a Elizabeth Gonzalez) v. Luis Serrano, Gabriel Gutierrez and the City of Austin, Case No. 1:23-cv—9, in the United States District Court for the Western District of Texas (Austin Division).

Dear Mr. Hendler,

The undersigned represents Alex Gonzales, Sr., and Elizabeth Herrera in connection with their decision to transfer representation of them in the above referenced matters from Hendler & Flores Law, PLLC and Webber Law to the Devlin Law Firm LLC.

To ensure a smooth transition of the cases, my clients have agreed that the effective date for the termination of your firm's representation of them should be April 7, 2023. The Devlin Law Firm will be filing a notice of appearance in the above referenced cases no later than March 27, 2023. I would ask that you stand down from any work on these cases that is not driven by imminent deadlines and that you instead allow the Devlin Law Firm to take the lead and make any decisions regarding the pending litigation. Additionally, I would request that you prepare to promptly transfer all your litigation files and work product relating to the above referenced cases and that you create a summary report identifying all pending litigation deadlines, tasks, or information of which substitute counsel should be aware. Finally, I would ask that you cooperate with the Devlin Law Firm to ensure the smooth transfer of responsibility for the above referenced cases and that you prepare a formal motion for substitution of counsel after the Devlin Law Firm confirms receipt of all materials necessary for the substitution of counsel, but in no later than April 7, 2023.

If you have any questions, you should feel free to contact me via email as I am out of the country until April 3, 2023.

Sincerely,

Michael Marconi

Michael Marconi

cc. Rebecca Webber, Esq

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EXHIBIT C

D-1-GN-23-001636

CAUSE NO. _____

HENDLER FLORES LAW, PLLC, *Plaintiff*	§	**IN THE DISTRICT COURT OF**
v.	§	**TRAVIS COUNTY, TEXAS**
GORDIE DONALD PUCKETT, DEVLINE LAW FIRM, LLC, AND THE MARCONI LAW FIRM, *Defendants*	§	455TH, DISTRICT COURT **_____ JUDICIAL DISTRICT**

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE COURT:

Hendler Flores Law, PLLC, Plaintiff, files this lawsuit against Defendants Gordie Donald Puckett, Devlin Law Firm, LLC, and The Marconi Law Firm (collectively, "Defendants"), and respectfully shows this Court the following:

I. DISCOVERY LEVEL

1. Pursuant to Tex. R. Civ. P. 190.4, Plaintiff respectfully submits that discovery in this case be conducted pursuant to Level 2 Discovery Plan.

2. Plaintiff seeks monetary damages within the jurisdictional limits of this Court and non-monetary relief.

II. PARTIES

3. Plaintiff Hendler Flores Law, PLLC is a Texas Limited Liability Company whose principal place of business is in Travis County, Texas.

4. Plaintiff brings an action for tortious interference with contract against Defendants.

5. Defendant Gordie Donald Puckett is an individual residing in Texas. Mr. Puckett may be served with process at his domicile at 4309 Wingren Drive, Plano, Texas 75093, in Collin County, Texas. Plaintiff respectfully requests that citation be issued.

6. Defendant Devlin Law Firm, LLC is a limited liability company operating and doing business in Texas. Defendant Devlin Law Firm LLC may be served with process at its headquarters at 1526 Gilpin Ave., Wilmington, DE 19806. Plaintiff respectfully requests that citation be issued.

7. Defendant The Marconi Law Firm is a sole enterprise operating and doing business in Texas. Defendant The Marconi Law Firm may be served with process at its headquarters at 9284 Huntington Square # 100, North Richland Hills, Texas, 76182. Plaintiff respectfully requests that citation be issued.

III. VENUE AND JURISDICTION

8. Venue is proper in this matter pursuant to Tex. Civ. Prac. & Rem. Code §§ 15.002(a)(1) and because all or substantially all the events and omissions giving rise to the claim occurred in Travis County, Texas.

9. Plaintiff performed its contractual obligations in Travis County, Texas on behalf of the other parties to the underlying contract ("the Gonzales Clients") that is the subject of the tortious interference with contract claim.

10. Plaintiff performed its obligations in several ways, including, but not limited to, filing two legal actions in the Western District of Texas, Austin Division, on behalf of the Gonzales Clients, conducting the depositions of two witnesses involved in the shooting that is the subject of the law suits filed on behalf of the Gonzales Clients, engaging in various litigation activities on behalf the Gonzales Clients, and advancing substantial costs of litigation and other necessary expenses on behalf of the Gonzales Clients.

11. Plaintiff seeks damages within the jurisdictional limits of this Court.

12. Personal jurisdiction is proper over each Defendant in Texas.

13. The Defendants are residents and/or citizens of Texas and/or are subject to the general jurisdiction of Texas due to their continuous and systematic conduct of business in Texas.

14. Plaintiff's claims against Defendants arise out of and relate specifically to each Defendant's conduct in Texas that is the subject of this lawsuit.

IV. FACTS

15. Plaintiff, in its capacity as a law firm whose principals are licensed to practice law by the State Bar of Texas in the State of Texas, entered into an attorney contingent fee agreement to represent Alex Gonzales, Sr. and Elizabeth Herrera ("the Gonzales Clients"), individually and as representative of the estate of their deceased biological son, Alex Gonzales, Jr. in a lawsuit in the State of Texas.

16. Upon information and belief, beginning around January 2023, Defendants planned and acted in concert to tortiously interfere with Plaintiff's business relationship in connection with Plaintiff's representation of the Gonzales Clients.

17. On or about March 24-25, 2023, Defendants completed their tortious interference with Plaintiff's contractual relationship with the Gonzales Clients by willfully and intentionally persuading the Gonzales Clients to terminate Plaintiff's legal representation.

18. Plaintiff has been damaged by Defendants' actions and omissions both monetarily and personally.

19. Plaintiff reserves the right to supplement the facts of this case as provided by the Texas Rules of Civil Procedure.

V. CAUSE OF ACTION – TORTIOUS INTERFERENCE WITH CONTRACT

20. Plaintiff incorporates and adopts by reference the allegations contained in each and every preceding paragraph of this petition.

21. The elements of tortious interference with a contract are: (1) the existence of a contract subject to interference; (2) the occurrence of an act of interference that was willful and intentional; (3) the act was a proximate cause of the claimant's damage; and (4) actual damage or loss occurred. *See, e.g.*, *Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 856–57 (Tex. App.—Houston [14th Dist. 2001, pet. denied) (citing *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 283 (Tex. 1996)).

22. Plaintiff had an existing, fully executed attorney contingent fee contract that preexisted Defendants' relationship with the Gonzales Clients that was subject to interference.

23. Defendants willfully and intentionally interfered with Plaintiff's contract, in a variety of ways, including but not limited to willfully and intentionally persuading the Gonzales Clients to terminate their attorney fee contract with Plaintiff and in fact persuaded the Gonzales Clients to terminate the contract with Plaintiff.

24. Defendants acted in concert to deliberately, willfully, and intentionally commit their acts and omissions and those acts and omissions were a proximate cause of the Gonzales Clients' decision to terminate Plaintiff's representation of the Gonzales Clients' on March 24, 2023, and of Plaintiff's damages.

25. As a result of Defendants' actions and omissions, Plaintiff has suffered, and continues to suffer, actual damages and loss.

VI. DAMAGES

26. Plaintiff repeats and re-alleges each of the allegations in the preceding paragraphs as if fully set forth herein.

27. As a direct and proximate result of the intentional and willful acts and/or omissions of the Defendants as set out above, Plaintiff suffered damages and loss. Plaintiff seeks damages in excess

of $1,000,000.

VII. PRAYER

Plaintiff Hendler Flores Law, PLLC prays that Defendants be cited to appear and answer herein. After a trial regarding their claims, Plaintiff Hendler Flores Law, PLLC prays for an award of damages and any other relief in law or equity to which they may show themselves to be entitled.

Respectfully submitted,

THE SNELL LAW FIRM, P.L.L.C.

BY: */s/ Jason W. Snell*

Jason W. Snell
Bar No. 24013540
AnneMarie McComb
Bar No. 24109527
1615 W. 6th St., Suite A
Austin, Texas 78703
(512) 477-5291 – Telephone
(512) 477-5294 – Facsimile
firm@snellfirm.com – Email

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that Plaintiff's Original Petition was filed on March 27th, 2023, via the Court's efile system and will be served in compliance with the Texas Rules of Civil Procedure.

/s/ Jason W. Snell
Jason W. Snell

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Jason Snell on behalf of Jason Snell
Bar No. 24013540
firm@snellfirm.com
Envelope ID: 74024608
Filing Code Description: Petition
Filing Description: PLAINTIFF'S ORIGINAL PETITION
Status as of 3/28/2023 12:18 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jason Snell	24013540	firm@snellfirm.com	3/27/2023 9:31:38 AM	SENT

EXHIBIT D

CAUSE NO. D-1-GN-23-001636

HENDLER FLORES LAW, PLLC,	§	
	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
	§	
v.	§	**TRAVIS COUNTY, TEXAS**
	§	
GORDIE DONALD PUCKETT, DEVLINE LAW FIRM, LLC and **THE MARCONI LAW FIRM**,	§	
	§	**455th JUDICIAL DISTRICT**
	§	
Defendants.	§	

DEFENDANT PUCKETT'S PLEA TO THE JURISDICTION, SPECIAL EXCEPTIONS, AND ORIGINAL ANSWER TO PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE COURT:

Pursuant to Tex. R. Civ. P. 83, 84 and 85, Defendant Gordie Donald Puckett (herein "Puckett" or "Defendant Puckett") files this Answer to Plaintiff's Original Petition.

PLEA TO THE JURISDICTION

1. Defendant Puckett asserts this Plea to the Jurisdiction pursuant to Tex. R. Civ. P. 85.

2. The Court lacks jurisdiction over this case due to a lack of ripeness. "Ripeness is a component of subject matter jurisdiction that focuses on a lawsuit's timing. . . [A] case must be ripe in order for the trial court to have subject matter jurisdiction . . . ." *Southwestern Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 682-83 (Tex. 2020).

3. This dispute is not ripe for judicial resolution because Plaintiff has not yet suffered any damages. Under Texas law, a lawyer with a contingent fee agreement that has been terminated by the client cannot—as a matter of law—suffer damages *unless and until* the client *actually recovers* money from a judgment or settlement that potentially is subject to the terminated lawyer's contingent fee. *See Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 562

(Tex. 2006) (discussing *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969)). "In allowing the discharged lawyer to collect the contingent fee from any damages the client recovers, *Mandell* complies with the principle that a contingent-fee lawyer 'is entitled to receive the specified fee ***only when and to the extent the client receives payment***.'" *Hoover*, 206 S.W.3d at 562 (quoting Restatement (Third) of the Law Governing Lawyers §35(2)) (emphasis added). *See also Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 94 (Tex. 2001); *Wilkinson v. Susman*, 2020 Tex. App. LEXS 8953 at *17-18, 2020 WL 6791057 (Tex. App.—Houston [14th] Nov. 19, 2020); *Grantham v. J&B Sausage Co.*, 2016 Tex. App. LEXIS 5168 at *13-14, 2016 WL 2935874 (Tex. App.—Houston [14th] May 17, 2016).

4. In its Original Petition, Plaintiff's allegations of damages are wholly conclusory, with no factual detail whatsoever. *See* Original Petition at ¶18 and ¶¶25-27. Plaintiff does not allege that the "Gonzales Clients" have received any money from a settlement or judgment that is subject to Plaintiff's contingent-fee agreement. Plaintiff's allegation of damages is nothing more than a speculative allegation of potential future damages. For this reason, Plaintiff has not pled facts that establish a dispute that is ripe for judicial resolution, and therefore Plaintiff's pleadings fail to establish the Court's subject matter jurisdiction. *See, e.g. Hill v. Heritage Resources*, 964 S.W.2d 89, 116 (Tex.App.—El Paso 1997) ("A cause of action for tortious interference with an existing contract does not accrue until the contract is interfered with ***and harm caused to the plaintiff***. . . . Until a cause of action accrues, a lawsuit is premature. . . . If the plaintiff is not yet harmed, even in the face of a breach of duty, then the cause of action has not yet accrued and any suit filed there upon is premature. . . . Moreover, if a claim is not yet ripe, a trial court has no jurisdiction to render an opinion thereon. . . . To the extent that a plaintiff seeks relief based upon facts that have not yet occurred, there is not live controversy between the

parties and a trial court lacks subject matter jurisdiction over such claims") (emphasis added). *See also Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000) ("[R]ipeness, like standing, is a threshold issue that implicates subject matter jurisdiction, and like standing, emphasizes the need for a concrete injury for a justiciable claim to be presented").

5. A plea to the jurisdiction is the appropriate procedural device for a defendant to challenge the court's subject matter jurisdiction. *See Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 232 (Tex. 2004). When the Court lacks subject matter jurisdiction, it must sustain the plea to the jurisdiction and dismiss the case. *See City of Houston v. Rhule*, 477 S.W.3d 440, 442 (Tex. 2013).

SPECIAL EXCEPTIONS

1. Pursuant to Tex. R. Civ. P. 85 and Tex. R. Civ. P. 91, Defendant Puckett asserts the following Special Exceptions to Plaintiff's Original Complaint.

2. Plaintiff's Original Petition alleges one cause of action for tortious interference with contract. The legal elements of a claim for tortious interference with an existing contract are: (1) the existence of a valid contract subject to interference; (2) that the defendant willfully and intentionally interfered with the contract; (3) that the interference proximately caused the plaintiff's injury; and (4) that the plaintiff incurred actual damages or loss. *See Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 689 (Tex. 2017).

3. Plaintiff's Original Complaint in this case fails to allege facts in support of element 2—that the defendant willfully and intentionally interfered with the contract. Plaintiff's only allegations for this legal element of tortious interference are wholly conclusory. *See* Original Petition at ¶¶23-24. Plaintiff's allegations do nothing more than recite the words of the legal standard, without including any specific factual allegation whatsoever.

4. Plaintiff's Original Complaint in this case also fails to allege facts in support of element 3— that the interference proximately caused the plaintiff's injury. Again, Plaintiff's only allegations for this legal element of tortious interference are wholly conclusory. *See* Original Petition at ¶¶24-25. Plaintiff's allegations do nothing more than recite the words of the legal standard, without including any specific factual allegation whatsoever.

5. Plaintiff's Original Complaint in this case also fails to allege facts in support of element 4— that the plaintiff incurred actual damages or loss. Again, Plaintiff's only allegations for this legal element of tortious interference are wholly conclusory. *See* Original Petition at ¶18 and ¶¶25-27. Plaintiff's allegations do nothing more than recite the words of the legal standard, without including any specific factual allegation whatsoever.

6. When a plaintiff uses bare and conclusory allegations to plead a cause of action in "general terms," the Court should sustain special exceptions and require the plaintiff to make specific factual allegations supporting each legal element of the cause of action. *See, e.g. Subia v. Texas Dep't of Human Services*, 750 S.W.2d 827, 829 (Tex. App.—El Paso 1988). *See also Fain v. Great Spring Waters of Am.*, 973 S.W.2d 327, 329 (Tex. App.—Tyler 1998) ("[O]nly well pleaded facts may be taken as true, and conclusory pleadings do not support relief."); *Larue v. Genescreen, Inc.*, 957 S.W.2d 958, 961-62 (Tex. App.—Beaumont 1997) (affirming district court's grant of special exceptions where "no facts are plead which support this conclusory allegation").

GENERAL DENIAL

Pursuant to Tex. R. Civ. P. 92, Defendant Puckett generally denies each and every allegation contained within Plaintiff's Original Petition.

AFFIRMATIVE DEFENSES

Pursuant to Tex. R. Civ. P. 84 and 85, Defendant alleges the following affirmative defenses:

1. **First Affirmative Defense: Void Contract – Illegality**. Plaintiff may not recover for the alleged tortious interference with contract because the attorney contingent fee contract on which Plaintiff's alleged cause of action is based is a void contract because it is an illegal contract. Specifically, the attorney contingent fee contract is an illegal contract because it contains a contractual attorney lien provision that is illegal under Texas law and that is a violation of Texas Attorney Disciplinary Rules of Professional Conduct §1.08(h). *See* State Bar of Texas Professional Ethics Committee Opinion No. 610. Additionally, the attorney contingent fee contract is an illegal contract because Plaintiff has taken actual steps to enforce the illegal attorney lien provision by filing petitions in intervention against the Gonzales Clients in their pending federal civil litigation. Additionally, the attorney contingent fee contract is an illegal contract because enforcement of the contract's terms would result in an unconscionable fee for Plaintiff, in violation of Texas Attorney Disciplinary Rules of Professional Conduct §1.04(a).

2. Second Affirmative Defense: Void Contract – Against Public Policy. Plaintiff may not recover for the alleged tortious interference with contract because the attorney contingent fee contract on which Plaintiff's alleged cause of action is based is a void contract because it is a contract against public policy. Specifically, the attorney contingent fee contract is an illegal contract because it contains a contractual attorney lien provision that is illegal under Texas law and that is a violation of Texas Attorney Disciplinary Rules of Professional Conduct §1.08(h). *See* State Bar of Texas Professional Ethics Committee Opinion No. 610. Additionally,

the attorney contingent fee contract is a contract against public policy because Plaintiff has taken actual steps to enforce the illegal attorney lien provision by filing petitions in intervention against the Gonzales Clients in their pending federal civil litigation. Additionally, the attorney contingent fee contract is a contract against public policy because enforcement of the contract's terms would result in an unconscionable fee for Plaintiff, in violation of Texas Attorney Disciplinary Rules of Professional Conduct §1.04(a).

3. **Third Affirmative Defense: Plaintiff's Fault**. Plaintiff may not recover for the alleged tortious interference with contract because any injury or harm to Plaintiff is Plaintiff's own fault. Specifically, Plaintiff is at fault for any alleged injury or damages because: (1) Plaintiff committed acts of professional negligence and/or professional malpractice in connection with its representation of the Gonzales Clients, (2) Plaintiff was grossly inattentive to the handling of the Gonzales Clients' legal matters, (3) Plaintiff breached its fiduciary obligations to the Gonzales Clients, (4) Plaintiff engaged in acts of professional misconduct and violation of lawyer ethics in its handling of the Gonzales Clients' legal matters, (5) Plaintiff materially breached this attorney contingent fee contract by failing to fulfill its own obligations to the Gonzales Clients under the contract and (6) Plaintiff committed other acts and omissions that caused or contributed to any injury or damages alleged by Plaintiff.

4. **Fourth Affirmative Defense: Responsibility of Others.** Defendant Puckett alleges that each of the following individuals committed acts of professional negligence and/or other wrongful acts such that each person is responsible, in whole or in part, for any damages alleged by Plaintiff: (1) Scott Martin Hendler, (2) Maria Luisa Flores, (3) Stephen Demik, (4) Laura Goetsche, (5) Mack Martinez and (6) Alexis Lopez.

5. **Fifth Affirmative Defense: Privilege**. Defendant Puckett was legally privileged to engage in the conduct that Plaintiff alleges as interfering with Plaintiff's contract rights because Defendant Puckett was, at all relevant times, exercising his own legal rights in good faith to provide truthful information and honest advice to the Gonzales Clients within the scope of their affirmative request for legal advice.

6. **Sixth Affirmative Defense: Justification**. Defendant Puckett was legally justified to engage in the conduct that Plaintiff alleges as interfering with Plaintiff's contract rights because Defendant Puckett was, at all relevant times, exercising his own legal rights as an attorney to interact with and provide legal advice and services to the Gonzales Clients, who had affirmatively solicited Defendant Puckett's legal services.

7. **Seventh Affirmative Defense: One Satisfaction Rule**. Plaintiff is not allowed to recover in this lawsuit because of the one satisfaction rule. Plaintiff has already attempted to recover duplicative damages for a single alleged injury by simultaneously filing this lawsuit and also filing Pleas in Intervention in other pending civil litigation against the Gonzales Clients to also recovery attorney fees from the Gonzales Clients under the attorney contingent fee contract that is the basis for Plaintiff's alleged tortious interference claim.

REQUEST FOR A JURY TRIAL

Defendant Puckett requests a jury trial on all disputed factual issues in this case.

Dated: June 4, 2023

Respectfully submitted,

/s/ Gordie D. Puckett
Gordie Donald Puckett
Defendant *Pro Se*
Texas State Bar No. 24013358
Email: donald.puckett@outlook.com
Phone: 214-274-1044

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plea to the Jurisdiction, Special Exceptions, and Original Answer to Plaintiff's Original Petition was e-served on all counsel of record on June 4, 2023.

/s/ Gordie D. Puckett
Gordie Donald Puckett

CAUSE NO. D-1-GN-23-001636

HENDLER FLORES LAW, PLLC,	§	
	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
	§	
v.	§	**TRAVIS COUNTY, TEXAS**
	§	
GORDIE DONALD PUCKETT, DEVLIN LAW FIRM, LLC and **THE MARCONI LAW FIRM**,	§	**455th JUDICIAL DISTRICT**
	§	
	§	
Defendants.	§	

DEFENDANT DEVLIN LAW FIRM LLC'S ORIGINAL ANSWER TO PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE COURT:

Pursuant to Tex. R. Civ. P. 83, 84 and 85, Defendant Devlin Law Firm LLC (herein "DLF" or "Defendant DLF") files this Answer to Plaintiff's Original Petition.

PLEA TO THE JURISDICTION

1. Defendant DLF asserts this Plea to the Jurisdiction pursuant to Tex. R. Civ. P. 85.

2. The Court lacks jurisdiction over this case due to a lack of ripeness. "Ripeness is a component of subject matter jurisdiction that focuses on a lawsuit's timing. . . [A] case must be ripe in order for the trial court to have subject matter jurisdiction . . . ." *Southwestern Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 682-83 (Tex. 2020).

3. This dispute is not ripe for judicial resolution because Plaintiff has not yet suffered any damages. Under Texas law, a lawyer with a contingent fee agreement that has been terminated by the client cannot—as a matter of law—suffer damages *unless and until* the client *actually recovers* money from a judgment or settlement that potentially is subject to the terminated lawyer's contingent fee. *See Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 562 (Tex. 2006) (discussing *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969). "In

allowing the discharged lawyer to collect the contingent fee from any damages the client recovers, *Mandell* complies with the principle that a contingent-fee lawyer 'is entitled to receive the specified fee ***only when and to the extent the client receives payment***.'" *Hoover*, 206 S.W.3d at 562 (quoting Restatement (Third) of the Law Governing Lawyers §35(2)) (emphasis added). *See also Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 94 (Tex. 2001); *Wilkinson v. Susman*, 2020 Tex. App. LEXIS 8953 at *17-18, 2020 WL 6791057 (Tex. App.—Houston [14th] Nov. 19, 2020); *Grantham v. J&B Sausage Co.*, 2016 Tex. App. LEXIS 5168 at *13-14, 2016 WL 2935874 (Tex. App.—Houston [14th] May 17, 2016).

4. Courts in Texas and elsewhere have repeatedly held that causes of action arising out of alleged rights to a contingency fee are not ripe where no recovery on the underlying suit has been made and there is no clear indication that one is likely to be awarded. *See, e.g.*, *In re Boyd Veigel, P.C.*, 575 F. App'x 393, 397 (5th Cir. 2014) (affirming grant of motion to dismiss claim for declaratory judgment of entitlement to attorneys' fees). Similarly, it has been well-settled law for over 125 years in Texas that a cause of action for compensation under a contingent fee does not accrue until there has been recovery on the underlying claim. *See Cobb v. First Nat'l Bank*, 91 Tex. 226, 230-31, 42 S.W. 770, 771-72 (1897); *see also*, *Wood v. Tran*, 2019 Tex. App. LEXIS 6756, at *8-9 (Tex. App.—Houston [1st] Aug. 6, 2019) (holding that cause of action for breach of contingency fee contract accrued "upon recovery"); *Douglas-Peters v. Cho, Choe & Holen, P.C.*, No. 05-15-01538-CV, 2017 Tex. App. LEXIS 1836, at *39-40 (Tex. App.—Dallas [5th] Mar. 3, 2017) (holding that cause of action for breach of contingency fee agreement accrued when recovery was had and payment of agreed fee was refused, not when client terminated the contract);

5. In its Original Petition, Plaintiff's allegations of damages are wholly conclusory, with no factual detail whatsoever. *See* Original Petition at ¶18 and ¶¶25-27. Plaintiff does not allege that the "Gonzales Clients" have received any money from a settlement or judgment that is subject to Plaintiff's contingent-fee agreement. Plaintiff's allegation of damages is nothing more than a speculative allegation of potential future damages. For this reason, Plaintiff has not pled facts that establish a dispute that is ripe for judicial resolution, and therefore Plaintiff's pleadings fail to establish the Court's subject matter jurisdiction. *See, e.g. Hill v. Heritage Resources*, 964 S.W.2d 89, 116 (Tex.App.—El Paso 1997) ("A cause of action for tortious interference with an existing contract does not accrue until the contract is interfered with ***and harm caused to the plaintiff***. . . . Until a cause of action accrues, a lawsuit is premature. . . . If the plaintiff is not yet harmed, even in the face of a breach of duty, then the cause of action has not yet accrued and any suit filed there upon is premature. . . . Moreover, if a claim is not yet ripe, a trial court has no jurisdiction to render an opinion thereon. . . . To the extent that a plaintiff seeks relief based upon facts that have not yet occurred, there is not live controversy between the parties and a trial court lacks subject matter jurisdiction over such claims") (emphasis added). *See also Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000) ("[R]ipeness, like standing, is a threshold issue that implicates subject matter jurisdiction, and like standing, emphasizes the need for a concrete injury for a justiciable claim to be presented").

6. A plea to the jurisdiction is the appropriate procedural device for a defendant to challenge the court's subject matter jurisdiction. *See Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 232 (Tex. 2004). When the Court lacks subject matter jurisdiction, it must sustain the plea to the jurisdiction and dismiss the case. *See City of Houston v. Rhule*, 477 S.W.3d 440, 442 (Tex. 2013).

SPECIAL EXCEPTIONS

1. Pursuant to Tex. R. Civ. P. 85 and Tex. R. Civ. P. 91, Defendant DLF asserts the following Special Exceptions to Plaintiff's Original Complaint.

2. Plaintiff's Original Petition alleges only one cause of action for tortious interference with contract. The legal elements of a claim for tortious interference with an existing contract are: (1) the existence of a valid contract subject to interference; (2) that the defendant willfully and intentionally interfered with the contract; (3) that the interference proximately caused the plaintiff's injury; and (4) that the plaintiff incurred actual damages or loss. *See Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 689 (Tex. 2017).

3. Here, Plaintiff's Original Complaint fails to allege facts in support of element 2— that the defendant willfully and intentionally interfered with the contract. Plaintiff's only allegations for this legal element of tortious interference are wholly conclusory. *See* Original Petition at ¶¶23-24. Plaintiff's allegations do nothing more than recite the words of the legal standard, without including any specific factual allegation whatsoever.

4. Here, Plaintiff's Original Complaint also fails to allege facts in support of element 3— that the interference proximately caused the plaintiff's injury. Again, Plaintiff's only allegations for this legal element of tortious interference are wholly conclusory. *See* Original Petition at ¶¶24-25. Plaintiff's allegations do nothing more than recite the words of the legal standard, without including any specific factual allegation whatsoever.

5. Here, Plaintiff's Original Complaint also fails to allege facts in support of element 4— that the plaintiff incurred actual damages or loss. Again, Plaintiff's only allegations for this legal element of tortious interference are wholly conclusory. *See* Original Petition at ¶18 and

¶¶25-27. Plaintiff's allegations do nothing more than recite the words of the legal standard, without including any specific factual allegation whatsoever.

6. When a plaintiff uses bare and conclusory allegations to plead a cause of action in "general terms," the Court should sustain special exceptions and require the plaintiff to make specific factual allegations supporting each legal element of the cause of action. *See, e.g. Subia v. Texas Dep't of Human Services*, 750 S.W.2d 827, 829 (Tex. App.—El Paso 1988). *See also Fain v. Great Spring Waters of Am.*, 973 S.W.2d 327, 329 (Tex. App.—Tyler 1998) ("[O]nly well pleaded facts may be taken as true, and conclusory pleadings do not support relief."); *Larue v. Genescreen, Inc.*, 957 S.W.2d 958, 961-62 (Tex. App.—Beaumont 1997) (affirming district court's grant of special exceptions where "no facts are plead which support this conclusory allegation").

7. The header of Plaintiff's Original Complaint identifies Defendant DLF as "DEVLINE LAW FIRM, LLC." The body of Plaintiff's Original Complaint variously identifies Defendant DLF as "Devlin Law Firm, LLC" (at 1, ¶ 6) and "Devlin Law Firm LLC[.]" Defendant DLF is in fact "Devlin Law Firm LLC"—a fact readily ascertainable from its registration information available from the State of Delaware, Department of State: Division of Corporations.

GENERAL DENIAL

Pursuant to Tex. R. Civ. P. 92, Defendant DLF generally denies each and every allegation contained within Plaintiff's Original Petition.

AFFIRMATIVE DEFENSES

Pursuant to Tex. R. Civ. P. 84 and 85, Defendant alleges the following affirmative defenses:

1. **First Affirmative Defense: Void Contract – Illegality**. Plaintiff may not recover for the alleged tortious interference with contract because the attorney contingent fee contract on which Plaintiff's alleged cause of action is based is a void contract because it is an illegal contract. Specifically, the attorney contingent fee contract is an illegal contract because it contains a contractual attorney lien provision that is illegal under Texas law and that is a violation of Texas Attorney Disciplinary Rules of Professional Conduct §1.08(h). *See* State Bar of Texas Professional Ethics Committee Opinion No. 610. Additionally, the attorney contingent fee contract is an illegal contract because Plaintiff has taken actual steps to enforce the illegal attorney lien provision by filing petitions in intervention against the Gonzales Clients in their pending federal civil litigation. Additionally, the attorney contingent fee contract is an illegal contract because enforcement of the contract's terms would result in an unconscionable fee for Plaintiff, in violation of Texas Attorney Disciplinary Rules of Professional Conduct §1.04(a).

2. **Second Affirmative Defense: Void Contract – Against Public Policy**. Plaintiff may not recover for the alleged tortious interference with contract because the attorney contingent fee contract on which Plaintiff's alleged cause of action is based is a void contract because it is a contract against public policy. Specifically, the attorney contingent fee contract is an illegal contract because it contains a contractual attorney lien provision that is illegal under Texas law and that is a violation of Texas Attorney Disciplinary Rules of Professional Conduct §1.08(h). *See* State Bar of Texas Professional Ethics Committee Opinion No. 610. Additionally, the attorney contingent fee contract is a contract against public policy because Plaintiff has taken actual steps to enforce the illegal attorney lien provision by filing petitions in intervention against the Gonzales Clients in their pending federal civil litigation. Additionally, the attorney contingent fee contract is a contract against public policy because enforcement of the contract's terms would

result in an unconscionable fee for Plaintiff, in violation of Texas Attorney Disciplinary Rules of Professional Conduct §1.04(a).

3. **Third Affirmative Defense: Plaintiff's Fault**. Plaintiff may not recover for the alleged tortious interference with contract because any injury or harm to Plaintiff is Plaintiff's own fault. Specifically, Plaintiff is at fault for any alleged injury or damages because: (1) Plaintiff committed acts of professional negligence and/or professional malpractice in connection with its representation of the Gonzales Clients, (2) Plaintiff was grossly inattentive to the handling of the Gonzales Clients' legal matters, (3) Plaintiff breached its fiduciary obligations to the Gonzales Clients, (4) Plaintiff engaged in acts of professional misconduct and violation of lawyer ethics in its handling of the Gonzales Clients' legal matters, (5) Plaintiff materially breached this attorney contingent fee contract by failing to fulfill its own obligations to the Gonzales Clients under the contract and (6) Plaintiff committed other acts and omissions that caused or contributed to any injury or damages alleged by Plaintiff.

4. **Fourth Affirmative Defense: Responsibility of Others.** Defendant DLF alleges that each of the following individuals committed acts of professional negligence and/or other wrongful acts such that each person is responsible, in whole or in part, for any damages alleged by Plaintiff: (1) Scott Martin Hendler, (2) Maria Luisa Flores, (3) Stephen Demik, (4) Laura Goetsche, and (5) Mack Martinez.

5. **Fifth Affirmative Defense: Privilege**. Defendant DLF was legally privileged to engage in the conduct that Plaintiff alleges as interfering with Plaintiff's contract rights because Defendant DLF was, at all relevant times, performing its obligations (and/or acting through persons (1) performing their own obligations and/or (2) acting in accord with their own rights) in

good faith to provide truthful information and honest advice to the Gonzales Clients within the scope of their affirmative request for legal advice.

6. **Sixth Affirmative Defense: Justification**. Defendant DLF was legally justified in engaging in the conduct that Plaintiff alleges as interfering with Plaintiff's contract rights because Defendant DLF was, at all relevant times, performing its obligations (and/or acting through persons (1) performing their own obligations and/or (2) acting in accord with their own rights) to interact with and provide legal advice and services to the Gonzales Clients, who had affirmatively solicited Defendant DLF's legal services. Further, Defendant DLF was legally justified in any conduct that Plaintiff alleges as interfering with Plaintiff's contract rights because Plaintiff's retention of the Gonzalez Clients' legal matters, under the circumstances, threatened or constituted a breach of one or more Texas Disciplinary Rules of Professional Conduct or other ethical obligations owed by Plaintiff.

7. **Seventh Affirmative Defense: One Satisfaction Rule**. Plaintiff is not allowed to recover in this lawsuit because of the one satisfaction rule. Plaintiff has already attempted to recover duplicative damages for a single alleged injury by simultaneously filing this lawsuit and also filing a Plea in Intervention against the Gonzales Clients to also recovery attorney fees from the Gonzales Clients under the attorney contingent fee contract that is the basis for Plaintiff's alleged tortious interference claim.

REQUEST FOR A JURY TRIAL

Defendant DLF requests a jury trial on all disputed factual issues in this case.

Dated: June 4, 2023

Respectfully submitted,

/s/ Chad Henson

Clifford Chad Henson
Bar No. 24087711
DEVLIN LAW FIRM LLC
1411 North Trail Drive
Carrollton, TX 75006
(t) (214) 728-5365
(f) (302) 353-4201

Counsel for Defendant Devlin Law Firm LLC

CAUSE NO. D-1-GN-23-001636

HENDLER FLORES LAW, PLLC,	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
	§	**TRAVIS COUNTY, TEXAS**
v.	§	
	§	
GORDIE DONALD PUCKETT, DEVLINE LAW FIRM, LLC and **THE MARCONI LAW FIRM**,	§	**455th JUDICIAL DISTRICT**
	§	
	§	
Defendants.	§	

ORIGINAL ANSWER AND PLEA TO THE JURISDICTION OF THE MARCONI FIRM

TO THE HONORABLE COURT:

COMES NOW The Marconi Firm and files this its Original Answer and Plea to the Jurisdiction and shows the Court the following:

PLEA TO THE JURISDICTION

1. The Marconi Firm asserts this Plea to the Jurisdiction pursuant to Rule 85 of the Texas Rules of Civil Procedure.

2. The Court lacks jurisdiction over this case due to a lack of ripeness. "Ripeness is a component of subject matter jurisdiction that focuses on a lawsuit's timing. . . [A] case must be ripe in order for the trial court to have subject matter jurisdiction . . . ." *Southwestern Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 682-83 (Tex. 2020).

3. This dispute is not ripe for judicial resolution because Plaintiff has not yet suffered any damages. Under Texas law, a lawyer with a contingent fee agreement that has been terminated by the client cannot—as a matter of law—suffer damages *unless and until* the client *actually recovers* money from a judgment or settlement that potentially is subject to the terminated lawyer's contingent fee. *See Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 562 (Tex. 2006) (discussing

Mandell & Wright v. Thomas, 441 S.W.2d 841, 847 (Tex. 1969). "In allowing the discharged lawyer to collect the contingent fee from any damages the client recovers, *Mandell* complies with the principle that a contingent-fee lawyer 'is entitled to receive the specified fee ***only when and to the extent the client receives payment***.'" *Hoover*, 206 S.W.3d at 562 (quoting Restatement (Third) of the Law Governing Lawyers §35(2)) (emphasis added). *See also Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 94 (Tex. 2001); *Wilkinson v. Susman*, 2020 Tex. App. LEXS 8953 at *17-18, 2020 WL 6791057 (Tex. App.—Houston [14th] Nov. 19, 2020); *Grantham v. J&B Sausage Co.*, 2016 Tex. App. LEXIS 5168 at *13-14, 2016 WL 2935874 (Tex. App.—Houston [14th] May 17, 2016).

4. In its Original Petition, Plaintiff's allegations of damages are wholly conclusory, with no factual detail whatsoever. *See* Original Petition at ¶18 and ¶¶25-27. Plaintiff does not allege that the "Gonzales Clients" have received any money from a settlement or judgment that is subject to Plaintiff's contingent-fee agreement. Plaintiff's allegation of damages is nothing more than a speculative allegation of potential future damages. For this reason, Plaintiff has not pled facts that establish a dispute that is ripe for judicial resolution, and therefore Plaintiff's pleadings fail to establish the Court's subject matter jurisdiction. *See, e.g. Hill v. Heritage Resources*, 964 S.W.2d 89, 116 (Tex.App.—El Paso 1997) ("A cause of action for tortious interference with an existing contract does not accrue until the contract is interfered with *and harm caused to the plaintiff*. . . . Until a cause of action accrues, a lawsuit is premature. . . . If the plaintiff is not yet harmed, even in the face of a breach of duty, then the cause of action has not yet accrued and any suit filed there upon is premature. . . . Moreover, if a claim is not yet ripe, a trial court has no jurisdiction to render an opinion thereon. . . . To the extent that a plaintiff seeks relief based upon facts that have not yet occurred, there is not live controversy between the parties and a trial court

lacks subject matter jurisdiction over such claims") (emphasis added). *See also Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000) ("[R]ipeness, like standing, is a threshold issue that implicates subject matter jurisdiction, and like standing, emphasizes the need for a concrete injury for a justiciable claim to be presented").

5. A plea to the jurisdiction is the appropriate procedural device for a defendant to challenge the court's subject matter jurisdiction. *See Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 232 (Tex. 2004). When the Court lacks subject matter jurisdiction, it must sustain the plea to the jurisdiction and dismiss the case. *See City of Houston v. Rhule*, 477 S.W.3d 440, 442 (Tex. 2013).

GENERAL DENIAL

6. The Marconi Firm generally denies the allegations contained within Plaintiff's Original Petition.

AFFIRMATIVE DEFENSES

7. The Marconi Firm asserts the affirmative defenses of privilege and justification.

Dated: June 4, 2023

Respectfully submitted,

THE MARCONI FIRM

By: */s/Michael Marconi*

Michael Marconi
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9288 Huntington Square
North Richland Hills, Texas 76182
Telephone: (214) 682-3592
Facsimile: (817) 479-2210

CERTIFICATE OF SERVICE

I hereby certify that the Original Answer and Plea to the Jurisdiction of The Marconi Firm was e-served on all counsel of record on this 4th day of June 2023.

/s/ Michael Marconi
Michael Marconi

EXHIBIT E

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

HENDLER FLORES LAW PLLC,		
Plaintiff	§	
vs.	§	**Civil Action No.** 1:23-cv-629
DEVLIN LAW FIRM LLC	§	
Defendant.	§	

PLAINTIFF'S ORIGINAL COMPLAINT

Hendler Flores Law, PLLC ("Plaintiff" or "HFL") files this suit for tortious interference with contract against Defendant Devlin Law Firm LLC ("Defendant" or "Devlin Law"). In support thereof, Plaintiff states as follows:

I. INTRODUCTION

1. This lawsuit arises out of the Devlin Law Firm's willful and intentional interference with HFL's contractual relationships with its clients.

2. After hiring one of HFL's former employees, Defendant began making false accusations about HFL to two of HFL's clients to persuade them to terminate their retainer agreement with HFL. Defendant's false accusations included statements about HFL, its attorneys, and the quality of their work.

3. As a result of Defendant's tortious interference, HFL's clients terminated a years-long relationship with HFL—a respected personal injury firm in Austin, Texas—and instead hired Defendant—an intellectual property firm based in Delaware—to litigate their policy brutality claims against City of Austin police officers.

4. HFL seeks to recover from Defendant the damages it has suffered as a result of Defendant's willful and intentional interference.

II. PARTIES

5. Plaintiff Hendler Flores Law, PLLC is a Texas Limited Liability Company whose principal place of business is in Travis County, Texas. Plaintiff's members are all citizens of the State of Texas.

6. Defendant Devlin Law Firm, LLC is a Delaware Limited Liability Company with its principal place of business in Wilmington, Delaware. On information and belief, Defendant's members are not citizens of the State of Texas. Defendant may be served with process at its headquarters located at 1526 Gilpin Avenue, Wilmington, Delaware, 19806.

III. JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1332 because this case involves claims between citizens of two different states and there is complete diversity of citizenship.

8. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to this lawsuit occurred in this district. This lawsuit arises out of Defendant's intentional and willful interference with Plaintiff's contractual relationship with its clients. Plaintiff performed its contractual obligations under the contract at issue in Travis County, Texas. The clients Defendant stole from Plaintiff reside in this district, and the underlying lawsuit Plaintiff filed on behalf of those clients was filed and remains pending in this district.

IV. FACTUAL ALLEGATIONS

9. HFL, founded in 1993, is a well-respected personal injury litigation firm located in Austin, Texas. While HFL has a wide-ranging personal injury practice, as relevant to this case, HFL has a docket of police brutality cases, in which HFL represents victims of police violence and their families.

10. On January 7, 2020, Alex Gonzales, Sr. and Elizabeth Herrera (the "Gonzalez Plaintiffs") signed a written Attorney Retainer Agreement ("Retainer Agreement") employing HFL to represent them as counsel of record in police brutality litigation against the Austin Police Department ("APD"), certain APD officers, and the City of Austin related to the death of their son (the "Gonzalez litigation").

11. Pursuant to the Retainer Agreement, the Gonzalez Plaintiffs agreed to pay HFL a contingent attorneys' fee of 40% of any settlement, verdict, or recovery obtained in the Gonzalez litigation. The Retainer Agreement further clarifies that if the Gonzalez Plaintiffs were to terminate HFL without cause and later obtain a recovery, the full percentage of the contingent fee will remain due, along with expenses incurred prior to the date of termination.

12. HFL hired Donald Puckett as an associate attorney in March 2022—more than two years after HFL began representing the Gonzalez Plaintiffs. While Mr. Puckett was employed by HFL, Mr. Puckett was assigned to work on the Gonzalez litigation.

13. On December 28, 2022, only nine months after starting to work at HFL, Mr. Puckett abruptly resigned from his employment with HFL.

14. Shortly thereafter, Mr. Puckett was hired by Defendant. Defendant advertises itself as a law firm specializing in intellectual property.[1] In its list of practice areas, Defendant does not list either personal injury or police brutality cases.[2]

15. On January 3, 2023, HFL filed a lawsuit on behalf of the Gonzalez Plaintiffs, both in their individual capacity, and as representatives of the estate of their son, Alex Gonzalez, Jr., against two APD officers and the City of Austin in the United States District for the Western District of Texas, Austin Division. That lawsuit remains pending in this Court. *See Gonzalez, et al. v. Serrato, et al.*, Case No. 1:23-cv-00009 (W.D. Tex.) (the "Gonzalez lawsuit").

16. After Mr. Puckett was hired by Defendant, Defendant began attempting to interfere with HFL's contractual relationship with the Gonzalez Plaintiffs. Defendant had actual knowledge of the Retainer Agreement between HFL and the Gonzalez Plaintiffs and persuaded the Gonzalez Plaintiffs to terminate that relationship. Defendant did so, at least in part, by making false accusations to the Gonzalez Plaintiffs about HFL, its attorneys, and the quality of their work.

17. Defendant's interference was successful: on or about March 24-25, 2023, Defendant successfully persuaded the Gonzalez Plaintiffs to terminate their relationship with HFL and to instead retain Defendant to represent them in the Gonzalez litigation.

18. On March 24, 2023, Defendant filed a notice of appearance in the Gonzalez lawsuit through its employees Donald Puckett and Clifford Chad Henson. *See* Dkts. 10-11, *Gonzalez, et al. v. Serrato, et al.*, Case No. 1:23-cv-00009 (W.D. Tex.). On or around that same day, HFL received correspondence purportedly sent on behalf of the Gonzalez Plaintiffs demanding that

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[1] *See* https://devlinlawfirm.com/about-devlin-law-firm/ (last accessed June 1, 2023).
[2] *See* https://devlinlawfirm.com/practice-areas/ (listing a number of commercial practice areas, most involving patent, intellectual property, and trademark law) (last accessed June 1, 2023).

HFL file a notice of withdrawal of representation in the Gonzalez lawsuit and transfer the Gonzalez Plaintiffs' files over to Defendant.

19. But for Defendant's willful and intentional interference with HFL's Retainer Agreement with the Gonzalez Plaintiffs, the Gonzalez Plaintiffs would not have terminated their years-long relationship with HFL.

20. HFL has been damaged by Defendant's tortious interference with its contractual relationships.

V. COUNT I
TORTIOUS INTERFERENCE WITH CONTRACT

21. The previous factual statements and allegations are incorporated by reference.

22. Under Texas law, the elements of a claim for tortious interference with existing contract are: "(1) a contract subject to interference; (2) a willful and intentional act of interference (3) that was a proximate cause of the plaintiff's damages; and (4) actual damage." *Wolf v. Cowgirl Tuff Co.*, No. 1-15-CV-1195-RP, 2016 WL 5957663, at *3 (W.D. Tex. Apr. 19, 2016).

23. HFL had an existing, fully executed attorney contingent fee contract—the Retainer Agreement—that long predated Defendant's relationship with the Gonzalez Plaintiffs. Defendant was a stranger to this contract.

24. After hiring one of HFL's former employees, Defendant willfully and intentionally interfered with HFL's contract by persuading the Gonzalez Plaintiffs to terminate their Retainer Agreement with HFL. Defendant did so, at least in part, by making false accusations to the Gonzalez Plaintiffs about HFL, its attorneys, and the quality of their work.

25. Defendant's willful and intentional acts of interference were the proximate cause of the Gonzalez Plaintiff's decision to terminate their Retainer Agreement with HFL. But for Defendant's interference, the Gonzalez Plaintiffs would not have terminated their Retainer

Agreement with HFL. Accordingly, Defendant's willful and intentional acts were the proximate cause of HFL's damages.

26. As a result of Defendant's willful and intentional acts, HFL has suffered, and continues to suffer, actual damages and loss, including but not limited to loss of the benefits owed to HFL under the Retainer Agreement, injury to reputation, and/or lost profits.

VI. DEMAND FOR JURY TRIAL

27. HFL respectfully demands a jury trial on all of its claims and causes of action so triable.

VII. PRAYER

WHEFORE, HFL asks this Court to enter judgment against Defendant as follows:

a. Awarding HFL the economic damages HFL has suffered as a result of Defendant's tortious interference, including loss of benefits under the Retainer Agreement and/or lost profits;

b. Awarding HFL the personal damages HFL has suffered as a result of Defendant's tortious interference, including damage to HFL's reputation;

c. Awarding HFL exemplary damages;

d. Awarding HFL its reasonable expenses and attorneys' fees incurred in presenting this action;

e. Awarding HFL pre- and post-judgment interest at the highest rate permitted by law; and

f. Any and all other relief to which HFL may be justly entitled.

Dated: June 2, 2023

Respectfully Submitted,

/s/ Jessica E. Underwood

NIX PATTERSON, LLP

Bradley E. Beckworth
TX Bar No. 24001710
Trey Duck
TX Bar No. 24077234
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Counsel for Plaintiff

JS 44 (Rev. 10/20)

CIVIL COVER SHEET

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

I. (a) PLAINTIFFS

HENDLER FLORES LAW PLLC

(b) County of Residence of First Listed Plaintiff Travis Cty, TX
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Jessica E. Underwood
NIX PATTERSON, LLP
8701 Bee Caves Road, Suite 500

DEFENDANTS

DEVLIN LAW FIRM LLC

County of Residence of First Listed Defendant New Castle Cty, DE
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☒ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*
Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☒ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding | ☐ 2 Removed from State Court | ☐ 3 Remanded from Appellate Court | ☐ 4 Reinstated or Reopened | ☐ 5 Transferred from Another District *(specify)* | ☐ 6 Multidistrict Litigation - Transfer | ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
28 U.S.C. 1332

Brief description of cause:
Tortious interference with contract

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*:

JUDGE Judge Pitman DOCKET NUMBER 1:23-cv-00009-RP

DATE
Jun 2, 2023

SIGNATURE OF ATTORNEY OF RECORD
Jessicas Underwood
Digitally signed by Jessicas Underwood
Date: 2023.06.02 08:57:11 -05'00'

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

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

I.(a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. Origin. Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

Monday, June 5, 2023 at 10:27:37 Central Daylight Time

Subject: Activity in Case 1:23-cv-00629 HENDLER FLORES LAW PLLC Complaint
Date: Friday, June 2, 2023 at 10:01:55 AM Central Daylight Time
From: TXW_USDC_Notice@txwd.uscourts.gov
To: cmecf_notices@txwd.uscourts.gov

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court [LIVE]

Western District of Texas

Notice of Electronic Filing

The following transaction was entered by Underwood, Jessica on 6/2/2023 at 10:01 AM CDT and filed on 6/2/2023
Case Name: HENDLER FLORES LAW PLLC
Case Number: 1:23-cv-00629
Filer: HENDLER FLORES LAW PLLC
Document Number: 1

Docket Text:
COMPLAINT *Plaintiff's Original* (Filing fee $ 402 receipt number ATXWDC-17509427), filed by HENDLER FLORES LAW PLLC. (Attachments: # (1) Civil Cover Sheet)(Underwood, Jessica)

1:23-cv-00629 Notice has been electronically mailed to:

Jessica Elaine Underwood junderwood@nixlaw.com, bkellogg@nixlaw.com, ncameron@nixlaw.com

1:23-cv-00629 Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1080075687 [Date=6/2/2023] [FileNumber=28638408-0
] [9023f967742c1debb77230c8a07d32923082f1e806b685d5146f5add8ff2f15d1db
992d398598acf065e9fe4053d0f459038422587afe5536f3ee2ca267f7186]]
Document description: Civil Cover Sheet
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1080075687 [Date=6/2/2023] [FileNumber=28638408-1
] [08eb5860fb49478b324eb4054234469f424a2fafc465ea56754f4001efcd3e6ee18
0943d427302e961035194669b78eaecb6fc47172acbb3925c0b97f565bb10]]

EXHIBIT F

DEVLIN
LAW FIRM LLC
INTELLECTUAL PROPERTY LAW

1526 Gilpin Avenue
Wilmington, Delaware 19806
United States of America
Tel: 302-449-9010
Fax: 302-353-4251
www.devlinlawfirm.com

MAY 23, 2023

VIA EMAIL
Scott M. Hendler
901 S. MoPac Expressway
Bldg. 1, Suite #300
Austin, Texas 78746
shendler@hendlerlaw.com

Re: Rule 11 Notice – Motion for Leave to Intervene in Case No. 1:22-cv-655 and Case No. 1:23-cv-9, in the U.S. Dist. Court for the W.D. Tex. (Austin Division).

Dear Mr. Hendler:

I am writing this letter to put you on notice pursuant to Fed. R. Civ. P. 11(c)(2) that my clients, Alex Gonzales, Sr. and Elizabeth Herrera, intend to file a Rule 11 motion for sanctions against you and Hendler Flores Law for the filing of your Motion for Leave to Intervene in each of the above-styled cases if the motion is not withdrawn in the next 21 days.

In your Motion for Leave to Intervene and in your supporting affidavit, you state that HFL's Retainer Agreement with the Gonzales family included a contractual attorney lien provision that HFL is seeking to enforce through its Motion for Leave to Intervene. It appears that you have not consulted the relevant ethical rules regarding contractual attorney liens in Texas.

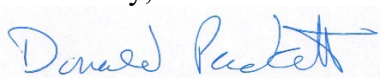
I attach to this letter a copy of Opinion No. 610 from the Professional Ethics Committee for the State Bar of Texas, issued in August of 2011. This Texas State Bar ethics opinion squarely holds that it is unethical and a violation of Texas Disciplinary Rule 1.08(h) for a lawyer to secure a contractual lien or other security interest in the subject matter of a client's litigation.

None of the cases cited in HFL's Motion for Leave to Intervene are contrary to Ethics Opinion 610. All cases cited in your motion: (1) were decided prior to 2011, and/or (2) involved enforcement of an attorney's contingent fee rights in ways that were not a contractual lien. Each of the cases cited in the Motion for Leave to Intervene also is distinguishable in other ways.

In short, HFL's Retainer Agreement is void and unenforceable because it contains a contractual attorney lien provision that is illegal under Texas law and that violates the attorney rules of ethics. HFL's attempt to enforce this illegal attorney lien by filing a Motion for Leave to Intervene also violates Disciplinary Rule 1.08(h). HFL's Motion for Leave to Intervene therefore is not in compliance with, *inter alia*, Fed. R. Civ. P. 11(b)(2).

I urge you to withdraw your Motion for Leave to Intervene immediately. The Gonzales family intends to file a motion for Rule 11 sanctions if HFL's motion for leave is not withdrawn.

Sincerely,



Donald Puckett

Enclosure: State Bar of Texas, Professional Ethics Committee Opinion No. 610

Cc: Stephen Demik (*via email to: sdemik@hendlerlaw.com*)

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 610

August 2011

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, is a lawyer permitted to acquire, by agreement with his client, a security interest in the subject matter of litigation that the lawyer is conducting for the client in order to secure payment of the lawyer's fee with respect to the litigation?

STATEMENT OF FACTS

A lawyer and the lawyer's client enter into a contingent fee agreement with respect to a litigation matter being handled by the lawyer which provides for the client to grant to the lawyer, as a means of securing payment of the fee due to the lawyer in the matter, a security interest in the cause of action that is the subject of the litigation. The cause of action relates to a claim for damages arising from an injury sustained by the client.

DISCUSSION

The facts considered in this case relate to a lawyer's acquisition of one type of proprietary interest – a security interest – in a matter that the lawyer is handling for his client. Rule 1.08(h) of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from acquiring a proprietary interest in a cause of action or subject matter of litigation that the lawyer is handling for a client, with two limited exceptions:

> "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
>
> (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
>
> (2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04."

Thus under Rule 1.08(h), a lawyer may not acquire a security interest or other proprietary interest in a matter being handled by the lawyer unless the particular proprietary interest is either a contingent fee permitted under Rule 1.04 or "a lien granted by law to secure the lawyer's fee or expenses."

Comment 7 to Rule 1.08 explains the underlying philosophy of Rule 1.08 as follows:

> "This Rule embodies the traditional general precept that lawyers are prohibited from acquiring a proprietary interest in the subject matter of litigation. This general precept, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for contingent fees set forth in Rule 1.04 and the exception for certain advances of the costs of litigation set forth in paragraph (d) [of Rule 1.08]."

Although the fee agreement between the lawyer and the client provides for a contingent fee for the services to be provided in the litigation matter, the contingent fee and the security interest are two different types of proprietary interest in the client's litigation matter. A security interest in a litigation matter is not an essential part of a contingent fee agreement that is permitted under Rule 1.04, and the fact that a contingent fee is permissible does not make a security interest to secure such a fee also permissible. The security interest must itself satisfy the requirements of Rule 1.08(h).

Since a security interest to secure a contingent fee is not itself a contingent fee, the security interest here considered will be permissible under Rule 1.08(h) only if the security interest qualifies as "a lien granted by law to secure the lawyer's fee or expenses." Under Texas law, there is no general statutory attorney's lien but a lawyer has a right to claim a common law possessory lien against a client's property, money and papers for the payment of amounts due the lawyer for services and expenses. See Professional Ethics Committee Opinion 395 (May 1979, corrected June 1980) and Opinion 411 (January 1984). A leading Texas case on the attorney's lien under Texas common law is the decision of the Supreme Court of Texas in *Thomson* v. *Findlater Hardware Co.,* 205 S.W. 831, 109 Tex. 235 (Tex. 1918), which recognized (quoting Mechem on Agency) that "[a]n attorney has a general lien upon all the papers, deeds, vouchers, and other documents of his client, which come into the possession of the attorney while he is acting for his client in a professional capacity." 205 S.W. at 832, 109 Tex. at 237. It should be noted that this lien on a client's documents is subject to the important limitation set forth in Rule 1.15(d) of the Texas Disciplinary Rules of Professional Conduct that a lawyer "may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation."

In the circumstances considered in this opinion, the proposed security interest is not an attorney's lien granted under Texas law within the meaning of Rule 1.08(h)(1). Instead the proposed security interest is to be created by contractual agreement between the lawyer and his client. The proposed security interest is thus a proprietary interest in a litigation matter being handled by the lawyer who is seeking to acquire the security interest, but this security interest is not within the scope of the exceptions stated in Rule 1.08(h). Accordingly, under Rule 1.08(h), acquisition by the lawyer of the proposed security interest is prohibited.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer representing a client in litigation may not acquire, by agreement with his client, a lien upon the subject matter of the litigation as a means of securing payment of the lawyer's fee with respect to the litigation.

EXHIBIT G

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

Alex Gonzales, Sr., and	§	
Elizabeth Herrera	§	
Plaintiff,	§	
v.	§	**Case no. 1:22-cv-655-RP**
	§	
City of Austin	§	
Defendants.	§	
	§	

PLAINTIFF'S RESPONSES TO DEFENDANT CITY OF AUSTIN'S FIRST REQUEST FOR PRODUCTION (1-45)

COMES NOW, Plaintiffs, pursuant to FRCP 34(b)(2), and hereby submits these Responses to Defendant City of Austin's First Request for Production (1-45).

GENERAL OBJECTIONS

Plaintiff objects to the Definitions and Instructions provided by Defendant City of Austin's First Request for Production to Plaintiffs (1-45) to the extent the instructions and/or definitions attempt to expand Plaintiff's discovery obligations beyond what is set forth in the Federal Rules of Civil Procedure, local rules of the Western District of Texas, and the orders of this Court.

[redacted]

REQUEST FOR PRODUCTION NO. 17
The attorneys' fee agreement between you and your legal counsel relating to this Litigation.

Response:
Plaintiffs object to this request on the basis of attorney-client privilege and attorney work-product privilege. Plaintiffs further object that this request is overbroad, seeks information irrelevant to this lawsuit, and therefore exceeds the proper scope of discovery under the Federal Rules of Civil Procedure.

[redacted]

[redacted]

Dated: November 22, 2022

Respectfully submitted,

HENDLER FLORES LAW, PLLC

/s/ Donald Puckett
Scott M. Hendler - Texas Bar No. 0944550
shendler@hendlerlaw.com
Donald Puckett - Texas Bar No. 24013358
dpuckett@hendlerlaw.com
901 S. MoPac Expressway
Bldg. 1, Suite #300
Austin, Texas 78746
Telephone: (512) 439-3200
Facsimile: (512) 439-3201

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served to all know counsel of record via electronic mail on November 22, 2022.

/s/ Donald Puckett
Donald Puckett

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

ALEX GONZALES, Sr. and **ELIZABETH HERRERA,** Individually and as "Next Friend" to minor child Z.A.G.,	§	
Plaintiffs,	§	
v.	§	
	§	**Case Nos. 22-CV-655, 23-CV-9-RP**
THE CITY OF AUSTIN, LUIS SERRATO, AND GABRIEL GUTIERREZ,	§	
Defendants.	§	
Hendler Flores Law, PLLC, Intervenor.	§	

HENDLER FLORES LAW, PLLC'S
REPLY TO PLAINTIFFS' RESPONSE TO MOTION FOR LEAVE TO INTERVENE AND BRIEF IN SUPPORT

Hendler Flores Law, PLLC (HFL or Intervenor), hereby files its Reply to the Plaintiffs' Response to its Motion for Leave to Intervene (Response).

Plaintiffs attempt to convince the Court to deny the Motion rests on three main arguments, all flawed because they are not supported by the cases cited by Plaintiffs. Plaintiffs' creative arguments are not based on applicable law.

A. HFL's Intervention is Ripe, and None of the Cases Cited by Plaintiffs Support a Different Conclusion.

In their Response, Plaintiffs cite *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557 (Tex. 2006) for the proposition that Intervenor's notice is not ripe. However, *Hoover Slovacek* is not a case about ripeness, and it does not support Plaintiffs' argument. Plaintiffs rely on a portion of the opinion which stands for the proposition that a terminated lawyer

cannot demand payment of a contingent fee from a client before the client prevails on the underlying action. That is not what is happening here. HFL is not demanding payment from Plaintiffs now. To the contrary, HFL is merely noticing all parties of its interest. *Id.* at 562.

The other cases Plaintiffs cite similarly fail to support their ripeness argument. Plaintiffs refer to *In re Deepwater Horizon*, 546 Fed. Appx. 502, 504 (5th Cir. 2013), as *Lake Eugenie Lan & Dev., Inc. v. BP Exploration and Prod*. While the case actually mentions ripeness, unlike the other cases Plaintiffs cite, the issue is not analyzed in the opinion. In *Deepwater Horizon*, the State of Louisiana sued the operator of an offshore drilling rig alleging that the operator's actions caused an explosion in the Gulf of Mexico. A nonprofit coalition of fishery advocacy organizations moved to intervene for the sole purpose of objecting to a single aspect of the class settlement agreement – the manner of conducting a second-round distribution of funds. The district court concluded the intervention was not ripe, and the would-be intervenor never disputed that conclusion. Therefore, the appellate court affirmed without considering the merits of the issue.

In *Wal-Mart Stores, Inc. v. Tex. Alcoholic Bev. Comm'n*, 834 F.3d 562 (5th Cir. 2016), a retailer sued the Commission alleging their regulation system violated various federal laws. The Texas Package Stores Association moved to intervene to defend the system. The Fifth Circuit reversed this Court's denial of the motion to intervene, allowing the intervention to proceed as of right. The word "ripe" is not contained in the opinion. The same goes for *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994), another case Plaintiffs try pigeon-holing into their argument against ripeness. In that case, the Fifth Circuit held that a timber purchaser's association was allowed to intervene as of right in an action by environmental groups against the United States Forest Service where the plaintiffs

challenged certain logging procedures, overturning the district court's denial of intervention.

Finally, in *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065 (5th Cir. 1970), another case cited on page 10 of the Response, the Fifth Circuit held the district court's denial of the motion to intervene was an abuse of discretion. The district court denied the motion based on timeliness, and the Fifth Circuit held that the timeliness requirement must flex in order to regulate intervention in the interest of justice, also recognizing the attitude allowing intervention "where no one would be hurt and the greater justice would be attained." Again, this was not a case about ripeness.

Plaintiffs' strained interpretations of these cases do not support their argument. Neither does their bald assertion of "severe[] prejudice[]" (Response, at 11) in the event Intervenor exercises its right. Plaintiffs also accuse HFL of disclosing confidential information in its Motion. This is another baseless accusation. Texas Disciplinary Rule of Professional Conduct 1.05(c)(5) provides that "a lawyer may reveal confidential information … "[t]o the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client." Plaintiffs' current counsel, Mr. Puckett, has waged a large-scale attack on HFL and its CEO Scott Hendler—contemporaneously filing a civil lawsuit alleging "fraud" in Collin County, a grievance with the Texas State Bar against Mr. Hendler, and a claim with the Texas Workforce Commission (which ruled against him and upheld its conclusions after his appeal). In fact, Mr. Puckett called one of the named Plaintiffs as a witness in the TWC hearing to testify against HFL and Mr. Hendler. Yet the Response cries "severe prejudice" that would result from "be[ing] required to use privileged and confidential information to

defend against HFL's proposed intervention claim" (Response, at 13-14), without alerting the Court to this all-fronts attack and the Plaintiffs and their counsel's mutli-pronged litigation against him. Plaintiffs cannot attack their former counsel and then attempt to prevent him from defending against their baseless accusations. The Texas Disciplinary Rules state otherwise.

At any rate, Plaintiffs' arguments related to disclosure of privileged and confidential information in order to defend against HFL's claim are premature. As should be clear from its motion, Intervenor's intention is merely to protect its claimed fee interest should there be a recovery. Even more, while Plaintiffs neither explain nor articulate what "confidential information" would "severely prejudice" them if disclosed to the defendants, they contradictorily argue that "HFL's proposed intervention claim arises from disputed facts that do not overlap substantially with the disputed facts involved with Plaintiffs' asserted claims under 42 U.S.C. [Section] 1983 …." (Response, at 15). Plaintiffs apparently argue out of both sides of their mouth—claiming on the one hand that granting intervention would require revelation of case-related information that would prejudice them, while on the other that the intervention does not overlap with their case-related claims.

The Court should recognize Intervenor's right and none of the arguments Plaintiffs propound in this section of their response support otherwise.

B. This Court has Supplemental Jurisdiction.

Plaintiffs also argue in their Response that HFL lacks an independent basis for Article III jurisdiction. Specifically, with relation to supplemental jurisdiction, Plaintiffs argue that "Courts within the Fifth Circuit have frequently denied intervention to a terminated contingent-fee lawyer who cannot establish federal jurisdiction over the proposed intervention claim." Response, at 16.

Two of the cases cited, however, held that the "amount in controversy" requirement led the courts to lack jurisdiction. *See Samuels v. Twin City*, 602 Fed.Appx. 209, 210 (5th Cir. 2015); *Griffin v. Lee*, 621 F.3d 380, 383-87 (5th Cir. 2010). And in another case Plaintiffs cite, the federal court remanded the action to state court so that the intervenor who was not diverse could be made part of the suit. *Causey v. State Farm*, No. CV 16-9660, 2018 WL 2980066, at *2 (E.D. La. June 14, 2018).

C. Intervenor's Motion Meets the Requirements of F.R.C.P. 24(a)(2).

Plaintiffs finally argue that HFL has not met the requirements for intervention under F.R.C.P. 24(a)(2). These arguments also fail.

In arguing against HFL's Motion, Plaintiffs respond that "Texas common law recognizes an attorney retaining lien over property that actually comes into the attorney's possession, but … does not allow an attorney to hold a charging lien over the subject matter of a client's lawsuit or future proceeds of a client's lawsuit." (Response, at 17)(emphasis omitted). In support of that argument, Plaintiffs cite two cases, one from 1867 and the other from 1918. Response, at 17, fn. 63. Plaintiffs also assert that "the Texas Commission on Professional Ethics issued an opinion in 2011 holding that the Texas rules of ethics strictly prohibit an attorney from obtaining a contractual charging lien from a client." Response, at 17.

Plaintiffs' assertion that HFL's claim is prohibited by the "Texas rules of attorney ethics" is incorrect. Texas Disciplinary Rule of Professional Conduct 1.08(h) addresses the situation (unlike what HFL did by contract with Plaintiffs) where a lawyer attempts to own some portion of the client's claims, such that the lawyer becomes a co-plaintiff or has separate interests that may conflict with the client's interests. Texas Ethics Opinion 610 refers to a situation where a lawyer has acquired a "security interest in the subject matter of the litigation," referring to the type of

interest prohibited by 1.08. Unfortunately, Ethics Opinion 610 does not quote the language of the agreement, making it difficult to use the opinion as an aid to analysis of other fee agreements. Neither Rule 1.08 nor Ethics Opinion 610, nor any other Texas law prohibits a lawyer's contractual lien on a client's recovery (such as the one created in the HFL retainer agreement) to secure the lawyer's contingent fee.

In *Mount Spelman & Fingerman, P.C. v. GeoTag, Inc.*, 70 F. Supp. 3d 782 (E.D. Tex. 2014), after considering Rule 1.08(h) and Ethics Opinion 610, the court held that the former law firm's contractual lien was not barred as a matter of Texas legal ethics. The law firm, MSF, contended that the attorney-client agreement gave it a contractual lien over all amounts recovered by GeoTag as a result of enforcing a certain patent in all cases filed within certain jurisdictions. MSF sent letters to defendants notifying them of its lien and GeoTag moved to enjoin MSF from making such demands on the defendants. GeoTag argued that the lien was unethical or should only cover existing settlements at the time of MSF's discharge. The court held that the lien was not barred as a matter of legal ethics. In its discussion of Ethics Opinion 610, the court noted: (1) the opinion is not precedential, as such opinions do not have the force of law and (2) Ethics Opinion 610 appears in conflict with Ethics Opinion 449 (a prior opinion finding that acquiring an interest in the property subject to a dispute for which the lawyer represents the client is equivalent to contracting for a contingent fee and therefore allowed). After dismissing Ethics Opinion 610 as neither controlling nor providing helpful advisory guidance, the court agreed with its sister courts

which have recognized that a contract may establish an attorney's lien[1] for money received in judgment or settlement of a matter. *Id.* at 786.[2]

Plaintiffs also cite *Ross v. Marshall* in support of the claim that HFL lacks an interest in the property or transaction that is the subject of the litigation. Based on *Ross*, the claim is that HFL's interest in the litigation is only "indirect." In *Ross*, an African American family brought tort and civil rights claims against a father whose child burned a cross in the family's yard. The defendant was held vicariously liable for $10,000,000 in damages. After judgment, the defendant's homeowner's insurer sought to intervene. The Fifth Circuit held that the insurer had a sufficient direct interest in the case to intervene as of right. The brief opinion addresses how defending an insured under a full or limited reservation of rights can affect whether the insurer's interest is direct or indirect. *Ross v. Marshall*, 456 F.3d 442, 443-44 (5th Cir. 2006). In stating, "By definition, an interest is not direct when it is contingent on the outcome of a subsequent lawsuit," the *Ross* court cited two other insurance cases: *Restor-A-Dent Dental Labs, Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871 (2d Cir. 1984) and *Travelers Indemnity Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989). Plaintiffs cannot present the Court with a case holding that a lawyer's fee interest in a former client's recovery is not sufficiently direct for Rule 24(a) because no case has held that way. To the contrary, cases cited and discussed by HFL in its Motion to Intervene make clear that an attorney's contingent fee interest is a sufficient interest under Rule 24(a) for intervention as of right.

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[1] The court also repeatedly referred to MSF's lien as a "charging lien," however arguing with Mr. Puckett over the correct label to place on HFL's valid lien is not necessary, and HFL will not further expend the Court's time and resources on semantics. However labeled, HFL's lien is proper under Texas law.

[22] Although the court found the lien to only cover the money received in settlement of disputes that were consummated while MSF was employed by GeoTag, that limitation was based on the precise language of the attorney-client contract itself – language that is different from the language at issue in the HFL retainer agreement.

Also, in the majority of the cases cited by Plaintiffs, the underlying parties settled their claims. That is not where these cases are procedurally. None of the parties outside of Intervenor can or will adequately represent Intervenor's interests. *See Adam Joseph Res. V. CAN Metals, Ltd.*, 919 F.3d 856, 868 (5th Cir. 2019)(holding that after an attorney has been discharged without cause, the parties to the underlying case will not concern themselves with the formers attorney's interest.). As *Adam Joseph Res.* held, "a law firm that ha[s] been discharged by its client must be allowed to intervene as of right in a suit to protect its contingent fee interest in any recovery by its former client." *Adam Joseph Res.*, 919 F.3d at 866 (citing *Gaines v. Dixie Carriers, Inc.*, 434 F.2d 52 (5th Cir. 1970). The Fifth Circuit has consistently held that a contingent attorney's fee suffices as an "interest relating to the property or transaction that is the subject of the action" and that a law firm discharged without cause after performing work for the client "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." *Adam Joseph Res.*, 919 F.3d at 866-67. This gives the Court supplemental jurisdiction over the matter.

Plaintiffs' argument that "HFL has other ways to enforce its rights" is no bar to its right to intervene here. Indeed, where the parties will certainly *not* adequately represent its interests, HFL seeks to put all parties on notice with its Motion and ask the Court's granting of its right to intervene. *Supra*. Intervenor takes no position on whether the claim is stayed or not. The purpose and intent of the petition is to put all parties on notice of Intervenor's claim for if and when plaintiffs obtain a recovery.

D. CONCLUSION

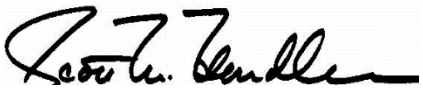
WHEREFORE, Intervenor HFL asks that the Court grant its Motion for Leave to Intervene, allow it to file its Plea in Intervention, and grant it such other and further relief to

which Intervenor may be entitled at law or in equity.

Dated: July 24, 2023

Respectfully submitted,

HENDLER FLORES LAW, PLLC



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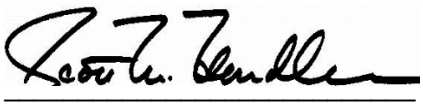
CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Court's CM/ECF system on July 24, 2023.



Scott M. Hendler

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

ALEX GONZALES, SR.,
INDIVIDUALLY AND AS "NEXT FRIEND" TO MINOR CHILD Z.A.G. AND
ELIZABETH HERRERA
(AKA ELIZABETH GONZALES),
INDIVIDUALLY AND AS "NEXT FRIEND" TO MINOR CHILD Z.A.G.,

Plaintiffs,

v.

Nos. 1:23-CV-00655-RP
1:23-CV-00009-RP

CITY OF AUSTIN, LUIS SERRATO, AND **GABRIEL GUTIERREZ**,

Defendants.

ORDER

Before the Court is Intervenor's Motion for Leave to File Plea in Intervention (ECF No. 43). Having considered the Motion, relevant docket entries, and applicable law, the Court **GRANTS** the Motion.

SO ORDERED on this _____ **day of July 2023.**

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

ALEX GONZALES, SR. and ELIZABETH HERRERA, Plaintiffs, v. CITY OF AUSTIN, Defendant.	§ § § § § § § § § §	1:22-CV-655-RP

ALEX GONZALES, SR., individually as a wrongful death beneficiary of Alex Gonzales, Jr., and as the Representative of the Estate of Alex Gonzales, Jr., Deceased, and ELIZABETH HERRERA, aka ELIZABETH GONZALES, individually and as a wrongful death beneficiary of Alex Gonzales, Jr., Plaintiffs, v. THE CITY OF AUSTIN, GABRIEL GUTIERREZ, and LUIS SERRATO, Defendants.	§ § § § § § § § § § § § § § § § §	1:23-CV-9-RP

ORDER

Before the Court is Movant Hendler Flores Law PPLC's ("HFL") motion to intervene, (Dkt. 32).[1] Plaintiffs Alex Gonzales, Sr. and Elizabeth Herrera ("Plaintiffs") filed a response, (Dkt. 37), and HFL filed a reply, (Dkt. 39). Having reviewed the motion, the parties' briefing, and the relevant law, the Court will grant the motion to intervene.

[1] In the related case, 1:23-cv-655-RP, Movant filed an identical motion to intervene. (Dkt. 43). For convenience, the Court will address the motions in one consolidated order, and all references will be to the 1:23-cv-9-RP case.

I. BACKGROUND

This case concerns the shooting of Alex Gonzales, Jr. by Austin Police Department Officers Luis Serrato and Gabriel Gutierez. (Compl., Dkt. 1). On January 7, 2020, Plaintiffs retained HFL through a signed, written retainer agreement ("the Agreement") to represent them in connection with the instant litigation. (Mot. Intervene, Dkt. 32, at 2). HFL agreed to represent Plaintiffs on a contingency basis, taking up to 40% of any settlement, verdict, or recovery obtained in the matter. (*Id.*). It also authorized reimbursement of expenses from any settlement recovery. (*Id.*). The Agreement further provides that HFL may create a charging lien to secure recovery of fees in the event that Plaintiffs terminate HFL without cause. (*Id.*). Finally, the Agreement allows HFL to keep 40% of its attorney's fees even if representation ends prior to recovery. (*Id.*).

HFL alleges that it dedicated significant amounts of time to Plaintiffs' case by investigating and filing the two instant suits and beginning discovery with the Austin Police Department. (*Id.*). During the course of their representation, HFL also worked with Plaintiffs on ancillary matters, such as probate, family law, and grief support, incurring expenses over $65,000. (*Id.*). HFL alleges that it has not been reimbursed for these expenses. (*Id.*). On March 24, 2023, HFL received a letter from an outside law firm, informing it that Plaintiffs intended to discharge HFL from representing them in this case and transfer their representation to Donald Puckett of Devlin Law Firm LLC. (*Id.* at 3). The parties contest the reason for this discharge, with HFL arguing that it was the result of wrongful interference by Plaintiffs' new counsel and without good cause. Plaintiffs contend that HFL engaged in professional negligence and breached its fiduciary duty, leading to the discharge.
(Pls.' Resp., Dkt. 37, at 1).

On May 12, 2023, HFL filed a motion to intervene as of right. (Dkt. 27). Plaintiffs responded, (Dkt. 28), and HFL filed an amended motion on June 12, 2023. (Mot. Intervene, Dkt. 32). HFL argues that it is entitled to intervene under Rule 24(a)(2) because it has an interest in a

monetary recovery through the contingency recovery in its agreement. (*Id.* at 4). HFL argues that Texas law permits attorneys to impose a charging lien as a way of securing payment of their fees and expenses and allows the attorneys to sue for their recovery. (*Id.* at 4–5).

Plaintiffs oppose the motion on several grounds. They argue that the Court lacks subject-matter jurisdiction over the proposed intervention because diversity citizenship is lacking. (Pls.' Resp., Dkt. 37, at 14). They also contend that the motion is procedurally unripe and would force them to disclose privileged information in order to show that HFL was terminated for good cause. (*Id.* at 12–14). Finally, Plaintiffs argue that HFL lacks an interest in the property or transaction that is the subject of this litigation under Rule 24 because the interest is purely contingent and the charging lien is prohibited by Texas ethics rules. (*Id.* at 24).

II. LEGAL STANDARD

Intervention by right is governed by Federal Rule of Civil Procedure 24(a). To intervene by right, the prospective intervenor either must be "given an unconditional right to intervene by a federal statute," Fed. R. Civ. P. 24(a)(1), or must meet each of the four requirements of Rule 24(a)(2):

> (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Texas v. United States, 805 F.3d 653, 657 (5th Cir. 2015). "Although the movant bears the burden of establishing its right to intervene, Rule 24 is to be liberally construed." *Id.* (citations omitted). "Federal courts should allow intervention where no one would be hurt and the greater justice could be attained." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir.1994) (internal quotation marks omitted). However, the Fifth Circuit has also cautioned courts to be "circumspect about allowing intervention of right by public-spirited citizens in suits by or against a public entity for simple

reasons of expediency and judicial efficiency." *City of Hous. v. Am. Traffic Sols., Inc.*, 668 F.3d 291, 294 (5th Cir. 2012).

III. DISCUSSION

The Court will first address whether it has subject-matter jurisdiction over the plea in intervention. Finding that it does, it will turn to whether the motion is procedurally ripe and meets the requirements under Rule 24.

A. Subject-Matter Jurisdiction

Plaintiffs oppose the motion to intervene on the basis that the Court would lack subject-matter jurisdiction over HFL's claim. (Pls.' Resp., Dkt. 37, at 14). "[A]n intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017). Because HFL seeks to recover under breach of contract, while Plaintiffs bring claims for violations of 42 U.S.C. § 1983, HFL must establish federal jurisdiction. (Pls.' Resp., Dkt. 37, at 14). Plaintiffs argue that this Court cannot exercise jurisdiction over the intervention because HFL raises only state law claims against non-diverse parties, since everyone in this case resides in Texas. (*Id.* at 14–15). In its reply, HFL argues that Plaintiffs' response only cites cases dealing with claims that do not meet the requisite amount-in-controversy. (Movant's Reply, Dkt. 39, at 4–5).

Both parties miss the mark. Plaintiffs' complaint arises under federal question jurisdiction. (*See* Compl., Dkt. 1, at 28–33 (pleading claims under 42 U.S.C. § 1983 for violations of the Fourth and Fourteenth Amendments)). Accordingly, this Court is vested with subject-matter jurisdiction because the action arises under the Constitution and laws of the United States. 28 U.S.C. § 1331. And under 28 U.S.C. § 1367(a), district courts may exercise supplemental jurisdiction over claims that "form part of the same case or controversy" as the plaintiff's claims. Moreover, § 1367(a) states: "Such supplemental jurisdiction shall include claims that involve the joiner or intervention of

additional parties." 28 U.S.C. § 1367(a). Plaintiffs briefly argue that the case does not involve the same case or controversy as the plea in intervention, but this misreads the statute, which explicitly extends supplemental jurisdiction to the intervention of additional parties. *Id.* Because the Court has federal question jurisdiction over Plaintiffs' claims, it has supplemental jurisdiction over claims in intervention that meet the requirements of Rule 24. *See Chambers Med. Found. v. Chambers*, 236 F.R.D. 299 (W.D. La. 2006), a*ff'd sub nom. Chambers Med. Found. v. Petrie*, 221 Fed. Appx. 349 (5th Cir. 2007) (unpublished) ("In cases where original jurisdiction is grounded upon a federal question, 28 U.S.C. § 1331, supplemental jurisdiction ordinarily attaches to the intervention without further ado.").

Plaintiffs' remaining argument on diversity jurisdiction is unavailing. They argue that this Court lacks jurisdiction over HFL's intervention because it involves non-diverse parties. Under 28 U.S.C. § 1367(b), a court cannot exercise supplemental jurisdiction over claims by plaintiffs, including intervening plaintiffs, that would be inconsistent with the requirements of diversity jurisdiction *if the civil action is based on diversity jurisdiction*. Because this case does not involve diversity jurisdiction, the § 1367(b) exception to supplemental jurisdiction is inapplicable. As the Court's original jurisdiction is based on the existence of a federal question, it has supplemental jurisdiction over the claims in intervention.

B. Whether the Motion is Ripe

Next, Plaintiffs argue that the proposed intervention is not ripe, and that they would be "severely prejudiced" if HFL is allowed to intervene at this time. (Pls.' Resp., Dkt. 37, at 11). Plaintiffs argue at length that public policy favors a client's freedom to select and discharge lawyers of their choosing. (*Id.* at 11–16). However, the cases cited by Plaintiffs do not lead to the proposition that HFL's claim is unripe. Plaintiffs cite *Hoover Slovacek LLP v. Watson*, 206 S.W.3d 557, 560 (Tex. 2006), but that case does not mention ripeness. In *Hoover*, the Texas Supreme Court denied immediate recovery to a discharged contingent-fee lawyer who sought immediate payment

regardless of whether the client actually recovered in the underlying litigation. *Id.* at 562. This is simply not applicable to HFL's claim, which seeks payment only upon Plaintiffs' recovery. The statement from *Hoover Slovacek* that "a contingent-fee lawyer is entitled to receive the specified fee only when and to the extent the client receives payment" simply does not provide support for the notion that HFL's intervention is unripe. *Id.* (cleaned up). Another case cited by Plaintiffs, *In re Deepwater Horizon*, 546 Fed. Appx. 502, 504 (5th Cir. 2013), briefly mentions ripeness, but deals with a party who attempted to intervene so it could potentially raise objections to a class-action compensation distribution program. And in that case, the intervening party effectively admitted that its intervention was premature. *Id.* at 506. This is simply not analogous to HFL's attempt to intervene in pending and ongoing litigation so that it may recover part of any payout. Plaintiffs' remaining case citations simply do not deal with ripeness at all.[2] Therefore, the Court sees no reason to deny HFL's motion to intervene as unripe.

C. Rule 24 Requirements

To intervene by right, the prospective intervenor either must be "given an unconditional right to intervene by a federal statute," Fed. R. Civ. P. 24(a)(1), or must meet each of the four requirements of Rule 24(a)(2):

> (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Texas v. United States, 805 F.3d 653, 657 (5th Cir. 2015). "Although the movant bears the burden of establishing its right to intervene, Rule 24 is to be liberally construed." *Id.* (citations

[2] *See Wal-Mart Stores, Inc. v. Tex. Alcoholic Bev. Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016) (discussing timeliness but not ripeness); *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (same); *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970) (same).

omitted). As HFL's intervention is based upon their breach of contract claim, they must satisfy the four requirements of Rule 24(a)(2).

1. Timeliness

"The most important consideration in determining timeliness is whether any existing party to the litigation will be harmed or prejudiced by the proposed intervenor's delay in moving to intervene." *McDonald*, 430 F.2d at 1073. Contrary to Plaintiffs' argument that the intervention comes too early, timeliness typically examines whether a motion to intervene is filed *too late*. *See Wal-Mart Stores*, 834 F.3d at 565–66.[3] With the exception of the inapplicable *In re Deepwater Horizon* case, Plaintiffs cite no cases holding that a motion to intervene is untimely because it was filed too early in litigation. 546 Fed. Appx. at 504. Accordingly, the motion to intervene, which was filed shortly after HFL's termination as counsel and in the early stage of litigation, is timely filed.

2. Interest Relating to the Transaction

Next, Plaintiffs contend that HFL lacks an interest related to the property or transaction at issue in the case. (Pls.' Resp., Dkt. 37, at 16). Here, Plaintiffs present two discrete arguments: (1) that Texas law does not authorize charging liens except on retainer fees and (2) that such a lien, even if lawful, does not constitute a property interest under Rule 24. Both arguments are unavailing.

[3] The Fifth Circuit uses a four-part test to determine timeliness of interventions.

> Determining the timeliness of a motion to intervene entails consideration of four factors: (1) The length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before it petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it knew or reasonably should have known of its interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if intervention is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Sierra Club v. Espy, 18 F.3d 1202, 1205 (5th Cir. 1994). The first two factors apply only to arguments that intervention comes too late. And the third and fourth factors do not counsel against intervention as untimely because the harms that Plaintiffs will purportedly endure, such as disclosing confidential information, will be true so long as HFL intervenes sometime between now and final judgment. Moreover, such harms can be remedied by simply addressing HFL's claims after any recovery by Plaintiffs.

Federal and state courts in Texas dealing with the issue of attorney liens have found that they are permissible. *Mt. Spelman & Fingerman, P.C. v. GeoTag, Inc.*, 70 F. Supp. 3d 782, 786 (E.D. Tex. 2014) (collecting cases). Plaintiffs rely on a Texas Ethics Opinion that suggests the state's ethics rules prohibit an attorney from obtaining a charging lien from a client. (Pls.' Resp., Dkt. 37, at 23) (citing Tex. Comm. On Professional Ethics, Op. 610 (2011))). In Texas, ethics opinions do not carry the force of law, but are advisory only. *Mt. Spelman*, 70 F. Supp. 3d at 786. District courts must examine "Texas law to determine whether an attorney holds a lien for fees against a judgment or settlement amount." *United States v. Betancourt*, CRIM. B–03–090–S1, 2005 WL 3348908 (S.D. Tex. Dec. 8, 2005), *aff'd*, 257 Fed. Appx. 785 (5th Cir. 2007). Plaintiffs cite *Betancourt* for the proposition that no "common law" attorney lien exists in Texas law, but HFL does not assert its lien under "common law." (Pls.' Resp., Dkt. 37, at 17 n.64 (citing *Betancourt*, 2005 WL 3348908, at *3)). HFL asserts a direct, contractual lien. The *Betancourt* opinion explicitly acknowledged that contractual leans *do* exist under Texas law. 2005 WL 33489808, at *3 ("Under Texas law, a contract may establish an attorney's lien for money received in judgment or settlement of a matter."). Plaintiffs' argument omits the key distinction that Texas courts have made between common law and contractual liens, and their reasoning fails as a result.

Next, Plaintiffs contend that "HFL fails to meet the requirements of [Rule 24(a)(2)] because HFL has, at most, an indirect interest in the subject of this litigation." (Pls.' Resp., Dkt. 37, at 24 (citing *Ross v. Marshall*, 456 F.3d 442, 443–44 (5th Cir. 2006))). This argument runs headfirst into repeated Fifth Circuit caselaw affirming the principle that an attorney has an interest in the outcome of litigation when they attempt to recover on a contingency fee. *Gilbert v. Johnson*, 601 F.2d 761, 767 (5th Cir. 1979); *Gaines v. Dixie Carriers, Inc.*, 434 F.2d 52, 54 (5th Cir. 1970); *Keith v. St. George Packing Co., Inc.*, 806 F.2d 525, 526 (5th Cir. 1986); *Adam Joseph Resources v. CNA Metals Ltd.*, 919 F.3d 856, 866 (5th Cir. 2019) ("From *Gaines* forward, this circuit has consistently held that an attorney's

contingent fee is a sufficient 'interest relating to the property or transaction that is the subject of the action' for purposes of intervention."). Plaintiffs ignore this line of cases, and instead characterize HFL's interest as hypothetical because the Court has not yet determined whether HFL's contract is valid and enforceable. (*Id.*). An interest is not hypothetical simply because the opposing party may assert an affirmative defense—an intervenor does not need to conclusively show that they will succeed on the merits in order to have an interest in the outcome. To hold otherwise would be to deny intervention in any case where there is at least some doubt about the intervening party's success. An established line of Fifth Circuit cases has held that attorneys who seek to recover on contingency fees have an interest at stake in the litigation, and Plaintiffs' arguments do not persuade the Court to deviate from those cases' reasoning.

3. Ability to Protect Interest

Next, Plaintiffs argue that HFL should not be allowed to intervene because they can protect their contingency fee interest through filing another lawsuit. (Pls.' Resp., Dkt. 37, at 19). The Court need not spend time on this argument because it has been squarely rejected by the Fifth Circuit. *Adam Joseph*, 919 F.3d at 867 ("Indeed, we have explicitly interpreted *Gaines* to dismiss the argument that an attorney's ability to institute a future proceeding to recover fees negates intervention as of right . . . ."); *United States v. Tex. E. Transmission Corp.*, 923 F.2d 410, 415–16 (5th Cir. 1991) (holding same); *Skinner v. Weslaco Indep. Sch. Dist.*, 220 F.3d 584, 584 (5th Cir. 2000) (same). Because Plaintiffs make no attempt to differentiate these cases, the Court finds their argument unpersuasive. Intervention will allow HFL to protect its interest in the contingency fee recovery, so it has met this this third element.

Finally, Plaintiffs do not contest that HFL's interests are not represented by any existing party. It is evident that neither Plaintiffs nor Defendants will adequately represent HFL in this case. Therefore, HFL has met the fourth element of intervention by right.

4. Remaining Grounds for Opposition

Finally, Plaintiffs oppose intervention on the grounds that it will "create a sideshow distraction that will complicate litigation of this case." (Pls.' Resp., Dkt. 37, at 19–20). Even accepting this as true, prejudice to a plaintiff is not a standalone reason to deny a timely motion to intervene. To the extent that the parties agree to a stay of the claims in intervention during discovery in this case, so as to mitigate any distractions or issues of privilege, they may submit a proposed order to that effect on or before August 16, 2023.

IV. CONCLUSION

For the reasons stated above, the Court finds that HFL is entitled to intervene as a matter of right in both cases. **IT IS THEREFORE ORDERED** that HFL's motion to intervene in 1:23-cv-9-RP, (Dkt. 32), is **GRANTED**. The Clerk of the Court shall file HFL's First Amended Plea in Intervention, (Dkt. 32-2).

IT IS FURTHER ORDERED that HFL's motion to intervene in 1:22-cv-655-RP, (Dkt. 43), is **GRANTED**. The Clerk of the Court shall file HFL's First Amended Plea in Intervention, (Dkt. 43-2).

IT IS FURTHER ORDERED that the parties shall file a joint and agreed proposed order to stay the claims in intervention, if at all, on or before August 16, 2023.

SIGNED on August 2, 2023.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

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

ALEX GONZALES, Sr. and ELIZABETH HERRERA, Plaintiffs. v. **CITY OF AUSTIN, LUIS SERRATO, AND GABRIEL GUTTIEREZ**, Defendants. Hendler Flores Law, PLLC, Intervenor.	§ § § § § § § § § § § § §	**Case Nos. 22-CV-655, 23-CV-9-RP**

FIRST AMENDED PLEA IN INTERVENTION
BY HENDLER FLORES LAW, PLLC

Hendler Flores Law, PLLC (HFL or Intervenor) files, pursuant to Federal Rule of Civil Procedure 24(a)(2), this Plea in Intervention and shows the Court the following:

I.

PARTIES AND SERVICE OF PROCESS

1. **Intervenor Hendler Flores Law, PLLC** (HFL) is a professional limited liability company with its principal place of business in Travis County, Texas.

2. **Respondent Alex Gonzales, Sr.** is a citizen of Texas and a resident of Bastrop County, Texas. Alex Gonzales, Sr. is the father and next of kin of Alex Gonzales, Jr. Alex Gonzales, Sr. may be served with process by serving counsel of record via the Court's CM/ECF system.

3. **Respondent Elizabeth Herrera** (aka Elizabeth Gonzales) is a citizen of Texas and a resident of Bastrop County, Texas. Elizabeth Herrera is the mother and next of kin of Alex

Gonzales, Jr. Elizabeth Herrera may be served by serving her counsel of record via the Court's CM/ECF system.

4. **Minor child Z.A.G.** is a person under the age of eighteen (18) who is a citizen of Texas and, on information and belief, is a resident of Travis County, Texas. This action is brought on behalf of Z.A.G. by Alex Gonzales, Sr. and Elizabeth Herrera as "Next Friends." Z.A.G. may be served with process through service on counsel for Alex Gonzales, Sr. and Elizabeth Herrera as well as on counsel for **Z.A.G.'s** custodial parent's attorney, Jeff Edwards, The Edwards Law Firm, 603 West 17th Street, Austin, Texas 78701.

II.

FACTS

5. On January 7, 2020, Respondents retained HFL as memorialized by a signed, written Attorney Retainer Agreement (Retainer Agreement) employing HFL to represent them in connection with the instant litigation.

6. The Retainer Agreement includes the basis for the charging of legal fees as a contingent percentage of any monetary recovery in the litigation by settlement, judgment, or otherwise. It provides that the plaintiffs agreed to pay a contingent attorneys' fee of 40% of any settlement, verdict, or recovery obtained in the matter to compensate HFL for its legal services in the case. The Retainer Agreement also set forth that HFL would recover the expenses it advanced on the Respondents' behalf from the Respondents' net amount of any monetary settlement, verdict, or recovery, after the deduction of the 40% attorney's fee.

7. The Retainer Agreement also provides, and the Respondents agreed, that HFL has a charging lien to secure recovery of its fees and expenses in the matter, and that if Respondents terminated HFL without cause, HFL would continue to have a claim for its full

percentage contingent attorneys' fee of 40% of the gross recovery, including its expenses incurred up to the time of termination. The Retainer Agreement states that if Respondents were to terminate HFL without cause and later obtain a recovery, the full percentage of the contingent fee would remain due, in addition to expenses incurred prior to the date of termination from that recovery.

8. While representing Respondents, HFL investigated, researched, and filed two separate lawsuits on behalf of the Respondents; served and responded to written discovery; noticed and conducted depositions of two witnesses; ordered medical records; HFL facilitated a private autopsy; consulted experts and retained one expert on the subject of police excessive force; and reviewed thousands of pages of records and hours of video. HFL also incurred several significant expenses for Respondents' benefit, including assisting the family with ancillary matters including probate, memorials, grief support and management, and family law, among other services. Those expenses are, at a minimum, $65,136.95. Respondents have not repaid these expenses.

9. On March 24, 2023, without any notice whatsoever, HFL received a letter from the Marconi Firm informing HFL that Respondents intended to discharge HFL effective April 7, 2023, and transfer their representation to Mr. Puckett and his new employer, the Devlin Law Firm LLC. Respondents discharge of HFL was without cause. HFL subsequently withdrew and transferred the file to the Devlin Law Firm on April 24, 2023, and this Court granted HFL's motion to withdraw on May 2, 2023.

III.

CLAIM

10. Intervenor's interest in any monetary recovery arises from a written contingent

fee contract with Intervenor that Respondents signed providing for a fee equal to forty percent of any monetary recovery Respondents obtained in this litigation. An attorney's right to assert a lien against client property to ensure payment of professional fees has been recognized at common-law since the early eighteenth century. *See, e.g.,* Everett, Clarke & Benedict v. Alpha Portland Cement Co., 225 F. 931, 935 (2d Cir. 1915) (summarizing history of attorney liens). The charging lien that Respondents contractually agreed to in the Retainer Agreement retaining Intervenor applies to the proceeds of a recovery and contrary to Respondents' current attorneys, does not provide for a security interest in the underlying case.[1] The contractually agreed to charging lien protects the attorney's fees and expenses from the proceeds of any judgment, decree or other order in his client's favor entered or made in such proceeding.

11. Texas common law establishes charging liens as a way for attorneys to secure recovery of their fees and expenses. *See, e.g.*, *Rotella v. Cutting*, No. 02-10- 00028-CV, 2011 WL 3836456, at *5 (Tex. App.—Fort Worth Aug. 31, 2011, no pet.); *Tarrant Cty. Hosp. Dist. v. Jones*, 664 S.W.2d 191, 196 (Tex. App.—Fort Worth 1984, no pet.). In Texas, when a client employs an attorney on a contingent-fee basis and then discharges the attorney without cause before the attorney completes the representation, the attorney may sue to enforce the contract and recover the amount of the contracted compensation from any monetary damages that the client subsequently recovers. *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561 (Tex. 2006) (citing *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex. 1969)). The ability of an attorney discharged without cause to recover for the services he rendered dates back at least as far as 1855. *Myers v. Crockett*, 14 Tex. 257 (1855). Respondents discharged HFL without

[1] To the extent a court interprets the contractual language describing the charging lien as providing for a security interest in the underlying claim as opposed to the proceeds from a recovery on the underlying claim, Intervenors expressly disavow any such interest in the Respondents' underlying claim.

notice and without good cause.

12. Disposition of the case through a negotiated agreement will almost certainly involve payment of a money recovery to Respondents. In that event, it will become exponentially difficult if not impossible for Intervenor to recover its fee. This is because the funds could be put out of reach through a structed settlement—a type of annuity for personal injury plaintiffs only—that will pay Respondents over a long period of time; alternatively, Respondents, may spend the funds and deplete them before Intervenor can recover its fees and expenses from the recovery, or Respondents may otherwise dispose of the funds before Intervenor could obtain its monetary interest through legal action.

13. Respondents have no incentive to protect HFL's interest in any monetary recovery they obtain in this matter because it will likely reduce their net recovery. That is because Respondents have hired replacement counsel who they purport to compensate through a percentage of any monetary recovery they obtain through the litigation. Similarly, none of the Defendants have any incentive to protect HFL's contingent fee interest in the recovery. In fact, if the matter is resolved through a negotiated agreement either before or after a verdict, it is standard practice for a Defendant to require a Plaintiff (Respondents in this case) to assume all responsibility for any party claiming an interest in the settlement funds. As such, Defendants have no incentive to protect HFL's interests in the recovery, and now Respondents interests conflict with HFL's because payment of HFL's fee risks reducing Respondents recovery on top of the fee that Respondents have agreed to pay its replacement counsel.

IV.

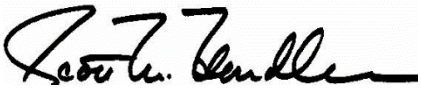
PRAYER

WHEREFORE, Intervenor requests citation and service be made as requested and that the Court award directly to Intervenor the expenses it has advanced and its share of any settlement, verdict, or other recovery to be paid by Defendants or judgment awarded against Defendants, in addition to such other and further relief to which Intervenor may be entitled at law or in equity.

Dated: June 12, 2023

Respectfully submitted,

HENDLER FLORES LAW, PLLC



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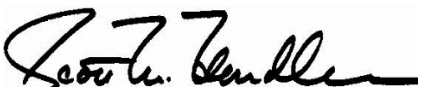
CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Court's CM/ECF system on June 12, 2023.



Scott M. Hendler

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

ALEX GONZALES, SR. and ELIZABETH HERRERA, Plaintiffs, v. CITY OF AUSTIN, Defendants.	§ § § § § § § § § §	1:22-CV-655-RP

JESSICA ARELLANO, individually and as next friend of Z.A., a minor child, and wrongful death beneficiary of Alex Gonzales, Jr., Plaintiffs, v. THE CITY OF AUSTIN, GABRIEL GUTIERREZ, and LUIS SERRATO Defendants.	§ § § § § § § § § § §	1:23-CV-8-RP

ALEX GONZALES, SR., individually as a wrongful death beneficiary of Alex Gonzales, Jr., and as the Representative of the Estate of Alex Gonzales, Jr., Deceased, and ELIZABETH HERRERA, aka ELIZABETH GONZALES, individually and as a wrongful death beneficiary of Alex Gonzales, Jr., Plaintiffs, v. THE CITY OF AUSTIN, GABRIEUL GUTIERREZ, and LUIS SERRATO Defendants.	§ § § § § § § § § § § § § § § § § § §	1:23-CV-9-RP

ORDER

Before the Court is Defendant Luis Serrato's Agreed Motion to Consolidate Cases (the "Motion") filed on June 7, 2023. (Dkt. 31). In that Motion, Defendant requests that this Court consolidate three highly related cases: 22-CV-655-RP, 1:23-CV-8-RP, and 23-CV-9-RP. Having considered Plaintiff's Motion, the Court agrees that it should be granted.

IT IS THEREFORE ORDERED that Plaintiff's Agreed Motion to Consolidate Cases, (Dkt. 31), is **GRANTED**. Cause Nos. 1:23-CV-8-RP and 1:23-CV-9-RP are **CONSOLIDATED** into Cause No. 1:22-CV-655-RP, which will be the lead case.

IT IS FURTHER ORDERED that:

1. This Agreed Order does not waive any parties' right to later move for a separate trial pursuant to FRCP 42(b) or otherwise;
2. The deadline for any party to move for separate trials pursuant to FRCP 42(b) must be filed 3 months prior to the close of discovery
3. All parties are required to conduct a joint conference within 14 days following entry of this Agreed Order, to discuss the topics set forth in FRCP 26(f)(2) and FRCP 26(f)(3) for purposes of the consolidated case; and
4. The parties are required to file a joint written report of their agreements and disagreements from the joint conference within 21 days following entry of this Agreed Order.

IT IS FINALLY ORDERED that the joint motion to consolidate cases, (Dkt. 24), is **MOOT**.

SIGNED on August 2, 2023.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE