

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

BOMANI BARTON,

*Plaintiff,*

V.

KYU AN, Individually,  
and CITY OF AUSTIN, TEXAS

*Defendants.*

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1-22 00221

CIVIL ACTION NO.: \_\_\_-CV-\_\_\_\_\_

**PLAINTIFF’S ORIGINAL COMPLAINT**

TO THE HONORABLE UNITED STATES DISTRICT COURT:

BOMANI BARTON (hereinafter referred to as “Mr. Barton” or “Plaintiff”) and files his Original Complaint complaining of KYU AN, individually (hereinafter referred to as “Officer Kyu An” or “An”), and the City of Austin, Texas (hereinafter referred to as “Austin, Texas” or “the City”), and respectfully shows this Honorable Court as follows:

**TABLE OF CONTENTS**

Nature of the Case .....3

Parties .....4

Jurisdiction .....4

Venue .....4

Conditions Precedent .....5

Factual Background .....5

Causes of Action .....7

    A. § 1983 – Excessive-Force Claims Against Officer Kyu An in his Individual Capacities .....7

    B. § 1983 – First Amendment Retaliation Claim against Officer Kyu An in his Individual Capacity .....9

    C. Qualified Immunity Under § 1983.....10

    D. Governmental Liability under 42 U.S.C. §1983 (*Monell*) and the First and Fourth Amendment to the U.S. Constitution .....12

Damages .....15

Attorney’s Fees and Costs .....15

Relief Requested .....15

Jury Demand .....16

Prayer .....16

TO THE HONORABLE UNITED STATES DISTRICT COURT:

BOMANI BARTON (hereinafter referred to as “Mr. Barton” or “Plaintiff”) and files his Original Complaint complaining of KYU AN, individually (hereinafter referred to as “Officer Kyu An” or “An”), and the City of Austin, Texas (hereinafter referred to as “Austin, Texas” or “the City”) and respectfully shows this Honorable Court as follows:

**I. NATURE OF THE CASE**

1. This is an excessive force and First Amendment retaliation case, wherein Defendant Kyu An – a police officer with the City of Austin Police Department – used excessive force against Plaintiff, including shooting him with bean bag rounds in the face, elbow, and hip despite the fact that Plaintiff posed no risk to Defendant or anyone else. Defendant An committed these acts in retaliation for Plaintiff exercising his First Amendment rights of free speech and assembly against police brutality.

2. Specifically, this is a civil action arising under the United States Constitution under the provisions of the First and Fourth Amendment to the Constitution of the United States, as applied through the Fourteenth Amendment, and under federal law, particularly the Civil Rights Act, Title 42 of the United States Code § 1983, seeking damages against Defendants for committing acts, under the color of law, with the intent and for the purpose of depriving Mr. Barton of rights secured under the Constitution and law of the United States.<sup>1</sup>

3. Plaintiff also asserts governmental liability (*Monell*) claim against the City of Austin because there exists pattern, practice, or custom of City of Austin Police Officers engaging in excessive force and because the City of Austin—acting through its policy makers—failed to

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<sup>1</sup> Although Plaintiff refers to Defendants collectively at times, specific factual references are made concerning actions or inactions by specific Defendants throughout this Complaint – these are not global allegations. As such, this pleading complies with current federal standards. FED. R. CIV. P. 8.

properly train and supervise Defendant Kyu An and encouraged the use of kinetic projectiles into crowd of unarmed people.

## **II. PARTIES**

4. Plaintiff, BOMANI BARTON, is a citizen of the United States currently residing Bell County, Texas.

5. Defendant, KYU AN, is an individual that was employed by the City of Austin Police Department at the time of the incident that make the basis of this lawsuit and was acting within the scope of his employment and under the color of law, statues, ordinances, rules and regulations, customs and usage of the City of Austin Police Department. At the time of the incident, Officer An assumed his role as a peace officer for the City of Austin. Upon information and belief, Defendant An is still employed by the City of Austin as a police officer. Officer An can be served with processes at the Austin Police Department, 715 E. 8<sup>th</sup> Street, Austin, Texas 78701.

6. Defendant, CITY OF AUSTIN, is a municipality located within the State of Texas. The City of Austin may be served through its Mayor, Steve Adler, or its City Clerk, Jannette Goodall, at 301 W. 2<sup>nd</sup> Street, Austin, Texas 78701.

## **III. JURISDICTION**

7. This action is brought pursuant to 42 U.S.C. § 1983, and the First, Fourth, and Fourteenth Amendments to the United States Constitution. The Court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1343.

## **IV. VENUE**

8. Venue is proper in this district under 28 U.S.C. § 1391(b) because the acts, events, or omissions giving rise to this claim occurred in Travis County, Texas, which falls within the United District Court for the Western District of Texas, Austin Division.

**V. CONDITIONS PRECEDENT**

9. All conditions precedent have been performed or have occurred.

**VI. FACTUAL BACKGROUND**

10. On Saturday, May 30, 2020, the Austin Police Department responded to a peaceful protest of police brutality with further police brutality.

11. Bomani Ray Barton, his girlfriend, and another friend attended a civil rights protest near the Austin Police Department Headquarters in Austin, Texas.

12. When they arrived, they noticed Austin Police Department officers in what appeared to be riot gear in a formation of numerous rows of officers.

13. These officers used bicycles to barricade and corral individuals into certain areas and to split up groups.

14. Mr. Barton and his friends protested peacefully for several hours; however, the police began to get agitated with the crowd, began pushing protestors, and used OC spray (commonly referred to as “pepper spray”) to silence the crowd.

15. Mr. Barton witnessed an officer push a female protestor off of a retaining wall, which caused her to hit her head on the ground.

16. As the police became more violent, the protesters migrated and made their way towards the Capitol. Officers continually used OC spray on unarmed individuals who did not pose a threat.

17. The protesters continued marching the streets of Austin and eventually found their way back to Austin Police Department Headquarters.

18. By this time, Austin police officers resorted to wantonly spraying OC spray into crowds. After seeing this tactic, Mr. Barton and his friends decided to stay towards the back of the protest — away from the violent officers.

19. The protesters again started to march down the highway and Mr. Barton eventually ended up towards the front of the march.

20. Officer Kyu An eventually blocked off Mr. Barton and a handful of other protestors from marching by aiming a weapon at Mr. Barton without ordering a command to Mr. Barton or the other protestors.

21. Officer Kyu An was approximately 20 feet away from Mr. Barton as Mr. Barton slowly raised his hands in a surrendering position. Mr. Barton begged Officer Kyu An not to shoot him; however, Officer Kyu An stared down Mr. Barton. Fearing for his life, Mr. Barton began to slowly back away from Officer Kyu An with his arms still in the surrender position.

22. Inexplicably, Officer Kyu An shot Mr. Barton in the right hip despite it being obvious that Mr. Barton posed no threat to Officer Kyu An or anyone else.

23. Mr. Barton staggered back in pain before Officer Kyu An immediately shot him in the right elbow.

24. Officer Kyu An then approached a stunned, immobile, and helpless Mr. Barton. This is when Officer Kyu An deploys his *coup de grâce* — a close-range, point-blank, bean bag round to Mr. Barton's face.

25. Mr. Barton, dazed and feeling like he was hit in the jaw with a metal bat, stumbled a few steps before falling to his knees as blood sputtered from his mouth. Two of his teeth broke off from his mouth and fell to the pavement.

26. Officer Kyu An, apparently pleased with his brutal assault of a peaceful protester, observed the carnage he inflicted and carelessly walked away.

27. Bystanders then assisted Mr. Barton to EMS as it was clear he needed emergency medical care. EMS informed Mr. Barton that getting to the hospital was a matter of life and death. Mr.

Barton, who was now dizzy from blood loss, was put on a stretcher and loaded into the ambulance.

28. The ambulance only made it a few feet before it had to stop and pick up another victim of Austin Police brutality. This time, EMS rescued a young, pregnant woman who suffered from asthma and had been sprayed with OC spay. She was also taken to the ER with Mr. Barton.

29. Mr. Barton underwent emergency surgery on his shattered jaw and was in and out of consciousness as he recovered the next day. Additionally, his right elbow and hip were severally bruised and could not function properly.

30. Mr. Barton has currently undergone seven (7) surgeries on his face, but unfortunately, the damage caused by Officer Kyu An is permanent.

31. Officer Kyu An and 18 other officers have been indicated for assaulting Mr. Barton and numerous other innocent civilians protesting police brutality. Several officers have stated through their attorney that the highest levels of APD command authorized and ordered the use of bean bags on the unarmed protesters that day.<sup>2</sup>

32. Mr. Barton has never been arrested nor charged with a crime related to this protest.

## **VII. CAUSES OF ACTION**

### **A. § 1983 – Excessive-Force Claims Against Kyu An in his Individual Capacity**

33. Plaintiff hereby adopts, incorporates, restates, and re-alleges paragraphs 1 through 32, inclusive, with regard to all causes of action.

34. As a direct and proximate result of the above-referenced unlawful and malicious physical abuses of Plaintiff by Officer Kyu An that were committed under the color of law and under his authority as a City of Austin Police Officer, Plaintiff suffered grievous bodily harm and was deprived of his right to be secure in his person against unreasonable seizure of his person, in

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<sup>2</sup> <https://www.texastribune.org/2022/02/21/austin-police-indictment-protests/>

violation of the Fourth Amendment of the Constitution of the United State of America.

35. Plaintiff specifically pleads that Officer Kyu An used excessive force and/or deadly force in the course of an illegal assault and battery of the Plaintiff, a free citizen, in violation of the Fourth Amendment and its “reasonableness” standard.

36. To establish Officer Kyu An violated his constitutional rights to be free from excessive force, Plaintiff must show:

- a. An injury;
- b. Which resulted from the use of force that was clearly excessive to the need; and
- c. The excessiveness of which was objectively unreasonable.<sup>3</sup>

37. Officer Kyu An’s use of unreasonable, unnecessary, and excessive force violated Plaintiff’s clearly established constitutional rights and was not objectively reasonable in light of the circumstances.

38. Specifically, Officer Kyu An used unreasonable, excessive, and unnecessary force by shooting Mr. Barton with a bean bag gun three times, including one in the face at close range.

39. Mr. Barton was not posing a threat to Officer Kyu An nor any other member of the public. Mr. Barton did not disobey any lawful commands issued by Officer Kyu An. Mr. Barton was not arrested nor charged with any crimes in relation to his presence at the protest.

40. Plaintiff suffered multiple injuries as a direct result of Officer Kyu An’s actions. As a result of his encounter with Officer Kyu An, Mr. Barton was shot in the elbow, hip, and jaw with bean bags, which resulted in a shattered jaw, numerous corrective surgeries, and permanent damage.

41. Officer Kyu An’s actions and/or omissions were “objectively unreasonable” in light of the facts and circumstances confronting the officer without regard to his underlying intention or

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<sup>3</sup> See *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012); *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011).

motivation. Clearly, the facts and circumstances of this particular incident demonstrate the unreasonableness of said actions, including that Plaintiff was unarmed, had not committed a crime, was not attempting to flee, and posed no immediate threat or danger to the police. For these reasons, it was objectively unreasonable for Officer Kyu An to shoot Plaintiff three times with a bean bag gun.

42. Officer Kyu An's actions were clearly excessive to the need.

43. The acts of Officer Kyu An as set forth above were intentional, wanton, malicious, and oppressive, or were with reckless disregard of Plaintiff's established constitutional rights; therefore, Plaintiff is entitled to an award of punitive damages.

**B. § 1983 – First Amendment Retaliation Claims Against Kyu An in his Individual Capacity**

44. Plaintiff hereby adopts, incorporates, restates, and re-alleges paragraphs 1 through 43, inclusive, with regard to all causes of action.

45. To assert a claim for First Amendment retaliation under § 1983, Plaintiff must show:

- a. He was engaged in a constitutionally protected activity;
- b. The defendants' actions caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and
- c. The defendants' adverse actions were substantially motivated against Plaintiff's exercise of constitutionally protected conduct.<sup>4</sup>

46. Here, Plaintiff was engaged in the constitutionally protected activity of voicing his free speech and freedom to peaceably assemble in an attempt to redress grievances related to police brutality across the nation.

47. Defendant Kyu An shattered Mr. Barton's jaw in an effort to both literally and figuratively take away his ability to speak on police brutality and to instill fear in all that assembled on the

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<sup>4</sup> *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002)

matter. Such a public, brutal, and devastating injury not only chills a person of ordinary firmness from continuing to engage in the activity, it also makes them physically unable to engage.

48. Plaintiff was peacefully protesting, was not armed, and had his hands raised in a surrendering position at the time Officer Kyu An shot him with the bean bag gun the first time. Officer Kyu An then proceeded to repeatedly shoot Mr. Barton in what can only be described as a simulated overkill. Officer Kyu An never gave Plaintiff a lawful order, never suspected Plaintiff of committing a crime, never attempted to arrest Plaintiff, and never attempted to render aid after the assault – he simply walked away. Further, Plaintiff was never charged with a crime related to the protest. The totality of the circumstances show that Officer Kyu An’s substantial motivation was to infringe on those protesting police brutality by inflicting police brutality.

49. The acts of Officer Kyu An as set forth above were intentional, wanton, malicious, and oppressive, or were with reckless disregard of Plaintiff’s established constitutional rights; therefore, Plaintiff is entitled to an award of punitive damages.

**C. Qualified Immunity Under § 1983**

50. Plaintiff hereby adopts, incorporates, restates and re-alleges paragraphs 1 through 49, inclusive, with regard to all causes of action.

51. Officer Kyu An was carrying out a governmental function in employing the excessive use of force against Plaintiff. Government actors can be entitled to qualified immunity to their individual liability, but this immunity is waived if the complainant shows that:

- a. the individual's acts deprived the party of constitutional rights under color of law;
- b. the deprived rights were clearly established and constitutional rights which existed at the time of the acts; and
- c. such acts were not objectively reasonable under the circumstances, that is, no reasonable official could have believed at the time that the conduct was lawful.

52. In *Kinney v. Weaver*, the Fifth Circuit explained the “clearly established” prong as follows:

Qualified immunity should not be denied unless the law is clear in the more particularized sense that reasonable officials should be on notice that their conduct is unlawful. The central concept is that of fair warning: The law can clearly be established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.<sup>5</sup>

53. In *Newman v. Guedry*, the Fifth Circuit Court addressed whether the law on the use of Tasers was clearly established at the time of the event that occurred before the encounter between Mr. Barton and Officer Kyu An:

Guedry contends that he had no reasonable warning that tasing Newman multiple times violated Newman’s constitutional rights, because there was then no binding case law on the appropriate use of tasers. Lawfulness of force, however, does not depend on the precise instrument used to apply it. Qualified immunity will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel.<sup>6</sup>

54. In *Bush v. Strain*, the Fifth Circuit held that the law was clearly established that an officer slamming an arrestee’s face into a vehicle when the arrestee was not resisting or attempting to flee was objectively unreasonable.<sup>7</sup>

55. At the time of the encounter between Officer Kyu An and Plaintiff, there was no doubt that Mr. Barton had the clearly established right to be free from harm, including excessive force in the form of improper use of a bean bag gun.

56. Here, Mr. Barton posed no immediate threat to Officer Kyu An or any else, was not disobeying an unlawful command, was not suspected of a crime, was not informed he was under

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<sup>5</sup> See *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (en banc) (internal citations and quotations omitted).

<sup>6</sup> See *Newman v. Guedry*, 703 F.3d 757, 763-64 (5th Cir. 2012).

<sup>7</sup> *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008).

arrest; yet, Officer Kyu An chose to shoot Mr. Barton with his bean bag gun three times and shatter Mr. Barton's jaw before calmly walking away.

57. The actions taken by Officer Kyu An were excessive and unreasonable under clearly established law.

58. The acts of Officer Kyu An violated clearly established statutory or constitutional rights of which a reasonable person would have known, including the constitutional rights afforded by the Due Process Clause, First Amendment and Fourth Amendment of the United States Constitution.

**D. Governmental Liability Under 42 U.S.C. §1983 (*Monell*) and the First and Fourth Amendment to the U.S. Constitution applied through the Fourteenth Amendment.**

59. Plaintiff hereby adopts, incorporates, restates, and re-alleges paragraphs 1 through 58, inclusive, with regard to all causes of action.

60. This cause of action is to redress the deprivation under the color of policy, custom, and practice of rights and privileges secured to Plaintiff by the First and Fourth Amendment to the United States Constitution.

61. The elements of a cause of action under § 1983 against a governmental entity are:

- a. Plaintiff was deprived of rights under the United States Constitution;
- b. Such deprivation was caused by a person acting under color of state law;
- c. The governmental entity adopted, or failed to adopt, a policy statement, ordinance, regulation or decision adopted and promulgated by the governmental entity's lawmaking officers or by an official to whom the law makers delegate law-making authority or a persistent, widespread practice of officials or employees of the governmental entity which, though not authorized or officially adopted and promulgated, the policy is so common and well settled as to constitute a custom that fairly represents policy of the governmental entity; and
- d. The promulgation of the policy by City of Austin was done so with deliberate indifference to known or obvious consequences that violations of constitutional rights would occur, and the unconstitutional policy is the moving force behind the deprivation of the Plaintiff's rights.<sup>8</sup>

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<sup>8</sup> *Zarnow v. City of Wichita Falls*, 614 F.3d 461, 166-67 (5th Cir. 2010); see *Groden v. City of Dallas*, 826 F.3d

62. At all relevant times mentioned here, the City of Austin employed Officer Kyu An as a police officer of the Austin Police Department. The City of Austin provided this employee and agent with an official badge, identification, and uniform, which designated and described its bearers as Austin Police Officers.

63. At all relevant times mentioned here, Officer Kyu An, separately and in concert, acted under the color of law, as well as under the color of policies, practices, and customs of the City of Austin. The Defendants deprived Plaintiff of the rights, privileges, and immunities secured to Plaintiff by the First and Fourth Amendment to the United States Constitution and the laws of the United States.

64. The facts alleged above are part of the customs, practices, policies, and decisions of the City of Austin, including but not limited to, the following:

- a. Shooting kinetic projectile into crowds where innocent people could be injured;
- b. Using, authorizing, and/or tolerating excessive force against non-violent protestors;
- c. Failing to adequately discipline officers;
- d. Failing to adequately supervise officers;
- e. Failing to adequately train officers concerning de-escalation of force, crowd control, use of force against non-violent protestors, and the use or misuse of kinetic projectiles;
- f. Failing to train officers regarding demonstrators' free speech and assembly rights;
- g. Not intervening to stop constitutional violations, including excessive force;
- h. Failing to train or instruct officers about specific incidents it considers unreasonable, excessive force, or in violation of the constitution; and
- i. Disproportionally using and tolerating excessive force, including deadly force, against unarmed people of color.

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280, 283 (5th Cir. 2016).

65. Former Chief Brian Manly, who was a policymaker for the City of Austin related to law enforcement at the time, had a duty to properly train and supervise his deputies concerning the use of force and to prevent excessive force. Former Chief Brian Manly failed to properly train and supervise Officer Kyu An in not engaging in excessive and the proper use of force.

66. Numerous other citizens have filed complaints and lawsuits against the City of Austin for excessive and unreasonable force stemming from police action in this protest and many other unrelated instances.

67. Further, 19 police officers, include Defendant Officer Kyu An have been indicted on criminal assault charges related to their conduct at this protest, including Officer Kyu An's conduct that makes the basis of this lawsuit.<sup>9</sup> This demonstrates that the City of Austin had a widespread failure to adequately train and/or supervise problem with its officers and/or condoned the use of these projectiles on innocent people at the time of the incident.

68. Each of these customs, practices, and/or policies was actually known, constructively known and/or ratified by the City of Austin, the Austin Police Department, and/or Former Chief Brian Manly, a policymaker for the City of Austin, and were promulgated with deliberate indifference to Plaintiff's rights, as guaranteed by the First and Fourth Amendments to the United States Constitution, and specifically deprived Plaintiff of his First Amendment right to free speech and to assemble and Fourth Amendment right to be free from excessive and unreasonable force. The known and obvious consequence of these policies was that Austin Police Department officers, and specifically Officer Kyu An, would be placed in recurring situations in which the constitutional violations that occurred in this incident would result. Plaintiff alleges that continuation of the above-mentioned practices of improper policies or customs actually caused Officer Kyu An to

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<sup>9</sup> <https://www.texastribune.org/2022/02/21/austin-police-indictment-protests/>

violate Plaintiff's constitutional rights.

69. Former Chief Brian Manly also ratified Officer Kyu An's conduct by failing to discipline Officer Kyu An for his use of excessive and unreasonable force. It took a grand jury indictment from citizens outside of Former Chief Brian Manly's control to bring Officer Kyu An to criminal justice.

### **VIII. DAMAGES**

70. Plaintiff hereby adopts, incorporates, restates and re-alleges paragraphs 1 through 69, inclusive, with regard to all causes of action.

71. As a result of Defendants' statutory and constitutional violations, Plaintiff has suffered serious and substantial damages and injuries, including but not limited:

- a. Past, present, and future medical expenses;
- b. Past, present, and future physical impairment;
- c. Past, present, and future physical pain and suffering;
- d. Emotional distress and mental anguish;
- e. Physical disfigurement; and
- f. Past, present, and future loss of earning capacity.

72. Defendants are *jointly and severally* liable for Plaintiff's damages.

### **IX. ATTORNEY'S FEES AND COSTS**

73. Pursuant to the *Civil Rights Attorney's Fees Award Act*, 42 U.S.C. § 1988, Plaintiff asserts the right to an award of attorney's fees and costs under its 42 U.S.C. § 1983 pleadings if he prevails.

### **X. RELIEF REQUESTED**

74. The preceding factual statements and allegations are incorporated by reference.

75. For these reasons, Plaintiff prays for judgment against Defendants, any or all of them, for

the following:

- a. Actual damages;
- b. Pre-judgment and post-judgment interest;
- c. Statutory attorney's fees and expenses;
- d. Punitive and exemplary damages against the individual Defendant in an amount to be determined and as allowed by the Court;
- e. Costs of court; and
- f. Such other and further relief as the Court deems just and equitable.

#### **XI. JURY DEMAND**

76. Plaintiff respectfully demands trial by jury and has tendered the appropriate fee for the same.

#### **XII. PRAYER**

Plaintiff respectfully requests Defendants to be cited to appear and answer herein, and that upon final trial hereof, the Court award the relief sought against Defendants.

Respectfully submitted,

By: /s/ Myles Lenz

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**ATTORNEYS FOR PLAINTIFF**

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

**BOMANI BARTON**  
*Plaintiff*

v.

**CITY OF AUSTIN AND KYU AN**  
*Defendants*

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CIVIL ACTION NO. 1:22-CV-00221-RP

**DEFENDANT CITY OF AUSTIN’S ANSWER AND  
AFFIRMATIVE DEFENSES TO PLAINTIFF’S ORIGINAL COMPLAINT**

TO THE HONORABLE JUDGE ROBERT PITMAN:

Defendant City of Austin (“the City”) 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, the City respectfully shows the Court the following:

**ORIGINAL ANSWER**

Pursuant to Federal Rule of Civil Procedure 8(b), the City responds to each of the specific averments in Plaintiffs’ First Amended Complaint as set forth below. To the extent that the City does not address a specific averment made by Plaintiffs, the City expressly denies that averment.<sup>1</sup>

**NATURE OF THE CASE**

1. The City admits that Plaintiff is seeking relief under the First and Fourth Amendments of the Constitution. The City denies the remaining allegations contained in Paragraph 1.
2. The City admits that Plaintiff is seeking relief pursuant to 42 USC § 1983 and constitutional provisions but denies that Plaintiff is entitled to such relief.

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<sup>1</sup> Paragraph numbers in Defendant’s Answer correspond to the paragraphs in Plaintiffs’ Original Complaint.

3. The City admits that Plaintiff is asserting a *Monell* claim against the City but denies the remaining allegations contained in Paragraph 3.

#### **PARTIES**

4. Upon information and belief, the City admits the allegations contained in Paragraph 4.
5. The City denies that any APD officer can be served at 715 E. 8<sup>th</sup> Street, Austin Texas 78701 but admits the remaining allegations contained in Paragraph 5.
6. The City admits the allegations contained in Paragraph 6.

#### **JURISDICTION**

7. The City admits the allegations contained in Paragraph 7.

#### **VENUE**

8. The City admits the allegations in Paragraph 8.

#### **CONDITIONS PRECEDENT**

9. The City is without information sufficient to admit or deny the allegations in Paragraph 9.

#### **FACTUAL BACKGROUND**

10. The City admits that the Austin Police responded and to and provided law enforcement support for large crowds of people gathered on May 30, 2020. The City denies the remaining allegations contained in Paragraph 10 of the Complaint.
11. The City admits that on May 30, 2020, Plaintiff was in downtown Austin. Otherwise, the City lacks sufficient information to admit or deny the remainder of the allegations of Paragraph 11.
12. The City 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. The City is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 13 of the Complaint and therefore denies same.
14. The City admits police use of force included OC Spray in response to violence and threats of violence by large crowds gathered on May 30, 2020. The City is without sufficient information to admit the remaining allegations in Paragraph 14 and therefore denies the same.
15. The City 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. The City admits that there were large crowds of people gathering at or near the Capitol Complex on May 30, 2020. The City further admits police use of force included OC Spray in response to violence and threats of violence by large crowds gathered. The City denies the remaining allegations in Paragraph 16.
17. The City admits that there were large crowds of people gathering at or near Austin Police Headquarters on May 30, 2020.
18. The City admits police use of force included OC Spray in response to violence and threats of violence by large crowds gathered on May 30, 2020. The City is without sufficient information to admit the remaining allegations in Paragraph 14 and therefore denies the same.
19. The City admits that there were large crowds of people gathered and walking along the highway. The City is without information sufficient to form a belief as to the remaining allegations and therefore denies the same.
20. The City 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. The City admits that upon information and belief Plaintiff was struck by a projectile fired by Officer Kyu An. The City denies the remaining allegations in Paragraph 21.
22. The City admits that upon information and belief Plaintiff was struck by a projectile fired by Officer Kyu An. The City denies the remaining allegations in Paragraph 22. contained in Paragraph 22 of the Original Complaint and therefore denies same.
23. The City admits that upon information and belief Plaintiff was struck by a projectile fired by Officer Kyu An. The City denies the remaining allegations in Paragraph 23.
24. The City admits that upon information and belief Plaintiff was struck by a projectile fired by Officer Kyu An. The City denies the remaining allegations in Paragraph 24.
25. The City 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. The City denies the allegations in Paragraph 26.
27. Upon information and belief the City admits that Plaintiff was transported to the hospital by EMS. The City is without sufficient knowledge to form a belief as to the truth of the remaining allegations in the Paragraph and therefore denies the same.
28. The City 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. The City 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. The City 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. Upon information and belief, the City admits that the Travis County District Attorney issued 19 indictments to APD officers, including Officer Kyu An. The indictments and the

news articles related to the indictments speak for themselves. The City denies any remaining allegations in the Paragraph.

32. Upon information and belief the City admits to the allegations in Paragraph 32.

#### **CAUSES OF ACTION**

33. Paragraph 32 does not allege facts and does not require a response.

34. The allegations contained in Paragraph 34 of the Complaint do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within this paragraph of the Complaint.

35. The allegations contained in Paragraph 35 of the Complaint do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within this paragraph of the Complaint.

36. Paragraph 36 contains a restatement of the legal requirements needed to assert a cause of action for excessive force and for that reason does not require a response.

37. Paragraph 37 contains a legal conclusion and further does not appear to be directed to the City. To the extent a response is required, the City denies the allegations in Paragraph 37.

38. The allegations contained in Paragraph 38 of the Complaint do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within this paragraph of the Complaint.

39. The allegations contained in Paragraph 39 of the Complaint do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within this paragraph of the Complaint. Upon information and belief, the City admits that Plaintiff was not arrested or charged with any crimes related to the May 30, 2020, protest.

40. Paragraph 40 does not appear to be primarily directed to the City. The City admits that police use of beanbag shotgun rounds in response to violence and threats of violence by large crowds at the May 30, 2020, protests resulted in Plaintiff being struck with beanbag round. Otherwise, the City lacks information sufficient to admit or deny the remainder of the allegations in Paragraph 40.
41. Paragraph 41 contains a legal conclusion and further does not appear to be directed at the City. If a response is required of the City, the City denies the allegations contained within this paragraph of the Complaint.
42. The allegations contained in Paragraph 42 of the Complaint do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within this paragraph of the Complaint.
43. The allegations contained in Paragraph 42 of the Complaint do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within this paragraph of the Complaint.
44. Paragraph 44 does not allege facts and does not require a response.
45. Paragraph 45 contains a restatement of the legal requirements needed to assert a cause of action for retaliation and for that reason does not require a response.
46. The allegations contained in Paragraph 46 of the Complaint do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City admits that Plaintiff was present in the crowd of people assembled in and near the downtown areas on May 30, 2020, it is without sufficient information to admit or deny what rights if any Plaintiff purported to exercise on May 30, 2020.

47. The allegations contained in Paragraph 47 of the Complaint do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within this paragraph of the Complaint and specifically denies that any APD officers fired weapons without provocation.
48. The allegations contained in Paragraph 48 of the Complaint do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City admits that it does not have any information indicating that Plaintiff was in possession of a weapon or that he was guilty of a crime on May 30, 2020. The City denies the remaining allegations contained within this paragraph of the Complaint and specifically denies that any APD officers fired weapons without provocation.
49. The allegations contained in Paragraph 49 of the Complaint do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within this paragraph of the Complaint.
50. Paragraph 50 does not allege facts and does not require a response.
51. Paragraph 51 is a restatement of the law related to qualified immunity and any allegations contained within that legal restatement do not appear to be directed at the City. To the extent a response is required, the City denies allegations of excessive force and retaliation.
52. Paragraph 52 contains a reference to Fifth Circuit case related to qualified immunity and legal requirements. The case speaks for itself and beyond that does not require a response.
53. Paragraph 53 contains a reference to and quote from Fifth Circuit case involving the use of tasers. The case speaks for itself and beyond that does not require a response.
54. Paragraph 54 contains a case law reference to a Fifth Circuit case involving an arrestee. As such it does not require a response from the City.

55. Paragraph 55 is a legal conclusion. To the extent a response is warranted, the City denies allegations of excessive force and retaliation.
56. Paragraph 56 does not appear to be directed to the City. To the extent a response is required, other than the fact that Plaintiff was in a large crowd of people—including people who were engaged in violent or otherwise threatening or unlawful behavior, the City admits that it does not have any information indicating that Plaintiff was guilty of any criminal conduct on May 30, 2020. Otherwise, the City lacks information sufficient to admit or deny the allegations in Paragraph 56.
57. The allegations contained in Paragraph 57 of the Complaint do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within this paragraph of the Complaint.
58. The allegations contained in Paragraph 58 of the Complaint do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within this paragraph of the Complaint.
59. Paragraph 59 does not allege facts and does not require a response. Paragraph 70 does not allege facts and does not require a response.
60. Paragraph 60 is a policy statement behind the cause of action and does not contain factual allegations for the City to admit or deny. The City denies that it is liable for any constitutional violations as described.
61. Paragraph 61 is a statement of the legal elements for a *Monell* claim and does not contain allegations that require the City to admit or deny. To the extent the cited elements contain factual allegations or references against the City, the City denies.

62. The City admits that on May 30, 2020, Kyu An was employed by the City of Austin as a full-time and licensed police officer. The City admits it provided Officer An with all City-issued equipment applicable to full-time officers for the City of Austin.
63. The City admits that Kyu An was employed as a peace officer on May 30, 2022, and was on duty on May 30, 2020, as a City of Austin police officer. The City denies the remaining allegations contained in Paragraph 63 of the Original Complaint.
64. The City denies the allegations contained in Paragraph 64 of the Original Complaint.
65. The City admits that former Chief Brian Manley served as a law enforcement policy maker, including policy maker for law enforcement training, during the May 2020 protests. The City denies the remaining allegations in Paragraph 65 of the Original Complaint.
66. The City admits that multiple individuals have filed lawsuits *alleging* excessive force related to the May 2020 protests and other incidents.
67. Upon information and belief, the City admits that the Travis County District Attorney issued 19 indictments to APD officers, including Officer Kyu An. The City denies the remaining allegations in Paragraph 67 of the Original Complaint.
68. The City denies the allegations in Paragraph 68 of the Original Complaint.
69. Per Texas state law, the disciplinary process for an officer remains open regarding the allegations in this lawsuit. The disciplinary process is deferred until 30 days after the conclusion of the related criminal process. Otherwise, the City denies the allegations in Paragraph 69 of the Original Complaint.

#### **DAMAGES**

70. Paragraph 70 does not allege facts and does not require a response.
71. The City denies the allegations contained in Paragraph 71 of the Original Complaint and

denies Plaintiff is entitled to the relief requested in Paragraph 71 a-f.

72. The City denies the allegations contained in Paragraph 72 of the Original Complaint.

#### **ATTORNEY'S FEES AND COSTS**

73. The City admits that Plaintiff seeks an award of attorney's fees and expenses under 42 U.S.C. § 1988 but denies that Plaintiff is entitled to such relief.

#### **RELIEF REQUESTED**

74. Paragraph 74 does not allege facts and does not require a response.

75. The City denies liability for the damages sought in Paragraph 75 of the Original Complaint and denies Plaintiff is entitled to the relief requested.

#### **JURY DEMAND**

76. Paragraph 76 is a request for a trial by jury and does not contain allegations that require the City to admit or deny.

#### **PRAYER FOR RELIEF**

77. The City denies Plaintiff is entitled to the requested relief in the unnumbered Prayer for relief in the Original Complaint.

#### **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. As a political subdivision, Defendant City of Austin denies that it can be liable for

exemplary/punitive damages under 42 U.S.C. § 1983.

4. 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 Plaintiff be denied, that the Court dismiss this case with prejudice, and that the Court award Defendant costs and attorney’s fees, and any additional relief to which it is entitled under law or equity.

RESPECTFULLY SUBMITTED,

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

/s/ Meghan L. Riley  
MEGHAN L. RILEY  
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**ATTORNEYS FOR DEFENDANT CITY OF  
AUSTIN**

**CERTIFICATE OF SERVICE**

I certify that on the 14<sup>th</sup> day of April 2022, I served a copy of *Defendant City of Austin's Answer and Affirmative Defenses to Plaintiff's Original Complaint* on all parties, by and through their attorney of record, in compliance with the Federal Rules of Civil Procedure.

**Via CM/ECF:**

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**ATTORNEYS FOR PLAINTIFF**

/s/ Meghan L. Riley  
MEGHAN L. RILEY

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

BOMANI BARTON,  
*Plaintiff,*

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v.

Case No. 1:22-cv-00221-RP

CITY OF AUSTIN AND KYU AN,  
*Defendants.*

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**DEFENDANT KYU AN’S ORIGINAL ANSWER TO  
PLAINTIFF’S ORIGINAL COMPLAINT**

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TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW Defendant, Kyu An, 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.**

**INTRODUCTION**

1. Between May 25 and July 31 of 2020, approximately 2,037 law enforcement officers were injured during protests related to the in-custody death of George Floyd in Minnesota.<sup>1</sup> During those protests, approximately 62% of major U.S. cities experienced looting.<sup>2</sup> 56% of major U.S. cities experienced arson incidents—a statistic which does not include the 97 police vehicles set on fire during that time period, which was an act of violence reported by over 26% of major city law

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<sup>1</sup> *Report on the 2020 Protests & Civil Unrest*, Major Cities Chiefs Association 9–12 (October 2020), <https://majorcitieschiefs.com/wp-content/uploads/2021/01/MCCA-Report-on-the-2020-Protest-and-Civil-Unrest.pdf>.

<sup>2</sup> *Id.*

enforcement agencies nationwide.<sup>3</sup> Approximately 72% of major city law enforcement agencies reported officer injuries.<sup>4</sup>

2. State and local governments in 21 different U.S. states were forced to call up the U.S. National Guard to defend persons and property from violent rioters.<sup>5</sup> Property Claims Services designated the riots as a “multi-state catastrophe event,” which is the first such designation for a civil disorder event since 1992.<sup>6</sup> Conservative insurance estimates of property damage caused during the riots exceeds \$1 billion dollars—the “costliest civil disorder in U.S. history.”<sup>7</sup>

3. The weapons used by the “protest” rioters nationwide varied. The most common weapons used “were improvised or weapons of opportunity such as rocks, bricks, pieces of landscape, and bottles (including frozen and glass bottles).”<sup>8</sup> Over three quarters of major city law enforcement agencies reported rioters using such weapons.<sup>9</sup> “Another common violent tactic used by protestors involved throwing ‘Molotov cocktails’ at officers,” which was reported by a staggering 46% of major city law enforcement agencies nationwide.<sup>10</sup> “Another common tactic was to use peaceful protesters as human shields while violent individuals attacked officers and attempted to incite violence by throwing objects from deep within crowds.”<sup>11</sup>

4. 63% of agencies reported incendiary fireworks thrown or launched at officers.<sup>12</sup> 51% of agencies reported officers being confronted by protestors wielding firearms—including “AR-15s,

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Facts + Statistics: Civil Disorders*, Insurance Information Institute, <https://www.iii.org/fact-statistic/facts-statistics-civil-disorders>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Report on the 2020 Protests & Civil Unrest* at 11.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 11 – 12.

shotguns, and handguns.”<sup>13</sup> Other weapons wielded by protestors commonly included bats, hammers, metal poles, and shields.<sup>14</sup> Five different agencies reported “police officers being shot or critically injured” during the riots, one agency reported rioters discharging their firearms from moving vehicles, and at least two agencies “reported protestors being shot and killed by other protestors.”<sup>15</sup>

5. It is undisputed that many protestors committed no violence whatsoever during the protests. It is equally undisputed that a significant number of protestors *did* commit violent acts during the protests. When a previously peaceful protest suddenly includes persons who are carrying deadly weapons, injuring police officers, throwing Molotov cocktails, looting buildings, and setting cars on fire, the protest is no longer a protest. It is a riot.

6. Austin was by no means immune to the violence. Rioters looted buildings and businesses; shattered windows—including buildings with important historical significance; set cars and other property on fire; broke open an ATM; and defaced the Capitol grounds and numerous other properties.<sup>16</sup> Rioters in Austin also launched or threw items that included—but were not limited to—“rocks, bricks, eggs, water bottles, and Molotov cocktails” at Austin Police Department officers.<sup>17</sup> Starting on May 30, the Austin Police Department was forced to issue a “citywide request for assistance, which means all Austin officers [were] asked to report to duty.”<sup>18</sup> DPS sent

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See e.g. Ken Herman, *Herman: A sad Sunday morning on Sixth Street*, AUSTIN AMERICAN STATESMAN (May 31, 2020, 1:38 PM), <https://www.statesman.com/news/20200531/herman-sad-sunday-morning-on-sixth-street>.

<sup>17</sup> Heather Osborne, Ariana Garcia & Katie Hall, *Fires set as Austin protests against police violence spread, scatter*, AUSTIN AMERICAN STATESMAN (May 30, 2020, 11:07 AM), <https://www.statesman.com/news/20200530/fires-set-as-austin-protests-against-police-violence-spread-scatter>.

<sup>18</sup> *Id.*

“more than 1,500 officers to assist local police departments” statewide, and the governor ultimately “activated the Texas National Guard.”<sup>19</sup> By the time of the incident underlying this lawsuit, the Austin protests were no longer protests—they were riots. It is thus within the context of an ongoing riot that the force used by APD officers must be analyzed.

7. On May 30, APD Officer Kyu An personally observed rioters throwing projectiles at APD officers that included but were not limited to rocks, glass bottles, fluid-filled water bottles, and large fireworks. Officer An himself suffered a serious burn to his neck as a result of one such rioter’s attack using an “artillery shell” style pyrotechnic explosive device, and was also struck by several other types of rioter-thrown projectiles that day.

8. APD Officer Kyu An was one of the APD officers tasked with policing the protests and riots to protect the citizens of Austin and the city itself on the day in question. APD officers on the scene had reason to believe that the protests would turn violent or even deadly—including the knowledge that rioters had burned a police precinct to the ground in a related “protest” two days earlier.<sup>20</sup> By the time Officer An arrived, protestors had physically taken over and blocked Interstate 35, creating a potentially deadly situation for themselves as well as oncoming drivers travelling on the highway.

9. Plaintiff Barton’s conduct on May 30, 2020 crossed the line of peaceful protest—including violent acts that intentionally and directly threatened the health and safety of officers on the scene. Plaintiff’s violent acts far exceeded anything that would be protected by the First Amendment.

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<sup>19</sup> *Id.*

<sup>20</sup> *See e.g.* Sarah Kerr, Mike Shum, Katie G. Nelson, Dmitry Khavin & Haley Willis, *Minneapolis Precinct Fire: How a Night of Chaos Unfolded*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/video/us/100000007162707/minneapolis-police-protest-burn.html?searchResultPosition=1>.

10. Over the course of the protest-turned-riot, Officer An never purposefully impacted any person who was not either actively committing a violent act, or was obviously preparing to imminently commit a violent act. Officer An never aimed his weapon at any rioter's head, neck, or face. At all times, Officer An acted pursuant to his training and accepted police procedures. Officer An's conduct as a law enforcement officer was reasonable, especially when the requisite consideration is given to his surrounding circumstances that were "tense, uncertain, and rapidly evolving."<sup>21</sup> He is entitled to the protections of Qualified Immunity as a result.

## II.

### ORIGINAL ANSWER

#### A. Nature of the Case.

11. Defendant admits that Plaintiff is seeking relief under the First and Fourth Amendments of the Constitution contained within Paragraph 1 of Plaintiff's Original Complaint. Otherwise, denied.

12. Defendant admits that Plaintiff is seeking relief pursuant to 42 USC § 1983 and constitutional provisions within Paragraph 2 of Plaintiff's Original Complaint. Otherwise, denied.

13. Defendant admits that Plaintiff is asserting a *Monell* claim against the City of Austin within Paragraph 3 of Plaintiff's Original Complaint. Otherwise, denied.

#### B. Parties.

14. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained within Paragraph 4 of Plaintiff's Original Complaint.

15. As to the allegations contained within Paragraph 5 of Plaintiff's Original Complaint, Defendant denies that any APD officer may be validly served at 715 E. 8<sup>th</sup> Street, Austin Texas

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<sup>21</sup> See *Graham v. Connor*, 490 U.S. 386, 397 (1989).

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

16. Defendant admits the allegations contained within Paragraph 6 of Plaintiff's Original Complaint.

**C. Jurisdiction and Venue.**

17. Defendant admits the allegations contained within Paragraphs 7 – 8 of Plaintiff's Original Complaint.

**D. Conditions Precedent.**

18. Defendant lacks sufficient knowledge to be able to form a belief as to the truth of the allegations contained in Paragraph 9 of Plaintiff's Original Complaint and therefore denies the same.

**E. Factual Background.**

19. As it pertains to the allegations contained in Paragraph 10 of Plaintiff's Original Complaint, Defendant admits that the Austin Police Department responded to and provided law enforcement support for large crowds of people gathered on May 30, 2020. Otherwise, denied.

20. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained within Paragraph 11 of Plaintiff's Original Complaint.

21. As to the allegations contained within Paragraph 12 of Plaintiff's Original Complaint, Defendant is without sufficient knowledge to form a belief as to the truth of the allegations as it pertains to what other APD officers were wearing when Plaintiff and his companions arrived.

22. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained within Paragraphs 13 – 19 of Plaintiff's Original Complaint as written, and therefore denies the same.

23. As to the allegations contained within Paragraphs 20 – 24 of Plaintiff’s Original Complaint, Defendant admits that he discharged his bean bag shotgun at an individual who was observed actively throwing projectiles at police officers, and that such person may have been Plaintiff. Defendant further admits that he aimed his bean bag shotgun at the rioter’s waist and discharged his weapon three times in quick succession in conformance with his training. Defendant denies the remaining allegations contained within Paragraphs 20 – 24 of Plaintiff’s Original Complaint.

24. As to the allegations contained within Paragraph 25 of Plaintiff’s Original Complaint, Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

25. Defendant denies the allegations and nefarious dramatizations contained within Paragraph 26 of Plaintiff’s Original Complaint.

26. As to the allegations contained within Paragraphs 27 – 30 of Plaintiff’s Original Complaint, Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

27. As to the allegations contained within Paragraph 31 of Plaintiff’s Original Complaint, Defendant admits that the Travis County District Attorney issued 19 indictments to APD officers, including to Defendant. The indictments and the cited news article related to the indictments speak for themselves. Defendant denies the remaining allegations and characterizations in Paragraph 31 of Plaintiff’s Original Complaint.

28. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained within Paragraph 31 of Plaintiff’s Original Complaint.

**F. Causes of Action.**

**i. §1983 – Excessive-Force Claims against Kyu An in his Individual Capacity**

29. As to the allegations contained in Paragraph 33, Defendant adopts and incorporates his responses to the previous Paragraphs of the Complaint.

30. As to the allegations contained in Paragraphs 34 – 43 of Plaintiff’s Original Complaint, Defendant admits that he was acting under the color of law during the protests and riots that form the backdrop of this lawsuit. No response from this Defendant is necessary regarding what the law allegedly is as it relates to the claims alleged. Otherwise, denied.

**ii. §1983 – First Amendment Retaliation Claims Against Kyu An in his Individual Capacity**

31. As to the allegations contained in Paragraph 44, Defendant adopts and incorporates his responses to the previous Paragraphs of the Complaint.

32. As to the allegations contained in Paragraphs 45 – 49 of Plaintiff’s Original Complaint, no response from this Defendant is necessary regarding what the law allegedly is as it relates to the claims alleged. Otherwise, denied.

**iii. Qualified Immunity Under § 1983.**

33. As to the allegations contained in Paragraph 50, Defendant adopts and incorporates his responses to the previous Paragraphs of the Complaint.

34. As to the allegations contained within Paragraph 51 – 58 of Plaintiff’s Original Complaint, no response from this Defendant is necessary regarding what the law allegedly is as it relates to the claims alleged. Otherwise, denied.

**iv. Governmental Liability Under 42 U.S.C. §1983 (*Monell*) and the First and Fourth Amendment to the U.S. Constitution applied through the Fourteenth Amendment.**

35. As to the allegations contained in Paragraph 59, Defendant adopts and incorporates his responses to the previous Paragraphs of the Complaint.

36. As to the allegations contained in Paragraphs 60 – 69, no answer is necessary from this Defendant. To the extent any answer is deemed necessary, Defendant denies the allegations therein.

**v. Damages, Relief Requested, Jury Demand, & Prayer.**

37. As to the allegations contained in Paragraphs 70 – 76, no answer is necessary from this Defendant. To the extent any answer is deemed necessary, Defendant admits that Plaintiff seeks the relief requested therein, but denies that any of his own alleged conduct at issue amounted to an injustice of any kind.

**III.**

**AFFIRMATIVE DEFENSES & IMMUNITIES**

38. 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.*

39. 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 him from using force to defend himself and/or other persons from an active or imminent assault with a potentially deadly weapon or projectile, whether during a riot or otherwise.

40. 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 Plaintiff himself. To the extent legally applicable herein,

Defendant invokes the comparative responsibility provisions of the Texas Civil Practice & Remedies Code.<sup>22</sup>

41. 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.

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

43. 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.

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

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

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

#### IV.

#### **JURY DEMAND**

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

#### V.

#### **PRAYER FOR RELIEF**

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

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<sup>22</sup> See TEX. CIV. PRAC & REM. CODE ANN. § 33.001.



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

BOMANI BARTON,  
*Plaintiff,*

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v.

Case No. 1:22-cv-00221-RP

CITY OF AUSTIN AND KYU AN,  
*Defendants.*

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**DEFENDANT KYU AN’S OPPOSED  
MOTION TO STAY DISCOVERY**

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TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES Defendant Kyu An, and files this, his motion to stay discovery pending the resolution of his criminal case, and would respectfully show the Court as follows:

**I. BACKGROUND**

**A. The day of the alleged incident.**

1. This lawsuit arises out injuries suffered by Plaintiff Bomani Barton (hereinafter “Plaintiff”) during his attendance at a protest-turned-riot outside of Austin Police Department (hereinafter “APD”) on May 30, 2020. The riots grew to such a size that the City of Austin was forced to call in *all* of its police officers due the scale and dangers posed by the violence demonstrated by the crowds.<sup>1</sup> Among other violent acts, the most common perpetrated against APD officers included the throwing of rocks, bricks, water bottles full of various liquids, and other dangerous projectiles. Officer An himself suffered a serious burn to his neck as a result of one such rioter’s attack using

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<sup>1</sup> Defendant incorporates by reference the information contained in his Original Answer, including background information about the protests-turned-riots nationwide and locally. *See* Defendant Kyu An’s Original Answer to Plaintiff’s Original Complaint, Dkt. # 8, pgs. 1 – 5.

an “artillery shell” style pyrotechnic explosive device, was struck by multiple rocks thrown by rioters, and saw several other police officers get struck by rocks thrown by rioters. Over the course of the protests-turned-riots, Officer An never purposefully discharged any weapon at any person who was not engaged in throwing potentially dangerous projectiles at police officers.

**B. The Travis County District Attorney has indicted Officer An arising out of Plaintiff Barton’s allegations in this lawsuit.**

2. Earlier this year, however, Travis County District Attorney Jose Garza indicted Officer An along with roughly two dozen other APD officers.<sup>2</sup> Officer An maintains his innocence and plans to aggressively defend all charges against him. Such indictments only represent a portion of the criminal charges being actively pursued against local first responders by District Attorney Garza.<sup>3</sup> It is believed that District Attorney Garza has potentially indicted more police officers related to riot response incidents than any other District Attorney nationwide.<sup>4</sup>

3. Specifically, District Attorney Garza is pursuing felony Aggravated Assault by a Public Servant charges against Officer An related to the less than lethal shotgun deployment conduct alleged by Plaintiff herein.<sup>5</sup> Plaintiff’s Original Complaint specifically references the indictment

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<sup>2</sup> See Andrew Weber, *Here’s what we know about APD officers facing charges for using beanbag rounds in 2020 protests*, AUSTIN MONITOR (Feb. 22, 2022), <https://www.austinmonitor.com/stories/2022/02/heres-what-we-know-about-apd-officers-facing-charges-for-using-beanbag-rounds-in-2020-protests/>; see also *2 more APD officers indicted related to 2020 protests*, KXAN AUSTIN (May 27, 2022 10:28 PM), <https://www.kxan.com/news/local/austin/2-more-apd-officers-indicted-related-to-2020-protests/>.

<sup>3</sup> See **Ex. 1**, Travis County DA Civil Rights Unit Case Summaries – September 30, 2022, pg. 2 [https://www.traviscountytexas.gov/images/district\\_attorney/docs/Press\\_Releases/2022/Case\\_Summaries\\_Sept\\_30\\_2022.pdf](https://www.traviscountytexas.gov/images/district_attorney/docs/Press_Releases/2022/Case_Summaries_Sept_30_2022.pdf).

<sup>4</sup> See Acacia Coronado et al., *Sources: 19 Austin police officers indicted in protest probe*, AP News (Feb. 18, 2022), <https://apnews.com/article/business-shootings-austin-texas-884a81a9663391e79b0ac45c7ae463cd> (“It ranks among the most indictments on a single police department in the U.S. over tactics used by officers during the widespread protests...”).

<sup>5</sup> See **Ex. 1**, Travis County DA Civil Rights Unit Case Summaries – September 30, 2022, pg. 2 [https://www.traviscountytexas.gov/images/district\\_attorney/docs/Press\\_Releases/2022/Case\\_Summaries\\_Sept\\_30\\_2022.pdf](https://www.traviscountytexas.gov/images/district_attorney/docs/Press_Releases/2022/Case_Summaries_Sept_30_2022.pdf).

of Officer An for First Degree Felony Aggravated Assault by a Public Servant, and concedes that the indictment is based on “Officer Kyu An’s conduct that makes the basis of this lawsuit.”<sup>6</sup>

4. Officer An files this motion to seek relief from this Court in the form of not forcing him to sacrifice one case or the other—his civil defense and reputation, or his criminal defense. Officer An seeks such relief in the form of a temporary stay of discovery until the parallel criminal proceedings have resolved.

## **II. ARGUMENTS & AUTHORITIES**

6. “There’s no question that a district judge can stay a federal civil rights case pending the resolution of a defendant’s parallel criminal proceeding.”<sup>7</sup> As a demonstrative example, this Court recently granted a stay of discovery for several individual defendants in the *Javier Ambler v. Williamson County, et al.*, civil suit based on the existence of ongoing parallel criminal proceedings for several of the individual defendants therein, as well as in several other pending civil suits—including one case related to an APD officer’s actions during the same riots at issue in this lawsuit.<sup>8</sup> Courts are empowered to utilize discretion on such motions “when the interests of justice seems to require such action.”<sup>9</sup> In *Campbell*, the Fifth Circuit admonished district courts to “be sensitive to the difference in the rules of discovery in civil and criminal cases.”<sup>10</sup> “While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures,

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<sup>6</sup> See Pl.’s Orig. Compl., Dkt. 1 ¶¶ 31, 67, 69.

<sup>7</sup> *Agueros v. Vargas*, No. CIVSA SA07-CV0994 XR, 2008 WL 2937972, \*1 (W.D. Tex. July 21, 2008); see also *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983).

<sup>8</sup> See Order, *Ambler v. Williamson County*, 1:20-cv-01068-LY (W.D. Tex. July 27, 2021), Dkt. # 89; see also e.g., Text Order, *Nembhard v. Williamson County*, 1:21-cv-00350-RP (W.D. Tex. Aug. 26, 2021); see also Order, *Drake v. City of Austin*, 1:20-cv-00956-RP (W.D. Tex. Sept. 21, 2021), Dkt. # 31; see also *DeSilva v. City of Austin*, 1:21-cv-00129-RP (W.D. Tex. Feb. 23, 2022), Dkt. # 23; see also *Kirsch v. City of Austin*, 1:20-cv-01113-RP (W.D. Tex. Aug. 5, 2022), Dkt. # 63.

<sup>9</sup> *United States v. Kordel*, 397 U.S. 1, 12, n. 27 (1970).

<sup>10</sup> *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962).

the rules governing criminal discovery are far more restrictive.”<sup>11</sup> The Fifth Circuit further advised that “in ruling on requests for stays of the civil side of parallel civil/criminal proceedings, [j]udicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and policies applicable to one suit from doing violence to those pertaining to the other.”<sup>12</sup>

7. Courts have established several factors to be considered in determining whether a stay is appropriate.<sup>13</sup> The current variation of these factors was first articulated in *Plumbers & Pipefitters*, and has been adopted and applied by District Courts within the Fifth Circuit.<sup>14</sup>

- (1) The extent to which the issues in the criminal case overlap with those presented in the civil case;
- (2) The status of the criminal case, including whether the criminal defendant has been indicted;
- (3) The private interests of the plaintiff in proceeding expeditiously weighed against the prejudice to plaintiff caused by the delay;
- (4) The private interests of and burden on the defendant;
- (5) The interests of the courts; and
- (6) The public interest.<sup>15</sup>

**B. The factors weigh in favor of staying discovery to relieve Officer An of the impossible choice between (1) harming his criminal defense or (2) harming his civil defense.**

- a. The “overlap” factor weighs in favor of a stay of discovery because the facts and legal issues align to create a danger of self-incrimination.**

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *Walker v. Wilburn*, No. 3:13-CV-4896-D, 2015 WL 5873392, at \*5 (N.D. Tex. Oct. 5, 2015) (citing *Heller Healthcare Fin., Inc. v. Boyes*, No. CIV.A. 300CV1335D, 2002 WL 1558337, at \*2 (N.D. Tex. July 15, 2020); see also *Trs. of Plumbers & Pipefitters Nat’l Pension Fund v. Transworld Mech. Inc.*, 886 F.Supp. 1134, 1139 (S.D. NY. 1995)(establishing current variation of test); see also *Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53 (E.D. Pa. 1980) (establishing initial test).

<sup>14</sup> See *Plumbers and Pipefitters*, 886 F.Supp at 1139; see also *Librado v. M.S. Carriers, Inc.*, No. CIV.A. 3:02-CV-2095D, 2002 WL 31495988, at \*1 (N.D. Tex. Nov. 5, 2002); see also *Alcala v. Tex. Webb County*, 625 F.Supp.2d 391, 398 – 99 (S.D. Tex. 2009); see also *Walker*, 2015 WL 5873392, at \*5.

<sup>15</sup> *Walker*, 2015 WL 5873392, at \*5; see also *Alcala* at 399; see also *Sec. & Exch. Comm’n v. Kiselak Capital Grp., LLC*, No. 4:09-CV-256-A, 2011 WL 4398443, at \*2; see also *Agueros*, 2008 WL 2937972, at \*1.

8. The first factor—the degree to which civil issues overlap with criminal issues—has been deemed the most important factor.<sup>16</sup> The primacy and importance of the overlap factor is because “[i]f there is no overlap, there would be no danger of self-incrimination and accordingly no need for a stay.”<sup>17</sup> A court should consider whether the defendant could effectively defend the civil lawsuit without being pressured into waiving his Fifth Amendment rights if no stay is entered.<sup>18</sup> Some courts have decided that the overlap factor weighs in favor of a stay simply because the subject matter of the two proceedings was substantially similar.<sup>19</sup> Courts have weighed this factor in favor of a stay even when the overlap of the issues was not “entirely coterminous.”<sup>20</sup>

5. This factor—the most important of the six—is functionally not even in dispute here. Plaintiff’s Original Complaint specifically references the indictment of Officer An for First Degree Felony Aggravated Assault by a Public Servant, and concedes that the indictment is based on “Officer Kyu An’s conduct that makes the basis of this lawsuit.”<sup>21</sup> Such a judicial admission is arguably binding in a manner that would prevent Plaintiff from arguing against the overlap factor whatsoever in his response.<sup>22</sup> Judicial admissions notwithstanding, a review of the parallel civil

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<sup>16</sup> See *S.E.C. v. AmeriFirst Funding, Inc.*, No. CIV A 307-CV-1188-D, 2008 WL 866065, at \*2 (N.D. Tex. Mar. 17, 2008 (citing *Volmar Distribs., Inc. v. New York Post Co.*, 152 F.R.D. 36, 39 (S.D.N.Y. 1993))).

<sup>17</sup> *AmeriFirst Funding, Inc.*, 2008 WL 866065, at \*2 (citing *Trs. of Plumbers & Pipefitters Nat’l Pension Fund*, 886 F.Supp. at 1139)).

<sup>18</sup> See *Alcala* at 400.

<sup>19</sup> See *Sec & Exch. Comm’n v. Mutuals.com Inc.*, No. CIV. A. 3:03-CV-2912-D, 2004 1629929, at \*3 (N.D. Tex. July 20, 2004); see also *Dominguez v. Hartford Fin. Svcs. Grp., Inc.*, 530 F.Supp.2d 902, 907 (S.D. Tex. 2008); see also *Doe v. Morris*, No. 11-1532, 2012 WL 359315, at \*1 (E.D. La. Feb. 2, 2012).

<sup>20</sup> *Heller Healthcare Fin., Inc.*, 2002 WL 1558337, at \*2.

<sup>21</sup> See Pl.’s Orig. Compl., Dkt. 1 ¶¶ 31, 67, 69.

<sup>22</sup> See *Martinez v. Bally’s Louisiana, Inc.*, 244 F.3d 474, 476 (5th Cir. 2001) (“A judicial admission is a formal concession in the pleadings or stipulations by a party or counsel that is binding on the party making them.”); see also *White v. ARCO/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983) (“Normally, factual assertions in pleadings and pretrial orders are considered to be judicial admissions conclusively binding on the party who made them.”).

and criminal elements would reach the same result—a finding of coterminous overlap that would weigh in favor of the requested stay of discovery.

9. The incident that forms the basis of this lawsuit also forms the basis of the subject criminal charges—Officer An’s alleged less than lethal deployment against Plaintiff Barton on May 30, 2020. Consequently, the factual overlap is a *fait accompli*, and should not be in dispute. The corresponding self-incrimination minefield inherent in testifying in a deposition in this civil suit—not to mention responding to written discovery—for Officer An merits a stay of discovery until the criminal case has been adjudicated.

10. The conduct at issue in both legal actions is so intertwined as to make the legal aspect of the “overlap” factor likewise undeniable. Defendant An has been indicted for the charge of Aggravated Assault by Public Servant, a first-degree felony. This offense requires the State to prove Officer An caused serious bodily injury to Plaintiff Barton while An was acting as a public servant under color of his office/employment.<sup>23</sup>

11. Plaintiff’s Excessive Force claim in this civil case requires him to prove that he: (1) suffered a physical injury; (2) which resulted directly and only from a use of force by Defendant An while acting under color of State law that was clearly *excessive to the need*; and (3) the excessiveness of the force employed was *objectively unreasonable*.<sup>24</sup> Demonstrably, these legal tests for the criminal and civil cases overlap significantly—in that both require an examination of the force used against Barton and *whether that force was reasonable* under the circumstances.

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<sup>23</sup> See TEX. PENAL CODE § 22.02(a)(1) and (b)(2)(A).

<sup>24</sup> See *Knight v. Caldwell*, 970 F.2d 1430, 1432, n.3 (5th Cir. 1992); see also *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989).

This legal overlap—arising from the exact same event and involving the exact same parties—reveals that these issues are effectively “coterminous.”<sup>25</sup>

12. Allowing civil discovery would force Officer An to—at minimum—give sworn deposition testimony about matters that would strike at the very heart of the legal elements at issue in his parallel criminal proceedings.<sup>26</sup> Permitting civil discovery at this time will thus force Officer An to choose between testifying under oath on matters directly implicated in his looming criminal trial, or asserting his Fifth Amendment rights and being unable to fully defend himself in this lawsuit—precisely the scenario this factor seeks to avoid. In the context of that impossible decision, the most important “overlap” factor has already been judicially admitted, but still nonetheless weighs *heavily* in favor of a stay of discovery.

**b. The “status of the criminal case” factor weighs in favor of a stay because the officer is under an active indictment.**

13. The second factor is the status of the criminal case.<sup>27</sup>

*“A stay of a civil case is most appropriate where a party to the civil case has already been indicted for the same conduct for two reasons: first, the likelihood that a defendant may make incriminating statements is greatest after an indictment has issued, and second, the prejudice to the plaintiffs in the civil case is reduced since the criminal case will likely be quickly resolved due to Speedy Trial Act consideration.”<sup>28</sup>*

The “strongest case for a stay exists where a party is [*currently*] *indicted for a serious offense* and must defend a civil action involving the same matter.”<sup>29</sup> Whether the civil and criminal issues will

<sup>25</sup> *Heller Healthcare Fin., Inc.*, 2002 WL 1558337, at \*2.

<sup>26</sup> FED. R. CIV. P. 37 (Allowing civil parties to obtain Court orders compelling responses to interrogatories, requests for production, requests for admission and to compel a party to attend a deposition).

<sup>27</sup> *See Alcala* at 398; *see also Walker*, 2015 WL 5873392, at \*5.

<sup>28</sup> *Kiselak Capital Group, LLC*, 2011 WL 4398443, at \*2 (emphasis added); *see also S.E.C. v. Offill*, No. CIV. A. 3:07-CV-1643-D, 2008 WL 958072, at \*2 (N.D. Tex. Apr. 9, 2008).

<sup>29</sup> *Id.* (emphasis added) (internal quotations removed); *see also Lizarraga v. City of Nogales Arizona*, No. CV 06-474 TUC DCB, 2007 WL 215616, at \*3 (D. Arizona, January 24, 2007).

overlap prior to an indictment is a mere “matter of speculation.”<sup>30</sup> Post-indictment, however, “is when the degree of overlap between a criminal and civil case can most readily be determined.”<sup>31</sup> The criminal indictment “helps clarify the alleged conduct at issue and can be easily compared against the civil complaint.”<sup>32</sup>

14. This lawsuit does not deal with potential indictments. Defendant An is under an active indictment for the exact same conduct that forms the basis of Plaintiff’s lawsuit. Due to the active indictment and the extremely serious nature of the criminal charges and corresponding potential consequences, the second factor—the status of the criminal case—weighs *heavily* in favor of granting the requested stay of discovery.

**c. Mere delay alone is legally insufficient to tip the “Plaintiff’s interests” factor against a stay, especially where—as here—the incident was captured via video footage and witness interviews.**

15. Courts recognize that a “civil plaintiff has an interest in the prompt resolution of its claims and in obtaining discovery while information is still fresh in witnesses’ minds.”<sup>33</sup> However, “[n]ormally in evaluating the plaintiff’s burden resulting from the stay, courts may insist that the plaintiff establish more prejudice than simply a delay in his right to expeditiously pursue his claim.”<sup>34</sup> Courts recognize that this allegation of prejudice is typically insufficient—even if the criminal case is “proceeding slowly and uncertainly, with no specific trial date,” because “Texas law recognizes a right to a speedy trial.”<sup>35</sup>

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<sup>30</sup> *Alcala* at 401.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See Mutuals.com Inc.*, 2004 WL 1629929, at \*3.

<sup>34</sup> *Walker*, 2015 WL 5873392, at \*7 (citing *Alcala* at 397).

<sup>35</sup> *Librado*, 2002 WL 31495988, at \*2; *see also Walker*, 2015 WL 5873392, at \*7.

16. The events of this lawsuit were largely captured via video evidence—from multiple cameras—and further memorialized by IA and SIU recorded interviews, none of which has the corresponding threat of degradation like that of human witness memory. Moreover, the requested stay of discovery would not prevent or delay Plaintiff’s counsel from conducting discovery or depositions related to the claims made against Defendant City of Austin, and thus there are plenty of available avenues for Plaintiff to work up and move this case forward during the pendency of the requested stay. Because mere delay alone is insufficient as a legal argument for this factor, any argument by Plaintiff that does not go beyond a mere temporal delay would thus fail to defeat the requested stay of discovery.<sup>36</sup>

**d. The “Defendant’s interests” factor weighs heavily in favor of a stay because the lack of a stay would unavoidably cripple either his civil or criminal defense.**

17. The undersigned cannot overemphasize Officer An’s private interest in the stay requested herein. The fourth factor considers the private interest of the defendant in securing a stay, and the burden that would result if the stay were denied.<sup>37</sup> *“[A]bsent a stay [the officer] faces a conflict between asserting his Fifth Amendment rights and fulfilling his legal obligations as a witness in this civil action. This conflict may be largely, if not completely, eliminated by granting a stay.”*<sup>38</sup> A defendant officer also has an interest in a stay “to avoid exposing [his] criminal defense strategy to the prosecution.”<sup>39</sup>

18. The insidious civil-law threat looming over Officer An—should he choose to invoke his Fifth Amendment constitutional rights during depositions—is the potential for harmful adverse

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<sup>36</sup> *See id.*

<sup>37</sup> *Librado*, 2002 WL 31495988, at \*3; *see also Walker*, 2015 WL 5873392, at \*8.

<sup>38</sup> *See Librado v. M.S. Carriers, Inc.*, No. CIV.A. 3:02-CV-2095D, 2002 WL 31495988, at \*3 (N.D. Tex. Nov. 5, 2002) (emphasis added).

<sup>39</sup> *Walker*, 2015 WL 5873392, at \*8.

inferences. Legally, when a party invokes his or her Fifth Amendment privilege during a deposition, the invocation of such privilege is potentially admissible against the party, specifically as an inference wherein the jury may be allowed to interpret such invocation adversely against the invoking party.<sup>40</sup> Applied here in more direct terms, Plaintiff may be permitted to argue to the jury that Officer An invoked his Fifth Amendment rights because he has something to hide or is a criminal. If permitted, such an inference would likely be fatal for Officer An's defense of this civil suit and thus of his personal and vocational reputation.

19. In contrast, the insidious criminal-law threat looming over Officer An—should he choose to ***not*** invoke his Fifth Amendment constitutional rights during depositions—would be inevitable scrutiny under oath for seven hours or more about his split-second decision to use force against what he ostensibly believed to be a serious or potentially deadly threat to nearby officers.<sup>41</sup> Crucially, nothing will prevent the Travis County District Attorney's office from obtaining Officer An's written discovery responses or depositions transcripts for use in his future criminal trial of the felony charges levied against him.

20. Absent a stay, Officer An would effectively be forced to choose between (1) the civil jury holding An's decision not to testify against him; ***or*** (2) providing information and potential impeachment testimony to the Travis County District Attorney, who would otherwise not be entitled to obtain any such testimony prior to trial. ***Other than the granting of this stay, there is no path forward that would allow Officer An to avoid potential prejudice in one case or the other.*** Like in *Librado* and in *Walker*, Officer An's dilemma of being forced to pick between the

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<sup>40</sup> See *F.D.I.C. v. Fid. & Deposit Co. of Maryland*, 45 F.3d 969, 977 (5th Cir. 1995) (reiterating that courts have discretion as to whether to allow a party's Fifth Amendment invocation into evidence, and permit an adverse inference to be drawn from the same).

<sup>41</sup> See TEX. PENAL CODE § 22.02(a)(1) and (b)(2)(A).

two testimonial poisons will be “largely, if not completely, eliminated by granting a stay of appropriate scope.”<sup>42</sup> The fourth factor of the Defendant’s interests consequently weighs in favor of granting the requested stay of discovery, as Officer An’s interests are inexorably intertwined with the outcome of this motion.

**e. The fifth factor—the Courts’ interests—weighs in favor of a stay, because the criminal case’s results could streamline the burden of proof in this suit or increase the likelihood of settlement.**

21. The fifth factor takes this Court’s own interests into account, including judicial efficiency.<sup>43</sup> While progressing civil cases on a docket is no doubt important, courts have recognized that “granting a stay of discovery serves the interests of the courts, because **conducting the criminal proceedings first advances judicial economy.**”<sup>44</sup> To advance judicial economy here, the Court should analyze whether—and to what extent—the outcome of the parallel criminal proceedings would “streamline” the issues in this lawsuit.<sup>45</sup> The judicial efficiency analysis also turns upon the degree of overlap between the criminal and civil cases, with an eye toward whether a conviction in the criminal case would “speak to the actual bases [sic] of liability” in the latter civil action.<sup>46</sup> Due to differences in the standards of proof between civil and criminal prosecutions, “the possibility always exists for a collateral estoppel or res judicata effect on some or all of the overlapping issues.”<sup>47</sup> Resolution of the criminal case consequently may also increase the likelihood of reaching a settlement that resolves the civil lawsuit outright.<sup>48</sup> All of the possible

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<sup>42</sup> *Librado*, 2002 WL 31494988, at \*3; *see also Walker*, 2015 WL 5873392, at \*8.

<sup>43</sup> *Offill*, 2008 WL 958072, at \*3.

<sup>44</sup> *Id.*; *see also Walker*, 2015 WL 5873392, at \*8 (emphasis added).

<sup>45</sup> *See Alcala* at 406.

<sup>46</sup> *Id.*

<sup>47</sup> *Offill*, 2008 WL 958072, at \*3; *see also Emich Motors Corp. v. Gen. Motors Corp.*, 340 U.S. 558, 568 (1951).

<sup>48</sup> *See Offill*, 2008 WL 958072, at \*3; *see also Alcala*, 625 F.Supp.2d at 406 (noting a potential criminal conviction against the civil defendant might significantly decide that gambling occurred,

efficiencies discussed *supra* are palpable in the case at bar. The fifth factor of judicial efficiency consequently weighs in favor of granting the requested stay of discovery.

**f. The final “public interest” factor weighs in favor of a stay because the public has an interest in preserving citizens’ abilities to invoke their constitutional rights.**

22. The public has an interest in the just and constitutional resolution of disputes with minimal delay.<sup>49</sup> However, that resolution must be weighed against the possibility that the “integrity” of a citizen’s constitutional rights might be in jeopardy.<sup>50</sup> The Fifth Circuit has also recognized that the public has an interest in protecting law enforcement, and “ensuring the criminal discovery process is not subverted.”<sup>51</sup> Considering these principles, the public interest factor also weighs in favor of granting Officer An’s requested stay. The public has a vested interest in maintaining the integrity of a citizen’s choice to invoke the Fifth Amendment—and in being shielded from the unavoidable tainting of that constitutional right discussed *supra* if this motion is not granted.<sup>52</sup> The public interest factor thus likewise weighs in favor of granting the requested temporary stay of discovery until the criminal parallel proceedings have concluded.

### **III. PRAYER**

23. WHEREFORE, PREMISES CONSIDERED, Defendant Kyu An respectfully requests that this Court grant his motion to temporarily stay civil discovery until the parallel criminal

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the wrongful conduct in dispute in the overlapping civil case, and therefore promote settlement of the civil litigation).

<sup>49</sup> See *Collins*, 2011 WL 3874910, at \*4; see also *Librado*, 2002 WL 31495988, at \*3; see also *Frierson v. City of Terrell*, No. CIV.A. 3:02CV2340-H, 2003 WL 21355969, at \*4 (N.D. Tex. June 6, 2003).

<sup>50</sup> *Frierson*, 2003 WL 21355969, at \*4.

<sup>51</sup> *Offill*, 2008 WL 958072, at \*4 (citing *Campbell* at 487).

<sup>52</sup> See *Campbell*, 307 F.2d at 487.



**CERTIFICATE OF SERVICE**

I hereby certify that on the 14th day of October 2022, 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 U.S. First Class Mail, in accordance with the Federal Rules of Civil Procedure, as follows:

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\_\_\_\_\_/s/ Blair J. Leake  
Blair J. Leake

# **Exhibit**

# **1**



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### **Travis County DA Civil Rights Unit Case Summaries - September 30, 2022**

The following is a current list of each officer-involved use of force or other misconduct matter involving injury to any person currently pending in the Office's Civil Rights Unit.

#### **INDICTED CASES**

**INDICTED: STATE OF TEXAS VS BRETT TABLERIOU, D-1-DC-22-900018:** At the time of the incident, Mr. Tableriou was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Tableriou was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 460<sup>th</sup> District Court.

The next court setting is October 4, 2022.

**INDICTED: STATE OF TEXAS VS EDWARD BOUDREAU, D-1-DC-22-900020:** At the time of the incident, Mr. Boudreau was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Boudreau was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 450<sup>th</sup> District Court.

The next court setting is October 4, 2022.

**INDICTED: STATE OF TEXAS VS. SHANNON OWENS, D-1-DC-20-900003:** At the time of the incident, Mr. Owens was employed as a corrections officer with the Travis County Sherriff's Office. On Wednesday, December 16, 2020, TCSO Deputy Owens was indicted for Aggravated Perjury, a third-degree felony, and Tampering with Governmental Record with the intent to defraud or harm another, a state jail felony, by the 147<sup>th</sup> District Court Special Grand Jury. The case is pending in the 450<sup>th</sup> District Court.

The next court setting is October 4, 2022.

**INDICTED: STATE OF TEXAS VS NATHANIEL STALLINGS, D-1-DC-21-904041:** At the time of the incident, Mr. Stallings was employed as a police officer with the Austin Police Department. Mr. Stallings was indicted by the 390<sup>th</sup> District Court Special Grand Jury for Abuse of Official Capacity and Official Oppression, both of which are class-A misdemeanors. The case is pending in the 450<sup>th</sup> District Court.

The next court setting is October 4, 2022.

**INDICTED: STATE OF TEXAS VS. WALTER DODDS, D-1-DC-20-301555:** At the time of the incident, Mr. Dodds was employed as a police officer with the Austin Police Department. On Tuesday, August 30, 2022, Mr. Dodds was indicted by the 427<sup>th</sup> District Court Grand Jury for one count of Aggravated Sexual Assault, and two counts of Burglary Habitation Intend Sex Offense, all of which are first-degree felonies Mr. Dodds was also indicted for two counts of Official Oppression, both of which are class-A misdemeanors. The case is pending in the 460<sup>th</sup> District Court.

The next court setting is October 10, 2022

**INDICTED: STATE OF TEXAS VS. ROBERT CHODY, D-1-DC-21-904036:** At the time of the incident, Mr. Chody was the elected Sheriff in Williamson County, Texas. On Wednesday, March 31, 2021, Mr. Chody was indicted for Tampering with Physical Evidence with Intent to Impair, a third-degree felony by the 147<sup>th</sup> District Court Extended Special Grand Jury. The case is pending in the 299<sup>th</sup> District Court.

The next court setting is October 12, 2022

**INDICTED: STATE OF TEXAS VS. JASON NASSOUR, D-1-DC-21-904035:** At the time of the incident, Mr. Nassour was employed as General Counsel for the Williamson County Attorney's Office. On Wednesday, March 31, 2021, Mr. Nassour was indicted for Tampering with Physical Evidence with Intent to Impair, a third-degree felony by the 147<sup>th</sup> District Court Extended Special Grand Jury. The case is pending in the 299<sup>th</sup> District Court.

The next court setting is October 12, 2022

**INDICTED: STATE OF TEXAS VS DERRICK LEHMAN, D-1-DC-20-900071:** At the time of the incident, Mr. Lehman was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Lehman was indicted for Aggravated Assault by Public Servant, a first-degree felony by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 450<sup>th</sup> District Court.

The next court setting is October 18, 2022.

**INDICTED: STATE OF TEXAS VS KYU AN, D-1-DC-20-900057:** At the time of the incident, Mr. An was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. An was indicted for Aggravated Assault by Public Servant, a first-degree felony by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 403<sup>rd</sup> District Court.

The next court setting is October 19, 2022.

**INDICTED: STATE OF TEXAS VS JEREMY FISHER, D-1-DC-22-900011:** At the time of the incident, Mr. Fisher was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Fisher was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 403<sup>rd</sup> District Court.

The next court setting is October 19, 2022.

**INDICTED: STATE OF TEXAS VS ALEXANDER LOMOVSTEV, D-1-DC-21-900126:** At the time of the incident, Mr. Lomovstev was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Lomovstev was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 427<sup>th</sup> District Court.

The next court setting is October 26, 2022.

**INDICTED: STATE OF TEXAS VS JAMES MORGAN, D-1-DC-22-900053:** At the time of the incident, Mr. Morgan was employed as a police officer with the Austin Police Department. On Thursday May 26, 2022, Mr. Morgan was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 460<sup>th</sup> District Court Special Grand Jury. The case is pending in the 427<sup>th</sup> District Court.

The next court setting is October 26, 2022.

**INDICTED: STATE OF TEXAS VS JOHN SIEGEL, D-1-DC-20-900072:** At the time of the incident, Mr. Siegel was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Siegel was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 147<sup>th</sup> District Court.

The next court setting is October 27, 2022.

**INDICTED: STATE OF TEXAS VS JOSHUA JACKSON, D-1-DC-22-900010:** At the time of the incident, Mr. Jackson was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Jackson was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 390<sup>th</sup> District Court.

The next court setting is October 31, 2022

**INDICTED: STATE OF TEXAS VS STANLEY VICK, D-1-DC-22-900009:** At the time of the incident, Mr. Vick was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Vick was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 390<sup>th</sup> District Court.

The next court setting is October 31, 2022

**INDICTED: STATE OF TEXAS VS JUSTIN BERRY, D-1-DC-20-900055:** At the time of the incident, Mr. Berry was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Berry was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 390<sup>th</sup> District Court.

The next court setting is October 31, 2022

**INDICTED: STATE OF TEXAS VS JOSEPH CAST, D-1-DC-20-900061:** At the time of the incident, Mr. Cast was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Cast was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 390<sup>th</sup> District Court.

The next court setting is October 31, 2022

**INDICTED: STATE OF TEXAS VS NICHOLAS GEBHART, D-1-DC-20-900060:** At the time of the incident, Mr. Gebhart was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Gebhart was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 450<sup>th</sup> District Court.

The next court setting is November 1, 2022.

**INDICTED: STATE OF TEXAS VS CHRISTOPHER IRWIN, D-1-DC-22-900012:** At the time of the incident, Mr. Irwin was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Irwin was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 450<sup>th</sup> District Court.

The next court setting is November 1, 2022.

**INDICTED: STATE OF TEXAS VS ROLAN RAST, D-1-DC-20-900080:** At the time of the incident, Mr. Siegel was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Siegel was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 331<sup>st</sup> District Court.

The next court setting is November 04, 2022.

**INDICTED: STATE OF TEXAS VS ROLAN RAST, D-1-DC-20-900080:** At the time of the incident, Mr. Siegel was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Siegel was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 331<sup>st</sup> District Court.

The next court setting is November 04, 2022.

**INDICTED: STATE OF TEXAS VS TODD GILBERTSON, D-1-DC-21-900125:** At the time of the incident, Mr. Gilbertson was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Gilbertson was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 167<sup>th</sup> District Court.

The next court setting is November 07, 2022.

**INDICTED: STATE OF TEXAS VS. CHRISTOPHER TAYLOR, D-1-DC-19-900111:** At the time of the incident, Mr. Taylor was employed as an officer for the Austin Police Department. On Thursday, August 26, 2021, Mr. Taylor was indicted for Murder, a first-degree felony, and for Deadly Conduct Discharge of Firearm, a third-degree felony, by the 331<sup>st</sup> District Court Special Grand Jury. The case is pending in the 167<sup>th</sup> District Court.

The next court setting is November 07, 2022.

**INDICTED: STATE OF TEXAS VS. KARL KRYCIA, D-1-DC-21-900071:** At the time of the incident, Mr. Krycia was employed as an officer for the Austin Police Department. On Thursday, August 26, 2021, Mr. Krycia was indicted for Murder, a first-degree felony, and for Deadly Conduct Discharge of Firearm, a third-degree felony, by the 331<sup>st</sup> District Court Special Grand Jury. The case is pending in the 167<sup>th</sup> District Court.

The next court setting is November 07, 2022.

**INDICTED: STATE OF TEXAS VS. CHRISTOPHER TAYLOR, D-1-DC-20-900048:** At the time of the incident, Mr. Taylor was employed as an officer with the Austin Police Department. On Wednesday, March 10, 2021, Officer Taylor was indicted with Murder, a first-degree felony, by the 147<sup>th</sup> District Court Special Grand Jury. The case is pending in the 167<sup>th</sup> District Court.

The next court setting is November 07, 2022.

**INDICTED: STATE OF TEXAS VS. KARL KRYCIA, D-1-DC-21-900071:** At the time of the incident, Mr. Krycia was employed as an officer for the Austin Police Department. On Thursday, August 26, 2021, Mr. Krycia was indicted for Murder, a first-degree felony, and for Deadly Conduct Discharge of Firearm, a third-degree felony, by the 331st District Court Special Grand Jury. The case is pending in the 167<sup>th</sup> District Court.

The next court setting is November 07, 2022.

**INDICTED: STATE OF TEXAS VS. CHRISTOPHER TAYLOR, D-1-DC-20-900048:** At the time of the incident, Mr. Taylor was employed as an officer with the Austin Police Department. On Wednesday, March 10, 2021, Mr. Taylor was indicted for Murder, a first-degree felony, by the 147<sup>th</sup> District Court Special Grand Jury. The case is pending in the 167<sup>th</sup> District Court.

The next court setting is November 07, 2022.

**INDICTED: STATE OF TEXAS VS. CHRISTOPHER TAYLOR, D-1-DC-19-900111:** At the time of the incident, Mr. Taylor was employed as an officer for the Austin Police Department. On Thursday, August 26, 2021, Mr. Taylor was indicted for Murder, a first-degree felony, and for Deadly Conduct Discharge of Firearm, a third-degree felony, by the 331st District Court Special Grand Jury. The case is pending in the 167<sup>th</sup> District Court.

The next court setting is November 07, 2022.

**INDICTED: STATE OF TEXAS VS TODD GILBERTSON, D-1-DC-21-900125:** At the time of the incident, Mr. Gilbertson was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Gilbertson was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 167<sup>th</sup> District Court.

The next court setting is November 07, 2022.

**INDICTED: STATE OF TEXAS VS JOSHUA BLAKE, D-1-DC-22-900019:** At the time of the incident, Mr. Blake was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Blake was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 147<sup>th</sup> District Court.

The next court setting is November 08, 2022.

**INDICTED: STATE OF TEXAS VS. JAMES JOHNSON, D-1-DC-20-900070:** At the time of the incident, Mr. Johnson was employed as a deputy with the Williamson County Sheriff's Office. On Monday, March 29, 2021, Mr. Johnson was indicted for Manslaughter, a second-degree felony, by the 147<sup>th</sup> District Court Extended Special Grand Jury. The case is pending in the 299<sup>th</sup> District Court.

The next court setting is November 08, 2022.

**INDICTED: STATE OF TEXAS VS. ZACHARY CAMDEN, D-1-DC-20-900069:** At the time of the incident, Mr. Camden was employed as a deputy with the Williamson County Sheriff's Office. On Monday, March 29, 2021, Mr. Camden was indicted with Manslaughter, a second-degree felony, by the 147<sup>th</sup> District Court Extended Special Grand Jury. The case is pending in the 299<sup>th</sup> District Court.

The next court setting is November 08, 2022.

**INDICTED: STATE OF TEXAS VS JOSHUA BLAKE, D-1-DC-22-900019:** At the time of the incident, Mr. Blake was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Blake was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 147<sup>th</sup> District Court.

The next court setting is November 08, 2022.

**INDICTED: STATE OF TEXAS VS KYLE FELTON, D-1-DC-20-900054 / D-1-DC-20-900059:** At the time of the incident, Mr. Felton was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Felton was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 299<sup>th</sup> District Court.

The next court setting is November 10, 2022.

**INDICTED: STATE OF TEXAS VS KYLE FELTON, D-1-DC-20-900054 / D-1-DC-20-900059:** At the time of the incident, Mr. Felton was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Felton was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 299<sup>th</sup> District Court.

The next court setting is November 10, 2022.

**INDICTED: STATE OF TEXAS VS JEFFREY TENG, D-1-DC-22-900005:** At the time of the incident, Mr. Teng was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Teng was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 299<sup>th</sup> District Court.

The next court setting is November 17, 2022.

**INDICTED: STATE OF TEXAS VS ERIC HEIM, D-1-DC-20-900076:** At the time of the incident, Mr. Heim was employed as a police officer with the Austin Police Department. On Thursday, February 17, 2022, Mr. Heim was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 390<sup>th</sup> District Court Special Grand Jury. The case is pending in the 299<sup>th</sup> District Court.

The next court setting is November 17, 2022.

**INDICTED: STATE OF TEXAS VS. CHANCE BRETCHES, D-1-DC-20-900091:** At the time of the incident, Mr. Bretches was employed as a police officer with the Austin Police Department. On Wednesday, January 20, 2021, Officer Bretches was indicted with Aggravated Assault by a Public Servant, Serious Bodily Injury/Deadly Weapon, a first-degree felony, by the extended 147<sup>th</sup> District Court Extended Special Grand Jury. The case is pending in the 299<sup>th</sup> District Court.

The next court setting is November 17, 2022.

**INDICTED: STATE OF TEXAS VS CHANCE BRETCHES, D-1-DC-20-900056:** At the time of the incident, Mr. Bretches was employed as a police officer with the Austin Police Department. On Thursday May 26, 2022, Mr. Bretches was indicted for Aggravated Assault by Public Servant, a first-degree felony, by the 460<sup>th</sup> District Court Special Grand Jury. The case is pending in the 299<sup>th</sup> District Court.

The next court setting is November 17, 2022.

**UNINDICTED**

**COMPLAINANT: TYREE TALLEY/SUBJECT OFFICER: NAME WITHHELD (Date of Incident: 05/31/2020):** On May 31, 2020, Mr. Talley was struck by less-lethal ammunition while attending a protest in downtown Austin following the deaths of George Floyd and Michael Ramos.

The investigation into, and review of, the use of force allegations arising out of the May 30 and May 31, 2020 protests is still underway.

**DECEDENT: ENRIQUE QUIROZ/SUBJECT OFFICERS: EDUARDO PINEDA, SPENCER HANNA, ZANE DOWDELL, LUCAS PARKER, MARK YALETCHKO and TRINITHAD GARCIA (Date of Incident: 03/21/2020):** Mr. Quiroz died while in the custody of the Austin Police Department after an encounter with multiple officers on March 31, 2020.

The case is being jointly investigated by the Austin Police Department's Special Investigations Unit and the Travis County District Attorney Office's Civil Rights Unit.

**DECEDENT: ALEXANDER GONZALES/SUBJECT OFFICERS: LUIS SERRATO AND GABRIEL GUTIERREZ (Date of Incident: 01/05/2021):** On January 5, 2021, Mr. Alexander Gonzales died as a result of multiple gunshot wounds in an incident involving an off-duty Austin Police Department officer and another officer who was on duty.

The case is being jointly investigated by the Austin Police Department's Special Investigations Unit and the Travis County District Attorney Office's Civil Rights Unit.

**COMPLAINANT: NAME WITHHELD/SUBJECT OFFICER: NAME WITHHELD (Date of Incident: 03/12/2021):** On March 12, 2021, the complainant was arrested for an active warrant. While officers attempted to place the complainant under arrest, the complainant was struck with a baton and tased.

The case is being jointly investigated by the Austin Police Department's Special Investigations Unit and the Travis County District Attorney Office's Civil Rights Unit.

**COMPLAINANT: NAME WITHHELD/SUBJECT OFFICER: NAME WITHHELD (Date of Incident: 11/26/2020):** On November 26, 2020, the complainant was arrested by the Austin Police Department for interfering with a crime scene. The complainant was struck by the subject officer while being handcuffed.

The case is being jointly investigated by the Austin Police Department's Special Investigations Unit and the Travis County District Attorney Office's Civil Rights Unit.

**COMPLAINANT: NAME WITHHELD/SUBJECT OFFICERS: MICHAEL BARBA/JASON CUMMINS/DERRICK LEHMAN (Date of Incident: 08/19/2021):** On August 19, 2021, the complainant was shot and tased by Austin Police Department Officers. The civilian is expected to recover from his injuries.

The case is being jointly investigated by the Austin Police Department's Special Investigations Unit and the Travis County District Attorney Office's Civil Rights Unit.

**COMPLAINANT: NAME WITHHELD/SUBJECT OFFICER: NAME WITHHELD (Date of Incident: 09/18/2021):** On September 18, 2021, the complainant was struck by an Austin Police Department Officer after multiple requests to leave the area.

The case is being jointly investigated by the Austin Police Department's Special Investigations Unit and the Travis County District Attorney Office's Civil Rights Unit.

**DECENDENT: MICHAEL CAROTHERS/SUBJECT OFFICER: NAME WITHHELD (Date of Incident: 10/09/2021):** On October 9, 2021, there was gunfire between civilians. Subsequently, an officer discharged his weapon. Mr. Carothers died from a gunshot wound.

The case is being jointly investigated by the Austin Police Department's Special Investigations Unit and the Travis County District Attorney Office's Civil Rights Unit.

**COMPLAINANT: JUVENTINO NAVEJAR/SUBJECT OFFICER: JAVIER RODRIGUEZ (Date of Incident: 12/24/2021)** On December 24, 2021, Mr. Navejar was shot by an Austin Police Department Officer. Mr. Navejar is expected to recover from his injuries.

The case is being jointly investigated by the Austin Police Department's Special Investigations Unit and the Travis County District Attorney Office's Civil Rights Unit.

**COMPLAINT: NAME WITHHELD/SUBJECT OFFICER: NAME WITHHELD (Date of Incident: 06/24/2021):** On June 24, 2021, the juvenile complainant was struck by less-lethal ammunition while officers were executing a search warrant and arrest warrant.

The case is currently under investigation by the Travis County District Attorney's Office Civil Rights Unit.

**COMPLAINANT: SIMONE GRIFFITH/SUBJECT OFFICER: NAME WITHHELD (Date of Incident: 10/30/2021):** On October 30, 2021, Ms. Griffith was arrested for criminal trespass. While officers attempted to place Ms. Griffith under arrest, she was struck by Austin Police Department Officers.

The case is currently under investigation with the Travis County District Attorney's Office Civil Rights Unit.

**COMPLAINANT: TERRY GONZALES/SUBJECT OFFICER: JON RIORDAN (Date of Incident 01/29/2022)** On January 29, 2022, Mr. Gonzales sustained a gunshot wound during an incident with Austin Police Department Officers. Mr. Gonzales is expected to recover from his injuries.

The case is being jointly investigated by the Austin Police Department's Special Investigations Unit and the Travis County District Attorney Office's Civil Rights Unit.

**DECENDENT: MIGUEL RIVERA/SUBJECT OFFICERS: BRITTON TAYLOR and CHARLES WESLEY (Date of Incident: 03/06/2022)** On March 6, 2022, Mr. Rivera died as a result of a gunshot wound sustained during an incident involving Austin Police Department Officers.

The case is being jointly investigated by the Austin Police Department's Special Investigations Unit and the Travis County District Attorney Office's Civil Rights Unit.

**DECENDENT: ROBERT HAMMITT/SUBJECT OFFICERS: NAME WITHHELD (Date of Incident: 05/26/2022)** On May 26, 2022, Mr. Hammitt died from gunshot wounds sustained during an incident involving Austin Police Department Officers.

The case is being jointly investigated by the Austin Police Department's Special Investigations Unit and the Travis County District Attorney Office's Civil Rights Unit.

**DECEDENT: CARLOS ELI CHACON-CASTILLO/SUBJECT OFFICERS: JOHN ZAVALA, SPENCER BRADLEY, and DENNIS KERLIN (Date of Incident: 06/12/2022)** On June 12, 2022, Mr. Chacon-Castillo died as a result of a gunshot wound sustained during an incident with Austin Police Department Officers.

The case is being jointly investigated by the Austin Police Department's Special Investigations Unit and the Travis County District Attorney Office's Civil Rights Unit.

**DECEDENT: MICHAEL CRATER/SUBJECT OFFICERS: NAME WITHHELD (Date of Incident: 06/14/2022)** On June 14, 2022, Mr. Crater died as a result of a gunshot wound sustained during an incident involving a Leander Police Department Officer.

The case is being jointly investigated by the Austin Police Department's Special Investigations Unit and the Travis County District Attorney Office's Civil Rights Unit.

**COMPLAINANT: BRANDON MUNOZ/SUBJECT OFFICER: NAME WITHHELD (Date of Incident 08/08/2022)** On August 8, 2022, Mr. Munoz was sustained a gunshot wound during an incident involving an Austin Police Department Officer and a Texas Department of Public Safety Trooper. Mr. Munoz is expected to recover from his injuries.

The case is being jointly investigated by the Austin Police Department's Special Investigations Unit and the Travis County District Attorney Office's Civil Rights Unit.

**COMPLAINANT: CLATEACHIA STEWART/SUBJECT OFFICER: ZACHARY MAINI (Date of Incident: 08/28/2022):** On August 28, 2022, Ms. Stewart was pulled over for an alleged traffic violation. During the encounter, Ms. Stewart was tased by DPS Trooper Zachary Maini.

The case is currently under investigation with the Travis County District Attorney's Office Civil Rights Unit.

**DECEDENT: NAME WITHHELD/SUBJECT OFFICER: NAME WITHHELD (Date of Incident: 09/23/2022):** On September 23, 2022, a civilian died following an incident during which shots were fired by Austin Police Department Officers.

The case is being jointly investigated by the Austin Police Department's Special Investigations Unit and the Travis County District Attorney Office's Civil Rights Unit.

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

BOMANI BARTON,  
*Plaintiff,*

v.

CITY OF AUSTIN AND KYU AN,  
*Defendants.*

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Case No. 1:22-cv-00221-RP

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**ORDER GRANTING DEFENDANT KYU AN’S  
MOTION TO STAY DISCOVERY**

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CAME ON to be heard Defendant Kyu An’s Motion to Stay Discovery. After considering said Motion and the response of Plaintiff, if any, the Court is of the opinion that the Motion should be GRANTED.

It is therefore, ORDERED, ADJUDGED AND DECREED that Defendant Kyu An’s Motion to Stay Discovery is GRANTED, and discovery as to Defendant An shall hereby be stayed until the resolution of his criminal proceedings.

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 2022.

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ROBERT PITMAN  
UNITED STATES DISTRICT JUDGE

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

BOMANI BARTON

*Plaintiff,*

v.

CITY OF AUSTIN AND KYU AN

*Defendants.*

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CAUSE NO. 1:22-cv-00221-RP

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PLAINTIFF’S RESPONSE TO DEFENDANT KYU AN’S  
MOTION TO STAY DISCOVERY

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TO THE HONORABLE UNITED STATES JUDGE:

NOW COMES Plaintiff, Bomani Barton, and files this, his response the Defendant Kyu An’s (“Defendant”) motion to stay discovery pending the resolution of Defendant’s criminal case, and respectfully shows the Court the following in support:

**I. BACKGROUND**

1. On May 30, 2020, Bomani Barton attended the police brutality protest in Austin, Texas only to become the victim of further police brutality. Despite Bomani remaining peaceful at all times, Defendant An shot him three times with a bean bag shot gun. In his Original Answer, Defendant An admitted:

- a. that he was an Austin Police Department (“APD”) officer that responded to the protest<sup>1</sup>;
- b. that he shot a protestor (Bomani) three times with a bean bag shot gun<sup>2</sup>;

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<sup>1</sup> Dkt. #8, ¶ 8

<sup>2</sup> Dkt. #8, ¶ 23

- c. that doing so conformed to his training<sup>3</sup>;
- d. that he was acting under the color of law when he shot the protestor (Bomani).<sup>4</sup>

2. While Defendant An appears to justify his acts of violence by generally alleging some individuals in the protest were acting violent, he has failed to allege any specific acts he claims Bomani committed that justifies being shot in the face with a bean bag shotgun.<sup>5</sup>

3. On February 17, 2022, Defendant An was indicted by Travis County, Texas for Aggravated Assault by a Public Servant for his conduct at the May 30 and 31 protests.<sup>6</sup>

4. On March 8, 2022, Bomani filed his original complaint against Defendant An and the City of Austin for First and Fourth Amendment Violations.<sup>7</sup>

5. On August 22, 2022, Plaintiff sent written discovery to Defendants.

6. On October 3, 2022, the Court granted an agreed confidentiality and protective order for materials and information disclosed in this lawsuit.<sup>8</sup>

7. Rather than make specific objections to the written discovery, Defendant An filed his motion to stay discovery for an indefinite time period, essentially asserting a blanket Fifth Amendment privilege.<sup>9</sup> Defendant is not asking the Court to limit the scope of the discovery, but is instead asking this Court to fully restrict Plaintiff's ability to conduct any discovery related to Defendant An until the resolution of his criminal charges, whenever that may be.

8. There is currently a pending agreed proposed scheduling order before the Court with Plaintiff's expert deadline of 7/14/23 and discovery deadline of 9/29/23.<sup>10</sup>

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<sup>3</sup> Dkt. #8, ¶ 23

<sup>4</sup> Dkt. #8, ¶ 30

<sup>5</sup> Dkt. #8, ¶¶ 1 – 9; Dkt. #19, ¶ 1

<sup>6</sup> Dkt #19, Ex. 1

<sup>7</sup> Dkt. #1

<sup>8</sup> Dkt. #15

<sup>9</sup> Dkt. #19

<sup>10</sup> Dkt. #20

9. Plaintiff, Bomani Barton, opposes Defendant An's unnecessary request to stay discovery during the pendency of his criminal investigation because An has not shown good cause to do so. Further, staying discovery would cause unnecessary delay to the civil case and unduly prejudice Plaintiff's ability to seek redress for the harms done to him.

## II. ARGUMENT & AUTHRORITIES

10. The Supreme Court has established that there is no general constitutional, statutory, or common law prohibition against simultaneously prosecuting parallel civil and criminal actions.<sup>11</sup> Indeed, “[i]t is the rule, rather than the exception that civil and criminal cases proceed together.”<sup>12</sup> A stay of a civil action until the conclusion of a related criminal proceeding is considered to be an “extraordinary remedy.”<sup>13</sup> One reason for this is that a complete stay is equivalent to a defendant's “blanket assertion” of the Fifth Amendment, which is improper.<sup>14</sup> “A party is required to selectively invoke the privilege against self-incrimination and object with specificity to the information sought from him.”<sup>15</sup> This allows the court to examine whether the claimed privilege proper.<sup>16</sup> “Whether a party is entitled to the protection of the privilege is for the court to decide, not the invoking party.”<sup>17</sup> There is a strong presumption in favor of discovery and the defendant bears the burden to show “special circumstance” to overcome this strong presumption.<sup>18</sup>

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<sup>11</sup> *Alcala v. Tex. Webb Cnty.*, 625 F. Supp. 2d 391, 396 (S.D. Tex. 2009); *SEC v. First Fin. Group of Texas, Inc.*, 659 F.2d 660, 666–67 (5th Cir.1981) (citing *United States v. Kordel*, 397 U.S. 1, 11, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970)).

<sup>12</sup> *United States ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, 571 F.Supp.2d 758, 761 (W.D.Tex.2008) (quoting *IBM v. Brown*, 857 F.Supp. 1384, 1387 (C.D.Cal.1994)).

<sup>13</sup> *In re Piperi*, 137 B.R. 644, 646–47 (Bankr.S.D.Tex.1991) (citing *Weil v. Markowitz*, 829 F.2d 166, 174 (D.C.Cir.1987)); see also *Plumbers and Pipefitters*, 886 F.Supp. at 1139.

<sup>14</sup> *SEC v. Incendy*, 936 F.Supp. 952, 957 (S.D.Fla.1996); see *United States v. Little Al*, 712 F.2d 133, 134–136 (5th Cir.1983); see also *First Financial*, 659 F.2d at 668–69; see also *United States v. Goodwin*, 625 F.2d 693, 701 (5th Cir.1980).

<sup>15</sup> *Alcala* at 625 F. Supp. 2d 391, 397 (S.D. Tex. 2009) (citing *First Financial*, 659 F.2d at 668).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

11. Initially, court's looked to the following factors in determining whether a stay was appropriate when the defendant was facing criminal prosecution as well: (1) the plaintiff's interest in proceeding expeditiously in the civil case, balanced against the potential prejudice to the plaintiff caused by a delay; (2) the defendant's interest and the burden which any particular aspect of the proceedings may impose on him; (3) the court's interest in the management of its cases and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the public's interest in the pending civil and criminal litigation.<sup>19</sup> This test was modified in *Plumbers and Pipefitters* to add two additional factors: the extent to which the issues in the criminal case overlap with those presented in the civil case; and the status of the criminal case, including whether the defendants have been indicted.<sup>20</sup>

12. District courts in the Fifth Circuit who apply the *Plumbers and Pipefitters* test consider or weigh the six following factors: (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the criminal case, including whether the defendant has been indicted; (3) the private interests of the plaintiff in proceeding expeditiously, weighed against the prejudice to the plaintiff caused by a delay; (4) the private interests of and burden on the defendant; (5) the interests of the courts; and (6) the public interest.<sup>21</sup>

13. A Southern District of Texas court noted that factors (1) and (2) added in *Plumbers and Pipefitters* - the extent to which the issues in the criminal case overlap with those presented in the civil case and the status of the criminal case, including whether the defendant has been indicted – are not really independent factors for the court to consider.<sup>22</sup> “Rather, they are factors important in

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<sup>19</sup> *Id.* at 397–98 (Citing *Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53 (E.D.Pa.1980)).

<sup>20</sup> *Trustees of Plumbers and Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc.*, 886 F.Supp. 1134 (S.D.N.Y.1995).

<sup>21</sup> *Alcala*, at 625 F. Supp. 2d 391, 398-99 (S.D. Tex. 2009).

<sup>22</sup> *Id.*

determining how the interests of the parties, the Court, third parties, and the public will be weighed against each other.”<sup>23</sup> Essentially, these two factors that are in the interest of the defendant should be weighed within the framework of balancing the interests of the parties, the Court, third parties, and the public.<sup>24</sup> “This balancing-of-the-interests approach ensures that the rights of both [the defendant and the plaintiff] are taken into consideration before the court decides whose rights predominate.”<sup>25</sup>

14. Defendant’s main argument here is that because the criminal charges and civil action arise from the same conduct, Defendant An will either have to chose between defending his civil lawsuit or defending his criminal prosecution, but he cannot do both simultaneously.<sup>26</sup> The Fifth Circuit has addressed this argument in a similar case in which a defendant faced criminal and civil prosecution arising out of the same conduct in *United States v. White*.<sup>27</sup> In *White*, the court stated

It appears to us, however, that [defendant] overstates his dilemma. He was not forced to surrender his privilege against self-incrimination in order to prevent a judgment against him; although he may have been denied his most effective defense by remaining silent, there is no indication that invocation of the fifth amendment would have necessarily resulted in an adverse judgment.<sup>28</sup>

15. Moreover, in 2020, the same lawyers representing Defendant An made the same arguments as they do here, to the same court (Western District of Texas), in a case with the similar controlling facts, asking for the same relief, and were denied.<sup>29</sup> In *Olson as Next Friend of H.J. v. City of Burnet, Tex.*, Sgt. Butler was under indictment for murder as well as aggravated assault by a public

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 400

<sup>25</sup> *Id.* at 399–400 (S.D. Tex. 2009) (citing *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1088 (5th Cir.1979)

<sup>26</sup> Dkt #19.

<sup>27</sup> 589 F.2d 1283, 1286 (5th Cir. 1979)

<sup>28</sup> *Id.*

<sup>29</sup> *Olson as Next Friend of H.J. v. City of Burnet, Tex.*, No. A-20-CV-00162-JRN, 2020 WL 9076545, at \*2 (W.D. Tex. July 17, 2020)

servant arising from shooting a civilian and sought a stay of discovery because he may be forced to choose between asserting his Fifth Amendment rights and adequately defending himself in the lawsuit.<sup>30</sup> This Court held that while there is certainly overlap with the ongoing criminal case, none of the other factors favor the stay.<sup>31</sup> The Court further noted the plaintiff has a significant interest in proceeding with discovery quickly as many factual disputes about what occurred will require deposition testimony to resolve and delaying such until after the criminal trial will only further strain memories that may be hazy.<sup>32</sup> Further, abstract hypothetical fears of choosing between the Fifth Amendment and adequately defending a civil suit does not meet the heavy burden to merit a stay of discovery.<sup>33</sup> While Defendant can certainly make objections as he sees fit, blanket hypothetical objections are not proper. Similar to *Olsen*, Defendant An only provides abstract fears.

16. It is important to note that the degree of overlap between criminal and civil proceedings is further reduced by the fact that the prosecutor in the criminal case, the State of Texas, is not a party to the civil action.<sup>34</sup> Private parties have interests distinct from the Texas government and there is no reason to assume that the Plaintiff's case is brought for any purpose other a good faith effort to obtain compensation for his own injuries. Had the civil action been brought by the State of Texas as well, the risk improper discovery in the criminal case occurring through the civil case would be prevalent, but is not the case here.

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<sup>30</sup> *Olson as Next Friend of H.J. v. City of Burnet, Tex.*, No. A-20-CV-00162-JRN, 2020 WL 9076545, at \*1 (W.D. Tex. July 17, 2020)

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Alcala* at 625 F. Supp. 2d 391, 402 (S.D. Tex. 2009)

17. The Court in *Alcala*, noted that private plaintiffs are further prejudiced when a defendant is being prosecuted by the State of Texas rather than the Federal Government because Texas does not have a Speedy Trial Act.<sup>35</sup> Indeed, Plaintiff is unaware of any trial setting in the parallel criminal case and as such, the Defendants request for stay is essentially indefinite at this moment. This could make it impossible for Plaintiff to obtain the discovery needed if certain factual information is lost to hazy memories. Here, Plaintiff will need to obtain testimony as to the facts of how each individual involved interacted the day of the shooting – which is likely only available via deposition.

18. The public has an interest in resolution of disputes with minimal delay. Further, the Court has an interest in managing its docket and not letting cases languish before it.

19. Because the Plaintiff's interests would be unduly prejudiced by a stay and the Defendant is still able to present a defense by selectively using his Fifth Amendment privilege, if needed, the stay should be denied. Further, because the Court and the public have an interest in quickly resolving claims, especially when they involve public concerns such as police brutality, the stay should be denied.

### III. CONCLUSION

20. A defendant does not have an absolute right to stay discovery simply because they are subject to criminal prosecution as well. A civil litigant does not lose his fundamental right to plead the Fifth and protect against criminal prosecution during the civil case. The defendant may assert this privilege selectively during a civil proceeding, but cannot issue a blanket assertion. Staying all discovery against Defendant An would severely and unduly prejudice Plaintiff's ability to

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<sup>35</sup> *Id.* at 405–06

persecute his claim against all defendants and Defendant An has not shown special circumstances for doing so. For these reasons, Defendant's motion to stay should be denied

**IV. CONCLUSION**

For these reasons, Plaintiff prays that upon hearing and considering the arguments of counsel, Defendant An's motion to stay discovery be denied and for any and all such further relief Plaintiff is justly entitled.

Respectfully submitted,

By: /s/ Myles A. Lenz

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**CERTIFICATE OF SERVICE**

I do hereby certify that on November 2, 2022, a true and correct copy of the above and foregoing document has been forwarded electronically to all counsel of record through CM/ECF.

/s/ Myles A. Lenz  
Myles A. Lenz

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

BOMANI BARTON,  
*Plaintiff,*

v.

CITY OF AUSTIN AND KYU AN,  
*Defendants.*

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Case No. 1:22-cv-00221-RP

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**DEFENDANT KYU AN’S REPLY IN SUPPORT OF  
MOTION TO STAY DISCOVERY**

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TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES Defendant Kyu An (“Officer An”) and files this, his reply to Plaintiff Bomani Barton’s (“Barton”) response to An’s Motion to Stay Discovery of this civil matter pending the resolution of his criminal proceedings, and would respectfully show the Court as follows:

## I. SUMMARY OF THE ARGUMENT

1. Plaintiff's characterization as a stay of discovery as being a blanket Fifth Amendment invocation misses the mark. A stay of discovery seeks specifically to *avoid* invoking the Fifth Amendment entirely. Whereas the requested stay of discovery will ultimately result in full testimony and a trial *on the merits*, a denial of the stay is more likely to end up in a trial revolving around nefarious adverse inferences rather than the unrestricted truth. There is no benefit to the public at large nor to our court systems when a trial is decided outside of the merits—especially a trial that involves public interest or concern.

2. Plaintiff's reliance on *Alcala* is entirely misplaced. The facts of *Alcala* are so far outside the norm as to be alien and unhelpful for the analysis of the vast majority of motions to stay. Beyond that, the *Alcala* court by its own admission applied a stay of discovery test taken from the Ninth Circuit that deviates from the established Fifth Circuit test. Plaintiff either fails to address entirely, or only addresses in a handful of cast-off sentences with no legal support, four of the six accepted factors. This Court may legally grant Officer An's motion on those grounds alone.

3. Lastly, Plaintiff's citation of *Olson* is fatally incomplete. This Court subsequently ordered *sua sponte* that the same case be stayed entirely. The grounds for doing included the same “pick your poison” grounds initially presented in *Olson* that have also been presented in the motion at bar. If the stay is granted, Plaintiff Barton will still be able to depose every other fact witness and otherwise aggressively develop his case—and only stands to gain a Fifth Amendment invocation if the motion is denied—collectively rendering moot Plaintiff's arguments about decaying memories from fact witnesses. This Court in retrospect stayed the *Olson* case “out of fairness to [the defendant officer].” Officer An asks that those same notions of fairness be afforded to him so that he may defend himself and his reputation fully in court.

## II. ARGUMENTS & AUTHORITIES

### A. A stay of discovery is *not* a blanket Fifth Amendment invocation because it seeks to avoid the privilege altogether, and facilitates open testimony and a trial on the merits.

Plaintiff's characterization of a stay of discovery as being a blanket Fifth Amendment privilege invocation misses the point. In the context of an overlapping parallel criminal indictment situation, the entire purpose of moving for a stay of discovery is to avoid the Fifth Amendment entirely. The end result of a stay is *full and open testimony* after the criminal case has resolved, which in turn allows for *a civil trial on the actual merits of what happened*. In contrast, a Fifth Amendment privilege invocation prevents full and open testimony. A *de facto* forced Fifth Amendment invocation situation thus transforms what would be an open trial on the merits into one revolving around how nefarious of an inference the attorneys can weave during closing arguments—and with a jury instruction potentially supporting the adverse inference, no less.<sup>1</sup> A stay of discovery accordingly cannot be a blanket Fifth Amendment invocation when it both (i) is sought specifically to avoid invoking the Fifth Amendment entirely, and (ii) leads to a far different and far more meritorious trial on the merits rather than one based on inferences and speculation by counsel.

### B. Parties resisting a stay of discovery should stop citing *Alcala*—a case with facts especially far removed from a typical stay case, and where the Court admits its stay of discovery test deviates from Fifth Circuit precedent.

4. Simply put, litigants should stop citing *Alcala* when opposing a stay of discovery. The fact scenario the *Alcala* court faced was so atypical as to be inapplicable and unhelpful to the analysis of the vast majority of motions to stay discovery based on parallel criminal proceedings. Beyond

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<sup>1</sup> See e.g. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (“[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.”).

just being a factual outlier, the *Alcala* Court literally admits in a footnote that it applied a Ninth Circuit stay of discovery test out that does not strictly conform with Fifth Circuit precedent.

5. In the instant suit, the overlap between the criminal and civil matters is absolute—one specific incidence of a police officer allegedly using physical force against a specific person.<sup>2</sup> *Alcala* offers anything but harmonious overlap. In *Alcala*, the inculpatory criminal law conduct was the running of a *de facto* gambling operation, whereas the inculpatory civil law conduct amounted to an employment law retaliation case.<sup>3</sup> The conduct had factual a connection, but it certainly did not have the same—or probably *any*—overlapping elements between the civil and criminal statutes at issue.

6. The *Alcala* court cited numerous other precedents in its discussion, and thus is commonly cited due to being a *de facto* aggregation of various holdings and legal standards. The actual *Alcala* court’s reasoning and application of the law, however, deviates from Fifth Circuit precedent in a manner freely admitted to by the court in a footnote. The *Alcala* decision’s deviations include but are not limited to the point noted by Plaintiff’s Response—that pursuant to *Alcala* the first two factors *should not even be viewed as independent factors*.<sup>4</sup> The *Alcala* court explicitly recognized that its choice of which factors to apply (or not apply) deviated from the judicial norm, admitting that its “understanding of the test aligns more closely with the test applied by the Ninth Circuit Court of Appeals.”<sup>5</sup> In contrast, other Fifth Circuit district courts—including this Court *twice within the past week*—view the first factor as not only a proper factor, but also

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<sup>2</sup> Def. An’s Mot. to Stay Discovery, Dkt. # 19, pgs. 4—7.

<sup>3</sup> *Alcala v. Texas Webb Cnty.*, 625 F. Supp. 2d 391 (S.D. Tex. 2009).

<sup>4</sup> Pl. Resp. to Mot. to Stay, Dkt. # 23, pgs. 4—5.

<sup>5</sup> *Alcala v. Texas Webb Cnty.*, 625 F. Supp. 2d 391, 399, fn. 6 (S.D. Tex. 2009).

as being widely “regarded as the most important factor in the analysis.”<sup>6</sup> The *Alcala* challenged second factor likewise has been used by this Court and others to make a determination as to the appropriate length of a stay.<sup>7</sup>

7. Plaintiff ostensibly cites *Alcala* in part because he lacks any substantive rebuttal in regards to the existence of overlap, and he lacks any substantive rebuttal in regards to the active indictment status of the criminal case—the first and second factors that the *Alcala* decision deviates from emphasizing. Both factors weigh entirely in favor of a stay, not addressed whatsoever by Plaintiff. Plaintiff does address the interests of Plaintiff and the interests of Defendant—the third and fourth factors. Beyond that, however, Plaintiff’s only attempt to address the last two factors of the test come in the form of two to three short, conclusory sentences at the end of the response. As this Court recently noted, Plaintiff’s failure to engage and address all of the factors creates a situation where “[t]he Court could grant the motion on this basis alone.”<sup>8</sup>

8. The conduct that forms the basis of this lawsuit and the conduct that forms the basis of the criminal charges are the same conduct—the alleged use of force against Plaintiff Barton on May 30, 2020. There is also already an active indictment, and thus the criminal jeopardy that face Officer An is real and immediate. At the very least, this matter should not be controlled by a precedent that openly admits to using a different test taken from a different Circuit, especially one that downplays a factor that is considered *the* most important factor by other Fifth Circuit district

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<sup>6</sup> See e.g., Order, *Underwood v. Siegel*, 1:22-cv-00032-RP (W.D. Tex. Nov. 14, 2022), Dkt. # 39, pg. 3 (citing *DeSilva v. Taylor*, No. 1:21-CV-00129-RP, 2022 WL 545063, at \*3 (W.D. Tex. Feb. 23, 2022) (internal quotation marks omitted); see also e.g., Order, *Sanders v. City of Austin*, 1:22-cv-00314-RP (W.D. Tex. Nov. 15, 2022), Dkt. # 39, pgs. 3—4; see also e.g. *S.E.C. v. AmeriFirst Funding, Inc.*, No. CIV A 307-CV-1188-D, 2008 WL 866065, at \*2 (N.D. Tex. Mar. 17, 2008).

<sup>7</sup> See e.g. *Slack v. City of San Antonio, Texas*, No. CV SA-18-CA-1117-FB, 2019 WL 11097069, at \*3 (W.D. Tex. May 28, 2019).

<sup>8</sup> Order, *DeSilva v. Taylor*, 1:21-cv-00129-RP (W.D. Tex. Feb. 23, 2022), Dkt. # 23, pg. 5.

courts. Accordingly, *Alcala* as a precedent—both factually and legally—is inapplicable and unhelpful for the analysis of the facts and motion at issue before this Court.

**C. Plaintiff’s cite of *Olson* fails to disclose the fact that a stay was later granted *sua sponte* by this Court based on criminal exposure grounds and “out of fairness” to the officer defendant.**

Plaintiff’s cite of *Olson* is fatally incomplete. It is true, as Plaintiff notes, that this Court in *Olson* initially denied a motion to stay discovery filed by the undersigned counsel on behalf of a police officer defendant based on parallel criminal proceedings, and that the Court initially held that sworn testimony for an indicted civil defendant was an “abstract” concern.<sup>9</sup> However, this Court subsequently issued a *sua sponte* order staying the entire case, including trial, based on the very same concerns raised by Officer An of criminal exposure and being forced to pick a poison—harming his civil case or his criminal case. Specifically, this Court noted in retrospect that “this case approaches trial, during which [the defendant officer] could rightly be called upon to testify—that is *certainly not an abstract concern*, and the danger of eliciting testimony from [the defendant officer] harmful to his criminal case is not so easily overlooked.”<sup>10</sup> This Court also noted in *Olson* that “it appears to the Court that each of the [six accepted stay of discovery factors] support a stay,” which is likewise true for Officer An.<sup>11</sup>

The lack of any significant prejudice to the plaintiff noted in the *Olson* order is particularly important as it pertains to Plaintiff’s Response in this case. Therein, Plaintiff Barton argued incorrectly that the requested stay of discovery “could make it impossible for Plaintiff to obtain the discovery needed if certain factual information is lost to hazy memories.”<sup>12</sup> Plaintiff’s

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<sup>9</sup> Pl. Resp. to Mot. to Stay, Dkt. # 23, pgs. 5—6.

<sup>10</sup> Order, *Olson v. City of Burnet, Tex.*, 1:20-cv-00162-JRN (W.D. Tex. Mar. 17, 2021), Dkt. # 107, pg. 1 (emphasis added).

<sup>11</sup> *Id.* at 2.

<sup>12</sup> Pl. Resp. to Mot. to Stay, Dkt. # 23, pg. 7.

argument once again misses the mark. Officer An has never requested that this Court stay discovery regarding the other claims or parties in this lawsuit. It is the norm for courts to only stay discovery as to one defendant while allowing depositions and discovery to proceed for all other plaintiffs and defendants in the case.<sup>13</sup> If the requested stay is granted, there would be absolutely nothing barring Plaintiff from deposing every other fact witness, propounding written discovery with the City of Austin, and sending subpoenas to third parties. Plaintiff's argument also fails to address the fact that a deposition of Officer An in the immediate future would not actually net any substantive information about the subject incident whatsoever, because Officer An would be almost guaranteed to invoke his Fifth Amendment privileges if deposed while under active indictment. Thus, what risk of "information...lost to hazy memories" would be rectified by denying a stay? Such a denial will not yield a shred of additional discovery from other witness or parties—which can proceed at Plaintiff's will—and it likewise would not yield any substantive testimony from Officer An about the incident beyond a Fifth Amendment invocation.

There is no substantive discovery or information whatsoever that weighs in the balance of the outcome of this motion. This Court issued the *sua sponte* order staying the *Olson* case "in the interest of fairness to [the defendant officer]."<sup>14</sup> Officer An asks for the same relief out of fairness to him, and to be treated the same as the other officers currently in his exact same position.<sup>15</sup>

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<sup>13</sup> See e.g. *Weaver v. Stroman*, No. 1:16-CV-01195-ADA, 2020 WL 3545655, at \*3 (W.D. Tex. June 30, 2020) (Noting that "[t]his Court has discretion to tailor a stay to operate with respect to only 'some portion of the proceeding,'" and denying the municipal defendant's request for a stay "so as to allow Plaintiffs to...conduct depositions of any person who is not an individual Defendant [with a stay of discovery in place].").

<sup>14</sup> Order, *Olson v. City of Burnet, Tex.*, 1:20-cv-00162-JRN (W.D. Tex. Mar. 17, 2021), Dkt. # 107, pg. 1.

<sup>15</sup> See e.g., Order, *Underwood v. Siegel*, 1:22-cv-00032-RP (W.D. Tex. Nov. 14, 2022), Dkt. # 39, pg. 3; see also e.g., Order, *Sanders v. City of Austin*, 1:22-cv-00314-RP (W.D. Tex. Nov. 15, 2022), Dkt. # 39, pgs. 3—4.



**CERTIFICATE OF SERVICE**

I hereby certify that on the 18th day of November 2022, 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 U.S. First Class Mail, in accordance with the Federal Rules of Civil Procedure, as follows:

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

**BOMANI BARTON,**  
*Plaintiff*

v.

**CITY OF AUSTIN, TEXAS, KYU  
AN,**  
*Defendants*

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**No. 1:22-CV-00221-RP**

**ORDER**

Before the Court is Defendant Kyu An’s Opposed Motion to Stay Discovery, Dkt. 19. The District Court referred the motion to the undersigned for disposition pursuant to 28 U.S.C. § 636(b)(1)(A), Federal Rule of Civil Procedure 72, and Rule 1(c) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. After considering the motion and all related filings, the Court now grants the motion.

**I. BACKGROUND**

This case arises out of the Austin Police Department’s response to protests that happened in downtown Austin in May 2020. Dkt. 1. The plaintiff in this case, Bomani Barton, alleges that APD Officer An shot him with a “beanbag round,” also referred to as a “less lethal” round, during the protest. *Id.*, at 6. Citing this conduct, Barton asserts Fourteenth Amendment excessive-force, First Amendment retaliation, and punitive damages claims against Officer An, all pursuant to 42 U.S.C. § 1983. *Id.*, at 7-9. In connection with law enforcement’s response to this same protest, the Travis

County District Attorney indicted Officer An, along with numerous other area law-enforcement officers who were on the scene. Dkt. 17-2. Officer An's indictment in particular charges him with two counts of Aggravated Assault By Public Servant, specifically citing his alleged firing of a firearm at Barton. Dkt. 18-1.

## II. LEGAL STANDARDS

“The Court has broad discretion to stay proceedings in the interest of justice and in order to control its docket.” *Raymond v. J.P. Morgan Chase Bank*, No. SA-20-CA-161-OLG, 2020 WL 10731935, at \*1 (W.D. Tex. Sept. 24, 2020). “Proper use of this authority calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Id.* (internal quotation marks omitted). “When a defendant in a civil case is facing criminal charges, a district court may, in its discretion, stay the civil action.” *U.S. ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, 571 F. Supp. 2d 758, 761 (W.D. Tex. 2008); *see also United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983) (“Certainly, a district court may stay a civil proceeding during the pendency of a parallel criminal proceeding.”). Such a stay contemplates “special circumstances” and the need to avoid “substantial and irreparable prejudice.” *Little Al*, 712 F.2d at 136.

When deciding whether “special circumstances” warrant a stay, courts in the Fifth Circuit have found the following factors relevant: (1) the extent to which the issues in the criminal and civil cases overlap, (2) the status of the criminal case, (3) the private interests of the plaintiffs in proceeding expeditiously, (4) the burden on the defendants, (5) the interest of the courts, and (6) the public interest. *Olson v.*

*City of Burnet*, No. A-20-CV-00162-JRN, 2020 WL 9076545, at \*1 (W.D. Tex. July 17, 2020) (citing *Alcala v. Tex. Webb Cnty.*, 625 F. Supp. 2d 391, 397-98 (S.D. Tex. 2009)). Courts have found special circumstances where a defendant attempts to preserve his Fifth Amendment right against self-incrimination and resolve “the conflict he would face between asserting this right and defending the civil action.” *Bean v. Alcorta*, 220 F. Supp. 3d 772, 775 (W.D. Tex. 2016) (quoting *Alcala*, 625 F. Supp. 2d at 397); see also, e.g., *In re Grand Jury Subpoena*, 866 F.3d 231, 234 (5th Cir. 2017) (observing that “less restrictive civil discovery could undermine an ongoing criminal investigation and subsequent criminal case”).

### III. DISCUSSION

#### A. Overlap Between the Criminal and Civil Cases

“The extent to which issues in the criminal case overlap with those presented in the civil case generally is regarded as the most important factor in the analysis.” *DeSilva v. Taylor*, No. 1:21-CV-00129-RP, 2022 WL 545063, at \*3 (W.D. Tex. Feb. 23, 2022) (internal quotation marks omitted). “Where there is significant overlap, self-incrimination is more likely and thus weighs in favor of a stay.” *Bean*, 220 F. Supp. 3d at 776. The facts that form the basis of the indictment pending against Officer An are the same facts that form the basis for Barton’s claims against him. Compare Dkt. 1, at 6, with Dkt. 18-1.

Barton does not deny that the facts here overlap, nor could he credibly do so. Instead, Barton points to cases denying a stay despite an overlap in the facts. Dkt. 23, at 5-7. As Officer An points out, though, one of those cases, *Alcala*, involved a civil

claim based on an alleged employment-law retaliation, while the criminal case was based on the running of an illegal gambling operation. *See* Dkt. 26, at 4 (discussing *Alcala*, 625 F. Supp. 2d at 402-03). Citing “a lack of significant overlap between the [civil and criminal cases],” the court denied the stay. 625 F. Supp. 2d at 402. Likewise, *Olson*, is also distinguishable: while the Court there found the facts did overlap and the criminal prosecution was active, the Court concluded that—unlike here, as discussed below—the remaining factors did not favor a stay. 2020 WL 9076545, at \*2. Moreover, the Court later revisited that decision *sua sponte* and ultimately granted a stay. *See* Order, No. 1:20-CV-00162-JRN (W.D. Tex. Mar. 17, 2021), Dkt. 107.

The question is simple: do the facts overlap? Here, they undeniably do. This factor, the “most important,” weighs in favor of granting a stay. *See, e.g., DeSilva*, 2022 WL 545063, at \*3 (“Because there is significant overlap between the issue presented in this case and Defendants’ criminal proceedings, there is a significant danger of self-incrimination. The first and most important factor weighs strongly in favor of staying the case.”).

Barton gives the remaining factors either cursory treatment or declines to address them at all. As alluded to above, however, the Court concludes that each of the remaining factors likewise favors a stay.

## **B. Status of the Criminal Case**

“The ‘strongest case’ for a stay exists where a party is indicted for a serious offense and must defend a civil action involving the same matter.” *Alcala*, 625 F. Supp. 2d at 401. Officer An has been indicted. Dkt. 27-1.

A stay of a civil case is most appropriate where a party to the civil case has already been indicted for the same conduct for two reasons: first, the likelihood that a defendant may make incriminating statements is greatest after an indictment has issued, and second, the prejudice to the plaintiffs in the civil case is reduced since the criminal case will likely be quickly resolved due to Speedy Trial Act considerations.

*Librado v. M.S. Carriers, Inc.*, No. 3:02-CV-2095D, 2002 WL 31495988, at \*2 (N.D. Tex. Nov. 5, 2002). Now that Officer An has been indicted, he is at risk of potentially making incriminating statements in his civil case. *See DeSilva*, 2022 WL 545063, at \*3 (reaching the same conclusion). This factor weighs in favor of a stay.

### **C. Plaintiff's Interests**

Barton does have an interest in having his claim against Officer An prosecuted expeditiously. But when evaluating this factor, “courts may require a plaintiff to establish more prejudice than simply a delay in its right to expeditiously pursue his claim.” *Id.* Barton complains that granting a stay may delay the trial in this case “indefinitely,” and with that delay, the attendant loss of witnesses’ memory. Dkt. 23, at 7. But, as in *DeSilva*, Barton “identifies no discovery that is available now but would be unavailable later should a stay be granted” and “has not alleged that any witnesses will be unable to testify nor that any particular evidence will degrade if a stay is granted.” *DeSilva*, 2022 WL 545063, at \*3. Barton’s conclusory statements to the contrary fail to tip this factor in his favor.

### **D. Burden on Defendant**

Absent a stay, Officer An will face “a conflict between asserting his Fifth Amendment rights and fulfilling his legal obligations as a witness” and defendant in this civil case. *DeSilva*, 2022 WL 545063, at \*4. “This conflict may be largely, if not

completely, eliminated by granting a stay.” *Librado*, 2002 WL 31495988, at \*3. “Defendants have an interest in staying the civil trial to avoid exposing their criminal defense strategies to the prosecution.” *DeSilva*, 2022 WL 545063, at \*4 (citing *Alcala*, 625 F. Supp. 2d at 397). In light of the substantial overlap between the facts of the civil and criminal cases discussed above, the Court concludes that this factor weighs in favor of a stay.

#### **E. Interest of the Courts**

As the Court in *DeSilva* noted, “granting a stay ‘serves the interests of the courts, because conducting the criminal proceedings first advances judicial economy.’” 2022 WL 545063, at \*4 (quoting *Jean v. City of Dallas*, No. 3:18-CV-2862-M, 2019 WL 4597580, at \*5 (N.D. Tex. Sept. 22, 2019)). Moreover, “[r]esolution of the criminal case may increase prospects for settlement of the civil case and, [d]ue to differences in the standards of proof between civil and criminal prosecutions, the possibility always exists for a collateral estoppel or res judicata effect on some or all of the overlapping issues.” *Id.* (quoting *Jean*, 2019 WL 4597580, at \*5). The Court concludes that this factor, too, weighs in favor of a stay.

#### **F. The Public Interest**

Finally, the Court considers the public’s interest. “The public has an interest in the just and constitutional resolution of disputes with minimal delay.” *Walker v. Wilburn*, No. 3:13-CV-4896-D, 2015 WL 5873392, at \*9 (N.D. Tex. Oct. 5, 2015). “The sixth factor typically weighs against the grant of a stay only where, unlike here, a civil case is pending and no criminal investigation has begun.” *DeSilva*, 2022 WL

545063, at \*4 (citing *Meyers v. Pamerleau*, No. 5:15-CV-524-DAE, 2016 WL 393552, at \*7 (W.D. Tex. Feb. 1, 2016)). Moreover, “[w]hile the public certainly has an interest in the prompt resolution of the instant civil case, it also has an interest in protecting the constitutional rights of criminal defendants.” *Meyers*, 2016 WL 393552, at \*7. Accordingly, the final factor also supports a stay.

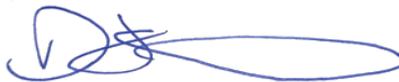
#### IV. ORDER

For these reasons, the Court **GRANTS** Officer An’s motion, Dkt. 19, and **ORDERS** that all discovery and further proceedings in the matter against Officer An are **STAYED** until further order of this Court. (This Order does not apply to proceedings or discovery involving Defendant City of Austin.)

**IT IS FURTHER ORDERED** that Officer An is to file a status report every three months, beginning February 1, 2023, notifying the Court of the status of his criminal case. Officer An should also notify the Court as soon as practicable upon the final resolution of the criminal case.

**IT IS FURTHER ORDERED** this cause of action is removed from the docket of the undersigned and **RETURNED** to the docket of the Honorable Robert Pitman.

SIGNED November 30, 2022.



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DUSTIN M. HOWELL  
UNITED STATES MAGISTRATE JUDGE

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

BOMANI BARTON,

*Plaintiff,*

V.

KYU AN, Individually,  
and CITY OF AUSTIN, TEXAS

*Defendants.*

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CIVIL ACTION NO.: 1:22-CV-00221-RP

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PLAINTIFF’S FIRST AMENDED COMPLAINT

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TO THE HONORABLE UNITED STATES DISTRICT COURT:

BOMANI BARTON (hereinafter referred to as “Mr. Barton” or “Plaintiff”) and files his First Amended Complaint complaining of KYU AN, individually (hereinafter referred to as “Officer Kyu An” or “An”), and the City of Austin, Texas (hereinafter referred to as “Austin, Texas” or “the City”), and respectfully shows this Honorable Court as follows:

**TABLE OF CONTENTS**

Nature of the Case .....3

Parties .....4

Jurisdiction .....4

Venue .....4

Conditions Precedent .....4

Factual Background .....5

Causes of Action .....7

    A. § 1983 – Excessive-Force Claims Against Officer Kyu An in his Individual Capacities .....7

    B. § 1983 – First Amendment Retaliation Claim against Officer Kyu An in his Individual Capacity .....9

    C. Qualified Immunity Under § 1983.....10

    D. Governmental Liability under 42 U.S.C. §1983 (*Monell*) and the First and Fourth Amendment to the U.S. Constitution .....12

Damages .....15

Attorney’s Fees and Costs .....15

Relief Requested .....15

Jury Demand .....16

Prayer .....16

TO THE HONORABLE UNITED STATES DISTRICT COURT:

BOMANI BARTON (hereinafter referred to as “Mr. Barton” or “Plaintiff”) and files his First Amended Complaint complaining of KYU AN, individually (hereinafter referred to as “Officer Kyu An” or “An”), and the City of Austin, Texas (hereinafter referred to as “Austin, Texas” or “the City”) and respectfully shows this Honorable Court as follows:

**I. NATURE OF THE CASE**

1. This is an excessive force and First Amendment retaliation case, wherein Defendant Kyu An – a police officer with the City of Austin Police Department – used excessive force against Plaintiff, including shooting him with bean bag rounds in the face, elbow, and hip despite the fact that Plaintiff posed no risk to Defendant or anyone else. Defendant An committed these acts in retaliation for Plaintiff exercising his First Amendment rights of free speech and assembly against police brutality.

2. Specifically, this is a civil action arising under the United States Constitution under the provisions of the First and Fourth Amendment to the Constitution of the United States, as applied through the Fourteenth Amendment, and under federal law, particularly the Civil Rights Act, Title 42 of the United States Code § 1983, seeking damages against Defendants for committing acts, under the color of law, with the intent and for the purpose of depriving Mr. Barton of rights secured under the Constitution and law of the United States.<sup>1</sup>

3. Plaintiff also asserts governmental liability (*Monell*) claim against the City of Austin because there exists pattern, practice, or custom of City of Austin Police Officers engaging in excessive force and because the City of Austin—acting through its policy makers—failed to

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<sup>1</sup> Although Plaintiff refers to Defendants collectively at times, specific factual references are made concerning actions or inactions by specific Defendants throughout this Complaint – these are not global allegations. As such, this pleading complies with current federal standards. FED. R. CIV. P. 8.

properly train and supervise Defendant Kyu An and encouraged the use of kinetic projectiles into crowd of unarmed people.

## II. PARTIES

4. Plaintiff, BOMANI BARTON, is a citizen of the United States currently residing Bell County, Texas.

5. Defendant, KYU AN, is an individual that was employed by the City of Austin Police Department at the time of the incident that make the basis of this lawsuit and was acting within the scope of his employment and under the color of law, statues, ordinances, rules and regulations, customs and usage of the City of Austin Police Department. At the time of the incident, Officer An assumed his role as a peace officer for the City of Austin. Officer An has appeared in this lawsuit and can be served through his attorney of record.

6. Defendant, CITY OF AUSTIN, is a municipality located within the State of Texas. The City of Austin has appeared in this lawsuit and can be served through its attorney of record.

## III. JURISDICTION

7. This action is brought pursuant to 42 U.S.C. § 1983, and the First, Fourth, and Fourteenth Amendments to the United States Constitution. The Court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1343.

## IV. VENUE

8. Venue is proper in this district under 28 U.S.C. § 1391(b) because the acts, events, or omissions giving rise to this claim occurred in Travis County, Texas, which falls within the United District Court for the Western District of Texas, Austin Division.

## V. CONDITIONS PRECEDENT

9. All conditions precedent have been performed or have occurred.

## VI. FACTUAL BACKGROUND

10. On Saturday, May 30, 2020, the Austin Police Department responded to a peaceful protest of police brutality with further police brutality.

11. Bomani Ray Barton, his girlfriend, and another friend attended a civil rights protest near the Austin Police Department Headquarters in Austin, Texas.

12. When they arrived, they noticed Austin Police Department officers in what appeared to be riot gear in a formation of numerous rows of officers.

13. These officers used bicycles to barricade and corral individuals into certain areas and to split up groups.

14. Mr. Barton and his friends protested peacefully for several hours; however, the police began to get agitated with the crowd, began pushing protestors, and used OC spray (commonly referred to as “pepper spray”) to silence the crowd.

15. Mr. Barton witnessed an officer push a female protestor off of a retaining wall, which caused her to hit her head on the ground.

16. As the police became more violent, the protesters migrated and made their way towards the Capitol. Officers continually used OC spray on unarmed individuals who did not pose a threat.

17. The protesters continued marching the streets of Austin and eventually found their way back to Austin Police Department Headquarters.

18. By this time, Austin police officers resorted to wantonly spraying OC spray into crowds. After seeing this tactic, Mr. Barton and his friends decided to stay towards the back of the protest — away from the violent officers.

19. The protesters again started to march down the highway. During this time, Mr. Barton is seen on video holding a protest sign over his head and sitting on the concrete divider between

north and south lanes of travel on I-35.

20. As Mr. Barton is sitting on the divider, Officer An and two other officers began to advance in his direction, which caused Mr. Barton to further retreat to the side of the highway opposite of the officers.

21. As Officer An and two other officers continue to walk towards Mr. Barton and other protestors, Mr. Barton continued to raise his protest sign and slowly back away. Inexplicably, Officer An raised his bean-bag shot gun and shot Mr. Barton three times, with one round hitting Mr. Barton in the face as Mr. Barton was backing away.

22. Mr. Barton, dazed and feeling like he was hit in the jaw with a metal bat, stumbled a few steps before falling to his knees as blood splattered from his mouth. Two of his teeth broke off from his mouth and fell to the pavement. Officers never checked on Mr. Barton after the assault nor did he or any other officer call for EMS.

23. Bystanders then assisted Mr. Barton to EMS as it was clear he needed emergency medical care. EMS informed Mr. Barton that getting to the hospital was a matter of life and death. Mr. Barton, who was now dizzy from blood loss, was put on a stretcher and loaded into the ambulance.

24. The ambulance only made it a few feet before it had to stop and pick up another victim of Austin Police brutality. This time, EMS rescued a young, pregnant woman who suffered from asthma and had been sprayed with OC spay. She was also taken to the ER with Mr. Barton.

25. Mr. Barton underwent emergency surgery on his shattered jaw and was in and out of consciousness as he recovered the next day. Additionally, his right elbow and hip were severally bruised and could not function properly.

26. Mr. Barton has currently undergone seven (7) surgeries on his face, but unfortunately, the damage caused by Officer Kyu An is permanent.

27. Officer Kyu An and 18 other officers have been indicated for assaulting Mr. Barton and numerous other innocent civilians protesting police brutality. Several officers have stated through their attorney that the highest levels of APD command authorized and ordered the use of bean bags on the unarmed protesters that day.<sup>2</sup>

28. Mr. Barton has never been arrested nor charged with a crime related to this protest and video evidence confirms that Mr. Barton was peacefully protesting when he was shot. Mr. Barton never threw any objects at Officer An or any other officer.

## VII. CAUSES OF ACTION

### A. § 1983 – Excessive-Force Claims Against Kyu An in his Individual Capacity

29. Plaintiff hereby adopts, incorporates, restates, and re-alleges paragraphs 1 through 28, inclusive, with regard to all causes of action.

30. As a direct and proximate result of the above-referenced unlawful and malicious physical abuses of Plaintiff by Officer Kyu An that were committed under the color of law and under his authority as a City of Austin Police Officer, Plaintiff suffered grievous bodily harm and was deprived of his right to be secure in his person against unreasonable seizure of his person, in violation of the Fourth Amendment of the Constitution of the United State of America.

31. Plaintiff specifically pleads that Officer Kyu An used excessive force and/or deadly force in the course of an illegal assault and battery of the Plaintiff, a free citizen, in violation of the Fourth Amendment and its “reasonableness” standard.

32. To establish Officer Kyu An violated his constitutional rights to be free from excessive force, Plaintiff must show:

- a. An injury;

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<sup>2</sup> <https://www.texastribune.org/2022/02/21/austin-police-indictment-protests/>

- b. Which resulted from the use of force that was clearly excessive to the need; and
- c. The excessiveness of which was objectively unreasonable.<sup>3</sup>

33. Officer Kyu An's use of unreasonable, unnecessary, and excessive force violated Plaintiff's clearly established constitutional rights and was not objectively reasonable in light of the circumstances.

34. Specifically, Officer Kyu An used unreasonable, excessive, and unnecessary force by shooting Mr. Barton with a bean bag gun three times, including one in the face at close range.

35. Mr. Barton was not posing a threat to Officer Kyu An nor any other member of the public. Mr. Barton did not disobey any lawful commands issued by Officer Kyu An. Mr. Barton was not arrested nor charged with any crimes in relation to his presence at the protest.

36. Plaintiff suffered multiple injuries as a direct result of Officer Kyu An's actions. As a result of his encounter with Officer Kyu An, Mr. Barton was shot in the elbow, hip, and jaw with bean bags, which resulted in a shattered jaw, numerous corrective surgeries, and permanent damage.

37. Officer Kyu An's actions and/or omissions were "objectively unreasonable" in light of the facts and circumstances confronting the officer without regard to his underlying intention or motivation. Clearly, the facts and circumstances of this particular incident demonstrate the unreasonableness of said actions, including that Plaintiff was unarmed, had not committed a crime, was not attempting to flee, and posed no immediate threat or danger to the police. For these reasons, it was objectively unreasonable for Officer Kyu An to shoot Plaintiff three times with a bean bag gun.

38. Officer Kyu An's actions were clearly excessive to the need.

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<sup>3</sup> See *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012); *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011).

39. The acts of Officer Kyu An as set forth above were intentional, wanton, malicious, and oppressive, or were with reckless disregard of Plaintiff's established constitutional rights; therefore, Plaintiff is entitled to an award of punitive damages.

**B. § 1983 – First Amendment Retaliation Claims Against Kyu An in his Individual Capacity**

40. Plaintiff hereby adopts, incorporates, restates, and re-alleges paragraphs 1 through 39, inclusive, with regard to all causes of action.

41. To assert a claim for First Amendment retaliation under § 1983, Plaintiff must show:

- a. He was engaged in a constitutionally protected activity;
- b. The defendants' actions caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and
- c. The defendants' adverse actions were substantially motivated against Plaintiff's exercise of constitutionally protected conduct.<sup>4</sup>

42. Here, Plaintiff was engaged in the constitutionally protected activity of voicing his free speech and freedom to peaceably assemble in an attempt to redress grievances related to police brutality across the nation.

43. Defendant Kyu An shattered Mr. Barton's jaw in an effort to both literally and figuratively take away his ability to speak on police brutality and to instill fear in all that assembled on the matter. Such a public, brutal, and devastating injury not only chills a person of ordinary firmness from continuing to engage in the activity, it also makes them physically unable to engage.

44. Plaintiff was peacefully protesting, was not armed, and had his hands raised in a surrendering position at the time Officer Kyu An shot him with the bean bag gun the first time. Officer Kyu An then proceeded to repeatedly shoot Mr. Barton in what can only be described as a

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<sup>4</sup> *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002)

simulated overkill. Officer Kyu An never gave Plaintiff a lawful order, never suspected Plaintiff of committing a crime, never attempted to arrest Plaintiff, and never attempted to render aid after the assault – he simply walked away. Further, Plaintiff was never charged with a crime related to the protest. The totality of the circumstances show that Officer Kyu An’s substantial motivation was to infringe on those protesting police brutality by inflicting police brutality.

45. The acts of Officer Kyu An as set forth above were intentional, wanton, malicious, and oppressive, or were with reckless disregard of Plaintiff’s established constitutional rights; therefore, Plaintiff is entitled to an award of punitive damages.

### **C. Qualified Immunity Under § 1983**

46. Plaintiff hereby adopts, incorporates, restates and re-alleges paragraphs 1 through 45, inclusive, with regard to all causes of action.

47. Officer Kyu An was carrying out a governmental function in employing the excessive use of force against Plaintiff. Government actors can be entitled to qualified immunity to their individual liability, but this immunity is waived if the complainant shows that:

- a. the individual's acts deprived the party of constitutional rights under color of law;
- b. the deprived rights were clearly established and constitutional rights which existed at the time of the acts; and
- c. such acts were not objectively reasonable under the circumstances, that is, no reasonable official could have believed at the time that the conduct was lawful.

48. In *Kinney v. Weaver*, the Fifth Circuit explained the “clearly established” prong as follows:

Qualified immunity should not be denied unless the law is clear in the more particularized sense that reasonable officials should be on notice that their conduct is unlawful. The central concept is that of fair warning: The law can clearly be established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated

constitutional rights.<sup>5</sup>

49. In *Newman v. Guedry*, the Fifth Circuit Court addressed whether the law on the use of Tasers was clearly established at the time of the event that occurred before the encounter between Mr. Barton and Officer Kyu An:

Guedry contends that he had no reasonable warning that tasing Newman multiple times violated Newman's constitutional rights, because there was then no binding case law on the appropriate use of tasers. Lawfulness of force, however, does not depend on the precise instrument used to apply it. Qualified immunity will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel.<sup>6</sup>

50. In *Bush v. Strain*, the Fifth Circuit held that the law was clearly established that an officer slamming an arrestee's face into a vehicle when the arrestee was not resisting or attempting to flee was objectively unreasonable.<sup>7</sup>

51. At the time of the encounter between Officer Kyu An and Plaintiff, there was no doubt that Mr. Barton had the clearly established right to be free from harm, including excessive force in the form of improper use of a bean bag gun.

52. Here, Mr. Barton posed no immediate threat to Officer Kyu An or any else, was disobeying a lawful command, was not suspected of a crime, was not informed he was under arrest; yet, Officer Kyu An chose to shoot Mr. Barton with his bean bag gun three times and shatter Mr. Barton's jaw before calmly walking away.

53. The actions taken by Officer Kyu An were excessive and unreasonable under clearly established law.

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<sup>5</sup> See *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (en banc) (internal citations and quotations omitted).

<sup>6</sup> See *Newman v. Guedry*, 703 F.3d 757, 763-64 (5th Cir. 2012).

<sup>7</sup> *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008).

54. The acts of Officer Kyu An violated clearly established statutory or constitutional rights of which a reasonable person would have known, including the constitutional rights afforded by the Due Process Clause, First Amendment and Fourth Amendment of the United States Constitution.

**D. Governmental Liability Under 42 U.S.C. §1983 (*Monell*) and the First and Fourth Amendment to the U.S. Constitution applied through the Fourteenth Amendment.**

55. Plaintiff hereby adopts, incorporates, restates, and re-alleges paragraphs 1 through 54, inclusive, with regard to all causes of action.

56. This cause of action is to redress the deprivation under the color of policy, custom, and practice of rights and privileges secured to Plaintiff by the First and Fourth Amendment to the United States Constitution.

57. The elements of a cause of action under § 1983 against a governmental entity are:

- a. Plaintiff was deprived of rights under the United States Constitution;
- b. Such deprivation was caused by a person acting under color of state law;
- c. The governmental entity adopted, or failed to adopt, a policy statement, ordinance, regulation or decision adopted and promulgated by the governmental entity's lawmaking officers or by an official to whom the law makers delegate law-making authority or a persistent, widespread practice of officials or employees of the governmental entity which, though not authorized or officially adopted and promulgated, the policy is so common and well settled as to constitute a custom that fairly represents policy of the governmental entity; and
- d. The promulgation of the policy by City of Austin was done so with deliberate indifference to known or obvious consequences that violations of constitutional rights would occur, and the unconstitutional policy is the moving force behind the deprivation of the Plaintiff's rights.<sup>8</sup>

58. At all relevant times mentioned here, the City of Austin employed Officer Kyu An as a police officer of the Austin Police Department. The City of Austin provided this employee and

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<sup>8</sup> *Zarnow v. City of Wichita Falls*, 614 F.3d 461, 166-67 (5th Cir. 2010); see *Groden v. City of Dallas*, 826 F.3d 280, 283 (5th Cir. 2016).

agent with an official badge, identification, and uniform, which designated and described its bearers as Austin Police Officers.

59. At all relevant times mentioned here, Officer Kyu An, separately and in concert, acted under the color of law, as well as under the color of policies, practices, and customs of the City of Austin. The Defendants deprived Plaintiff of the rights, privileges, and immunities secured to Plaintiff by the First and Fourth Amendment to the United States Constitution and the laws of the United States.

60. The facts alleged above are part of the customs, practices, polices, and decisions of the Cirt of Austin, including but not limited to, the following:

- a. Shooting kinetic projective into crowds where innocent people could be injured;
- b. Using, authorizing, and/or tolerating excessive force against non-violent protestors;
- c. Failing to adequately discipline officers;
- d. Failing to adequately supervise officers;
- e. Failing to adequately train officers concerning de-escalation of force, crowd control, use of force against non-violent protestors, and the use or misuse of kinetic projectiles;
- f. Failing to train officers regarding demonstrators' free speech and assembly rights;
- g. Not intervening to stop constitutional violations, including excessive force;
- h. Failing to train or instruct officers about specific incidents it considers unreasonable, excessive force, or in violation of the constitution; and
- i. Disproportionally using and tolerating excessive force, including deadly force, against unarmed people of color.

61. Former Chief Brian Manly, who was a policymaker for the City of Austin related to law enforcement at the time, had a duty to properly train and supervise his deputies concerning the use of force and to prevent excessive force. Former Chief Brian Manly failed to properly train and

supervise Officer Kyu An in not engaging in excessive and the proper use of force.

62. Numerous other citizens have filed complaints and lawsuits against the City of Austin for excessive and unreasonable force stemming from police action in this protest and many other unrelated instances.

63. Further, 19 police officers, include Defendant Officer Kyu An have been indicted on criminal assault charges related to their conduct at this protest, including Officer Kyu An's conduct that makes the basis of this lawsuit.<sup>9</sup> This demonstrates that the City of Austin had a widespread failure to adequately train and/or supervise problem with its officers and/or condoned the use of these projectiles on innocent people at the time of the incident.

64. Each of these customs, practices, and/or policies was actually known, constructively known and/or ratified by the City of Austin, the Austin Police Department, and/or Former Chief Brian Manly, a policymaker for the City of Austin, and were promulgated with deliberate indifference to Plaintiff's rights, as guaranteed by the First and Fourth Amendments to the United States Constitution, and specifically deprived Plaintiff of his First Amendment right to free speech and to assemble and Fourth Amendment right to be free from excessive and unreasonable force. The known and obvious consequence of these policies was that Austin Police Department officers, and specifically Officer Kyu An, would be placed in recurring situations in which the constitutional violations that occurred in this incident would result. Plaintiff alleges that continuation of the above-mentioned practices of improper policies or customs actually caused Officer Kyu An to violate Plaintiff's constitutional rights.

65. Former Chief Brian Manly also ratified Officer Kyu An's conduct by failing to discipline Officer Kyu An for his use of excessive and unreasonable force. It took a grand jury indictment

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<sup>9</sup> <https://www.texastribune.org/2022/02/21/austin-police-indictment-protests/>

from citizens outside of Former Chief Brian Manly's control to bring Officer Kyu An to criminal justice.

### **VIII. DAMAGES**

66. Plaintiff hereby adopts, incorporates, restates and re-alleges paragraphs 1 through 65, inclusive, with regard to all causes of action.

67. As a result of Defendants' statutory and constitutional violations, Plaintiff has suffered serious and substantial damages and injuries, including but not limited:

- a. Past, present, and future medical expenses;
- b. Past, present, and future physical impairment;
- c. Past, present, and future physical pain and suffering;
- d. Past, present, and future emotional distress and mental anguish;
- e. Physical disfigurement; and
- f. Past, present, and future loss of earning capacity.

68. Defendants are *jointly and severally* liable for Plaintiff's damages.

69. Plaintiff seeks punitive damages against Defendant An for the actions described above.

### **IX. ATTORNEY'S FEES AND COSTS**

70. Pursuant to the *Civil Rights Attorney's Fees Award Act*, 42 U.S.C. § 1988, Plaintiff asserts the right to an award of attorney's fees and costs under its 42 U.S.C. § 1983 pleadings if he prevails.

### **X. RELIEF REQUESTED**

71. The preceding factual statements and allegations are incorporated by reference.

72. For these reasons, Plaintiff prays for judgment against Defendants, any or all of them, for the following:

- a. Actual damages;

- b. Pre-judgment and post-judgment interest;
- c. Statutory attorney's fees and expenses;
- d. Punitive and exemplary damages against the individual Defendant in an amount to be determined and as allowed by the Court;
- e. Costs of court; and
- f. Such other and further relief as the Court deems just and equitable.

#### **XI. JURY DEMAND**

73. Plaintiff respectfully demands trial by jury and has tendered the appropriate fee for the same.

#### **XII. PRAYER**

Plaintiff respectfully requests Defendants to be cited to appear and answer herein, and that upon final trial hereof, the Court award the relief sought against Defendants.

Respectfully submitted,

By: /s/ Myles Lenz

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214.389.7333 telephone

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**ATTORNEYS FOR PLAINTIFF**

**CERTIFICATE OF SERVICE**

I do hereby certify that on January 30, 2023, a true and correct copy of the above and foregoing document has been forwarded electronically to all counsel of record through CM/ECF.

/s/ Myles A. Lenz  
Myles A. Lenz

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

BOMANI BARTON,  
*Plaintiff,*

v.

CITY OF AUSTIN AND KYU AN,  
*Defendants.*

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Case No. 1:22-cv-00221-RP

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**DEFENDANT KYU AN'S ORIGINAL ANSWER TO  
PLAINTIFF'S FIRST AMENDED COMPLAINT**

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TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW Defendant, Kyu An, by and through his attorneys of record, and files this his Original Answer to Plaintiff's First Amended Complaint and in support thereof would respectfully show the Court as follows:

**I.**

**INTRODUCTION**

1. Between May 25 and July 31 of 2020, approximately 2,037 law enforcement officers were injured during protests related to the in-custody death of George Floyd in Minnesota.<sup>1</sup> During those protests, approximately 62% of major U.S. cities experienced looting.<sup>2</sup> 56% of major U.S. cities experienced arson incidents—a statistic which does not include the 97 police vehicles set on fire during that time period, which was an act of violence reported by over 26% of major city law

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<sup>1</sup> *Report on the 2020 Protests & Civil Unrest*, Major Cities Chiefs Association 9–12 (October 2020), <https://majorcitieschiefs.com/wp-content/uploads/2021/01/MCCA-Report-on-the-2020-Protest-and-Civil-Unrest.pdf>.

<sup>2</sup> *Id.*

enforcement agencies nationwide.<sup>3</sup> Approximately 72% of major city law enforcement agencies reported officer injuries.<sup>4</sup>

2. State and local governments in 21 different U.S. states were forced to call up the U.S. National Guard to defend persons and property from violent rioters.<sup>5</sup> Property Claims Services designated the riots as a “multi-state catastrophe event,” which is the first such designation for a civil disorder event since 1992.<sup>6</sup> Conservative insurance estimates of property damage caused during the riots exceeds \$1 billion dollars—the “costliest civil disorder in U.S. history.”<sup>7</sup>

3. The weapons used by the “protest” rioters nationwide varied. The most common weapons used “were improvised or weapons of opportunity such as rocks, bricks, pieces of landscape, and bottles (including frozen and glass bottles).”<sup>8</sup> Over three quarters of major city law enforcement agencies reported rioters using such weapons.<sup>9</sup> “Another common violent tactic used by protestors involved throwing ‘Molotov cocktails’ at officers,” which was reported by a staggering 46% of major city law enforcement agencies nationwide.<sup>10</sup> “Another common tactic was to use peaceful protesters as human shields while violent individuals attacked officers and attempted to incite violence by throwing objects from deep within crowds.”<sup>11</sup>

4. 63% of agencies reported incendiary fireworks thrown or launched at officers.<sup>12</sup> 51% of agencies reported officers being confronted by protestors wielding firearms—including “AR-15s,

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Facts + Statistics: Civil Disorders*, Insurance Information Institute, <https://www.iii.org/fact-statistic/facts-statistics-civil-disorders>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Report on the 2020 Protests & Civil Unrest* at 11.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 11 – 12.

shotguns, and handguns.”<sup>13</sup> Other weapons wielded by protestors commonly included bats, hammers, metal poles, and shields.<sup>14</sup> Five different agencies reported “police officers being shot or critically injured” during the riots, one agency reported rioters discharging their firearms from moving vehicles, and at least two agencies “reported protestors being shot and killed by other protestors.”<sup>15</sup>

5. It is undisputed that many protestors committed no violence whatsoever during the protests. It is equally undisputed that a significant number of protestors *did* commit violent acts during the protests. When a previously peaceful protest suddenly includes persons who are carrying deadly weapons, injuring police officers, throwing Molotov cocktails, looting buildings, and setting cars on fire, the protest is no longer a protest. It is a riot.

6. Austin was by no means immune to the violence. Rioters looted buildings and businesses; shattered windows—including buildings with important historical significance; set cars and other property on fire; broke open an ATM; and defaced the Capitol grounds and numerous other properties.<sup>16</sup> Rioters in Austin also launched or threw items that included—but were not limited to—“rocks, bricks, eggs, water bottles, and Molotov cocktails” at Austin Police Department officers.<sup>17</sup> Starting on May 30, the Austin Police Department was forced to issue a “citywide request for assistance, which means all Austin officers [were] asked to report to duty.”<sup>18</sup> DPS sent

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See e.g. Ken Herman, *Herman: A sad Sunday morning on Sixth Street*, AUSTIN AMERICAN STATESMAN (May 31, 2020, 1:38 PM), <https://www.statesman.com/news/20200531/herman-sad-sunday-morning-on-sixth-street>.

<sup>17</sup> Heather Osborne, Ariana Garcia & Katie Hall, *Fires set as Austin protests against police violence spread, scatter*, AUSTIN AMERICAN STATESMAN (May 30, 2020, 11:07 AM), <https://www.statesman.com/news/20200530/fires-set-as-austin-protests-against-police-violence-spread-scatter>.

<sup>18</sup> *Id.*

“more than 1,500 officers to assist local police departments” statewide, and the governor ultimately “activated the Texas National Guard.”<sup>19</sup> By the time of the incident underlying this lawsuit, the Austin protests were no longer protests—they were riots. It is thus within the context of an ongoing riot that the force used by APD officers must be analyzed.

7. On May 30, APD Officer Kyu An personally observed rioters throwing projectiles at APD officers that included but were not limited to rocks, glass bottles, fluid-filled water bottles, and large fireworks. Officer An himself suffered a serious burn to his neck as a result of one such rioter’s attack using an “artillery shell” style pyrotechnic explosive device, and was also struck by several other types of rioter-thrown projectiles that day.

8. APD Officer Kyu An was one of the APD officers tasked with policing the protests and riots to protect the citizens of Austin and the city itself on the day in question. APD officers on the scene had reason to believe that the protests would turn violent or even deadly—including the knowledge that rioters had burned a police precinct to the ground in a related “protest” two days earlier.<sup>20</sup> By the time Officer An arrived, protestors had physically taken over and blocked Interstate 35, creating a potentially deadly situation for themselves as well as oncoming drivers travelling on the highway.

9. Plaintiff Barton’s conduct on May 30, 2020 crossed the line of peaceful protest—including violent acts that intentionally and directly threatened the health and safety of officers on the scene. Plaintiff’s violent acts far exceeded anything that would be protected by the First Amendment.

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<sup>19</sup> *Id.*

<sup>20</sup> *See e.g.* Sarah Kerr, Mike Shum, Katie G. Nelson, Dmitry Khavin & Haley Willis, *Minneapolis Precinct Fire: How a Night of Chaos Unfolded*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/video/us/100000007162707/minneapolis-police-protest-burn.html?searchResultPosition=1>.

10. Over the course of the protest-turned-riot, Officer An never purposefully impacted any person who was not either actively committing a violent act, or was obviously preparing to imminently commit a violent act. Officer An never aimed his weapon at any rioter's head, neck, or face. At all times, Officer An acted pursuant to his training and accepted police procedures. Officer An's conduct as a law enforcement officer was reasonable, especially when the requisite consideration is given to his surrounding circumstances that were "tense, uncertain, and rapidly evolving."<sup>21</sup> He is entitled to the protections of Qualified Immunity as a result.

## II.

### ORIGINAL ANSWER

#### A. Nature of the Case.

11. Defendant admits that Plaintiff is seeking relief under the First and Fourth Amendments of the Constitution contained within Paragraph 1 of Plaintiff's First Amended Complaint. Otherwise, denied.

12. Defendant admits that Plaintiff is seeking relief pursuant to 42 USC § 1983 and constitutional provisions within Paragraph 2 of Plaintiff's First Amended Complaint. Otherwise, denied.

13. Defendant admits that Plaintiff is asserting a *Monell* claim against the City of Austin within Paragraph 3 of Plaintiff's First Amended Complaint. Otherwise, denied.

#### B. Parties.

14. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained within Paragraph 4 of Plaintiff's First Amended Complaint.

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<sup>21</sup> See *Graham v. Connor*, 490 U.S. 386, 397 (1989).

15. As to the allegations contained within Paragraph 5 of Plaintiff's First Amended Complaint, Defendant denies that any APD officer may be validly served at 715 E. 8<sup>th</sup> Street, Austin Texas 78701 through means other than personal service of process. Defendant otherwise admits the remaining allegations therein.

16. Defendant admits the allegations contained within Paragraph 6 of Plaintiff's First Amended Complaint.

**C. Jurisdiction and Venue.**

17. Defendant admits the allegations contained within Paragraphs 7 – 8 of Plaintiff's First Amended Complaint.

**D. Conditions Precedent.**

18. Defendant lacks sufficient knowledge to be able to form a belief as to the truth of the allegations contained in Paragraph 9 of Plaintiff's First Amended Complaint and therefore denies the same.

**E. Factual Background.**

19. As it pertains to the allegations contained in Paragraph 10 of Plaintiff's First Amended Complaint, Defendant admits that the Austin Police Department responded to and provided law enforcement support for large crowds of people gathered on May 30, 2020. Otherwise, denied.

20. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained within Paragraph 11 of Plaintiff's First Amended Complaint.

21. As to the allegations contained within Paragraph 12 of Plaintiff's First Amended Complaint, Defendant is without sufficient knowledge to form a belief as to the truth of the allegations as it pertains to what other APD officers were wearing when Plaintiff and his companions arrived.

22. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained within Paragraphs 13 – 18 of Plaintiff’s First Amended Complaint as written, and therefore denies the same.

23. As to the allegations contained within Paragraphs 19 – 21 of Plaintiff’s First Amended Complaint, Defendant admits that he discharged his bean bag shotgun at an individual who was observed and identified as a person who was actively throwing projectiles at police officers, and that such person may have been Plaintiff. Defendant further admits that he aimed his bean bag shotgun at the rioter’s waist and discharged his weapon three times in quick succession in conformance with his training. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations contained therein, and therefore denies the same.

24. As to the allegations contained within Paragraphs 22 – 26 of Plaintiff’s First Amended Complaint, Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained therein, and therefore denies the same.

25. As to the allegations contained within Paragraphs 27 – 28 of Plaintiff’s First Amended Complaint, Defendant admits that the Travis County District Attorney issued 19 indictments to APD officers, including to Defendant. The indictments and the cited news article related to the indictments speak for themselves. Defendant is without sufficient knowledge to form a belief as to the truth of whether District Attorney Garza made any attempts to prosecute projectile-throwing rioters or those who may have enabled them. Defendant denies the remaining allegations and characterizations in Paragraphs 27 – 28 of Plaintiff’s First Amended Complaint.

**F. Causes of Action.**

**i. §1983 – Excessive-Force Claims against Kyu An in his Individual Capacity.**

26. As to the allegations contained in Paragraph 29, Defendant adopts and incorporates his responses to the previous Paragraphs of the Complaint.

27. As to the allegations contained in Paragraphs 30 – 39 of Plaintiff’s First Amended Complaint, Defendant admits that he was acting under the color of law during the protests and riots that form the backdrop of this lawsuit. No response from this Defendant is necessary regarding what the law allegedly is as it relates to the claims alleged. Otherwise, denied.

**ii. §1983 – First Amendment Retaliation Claims Against Kyu An in his Individual Capacity.**

28. As to the allegations contained in Paragraph 40, Defendant adopts and incorporates his responses to the previous Paragraphs of the Complaint.

29. As to the allegations contained in Paragraphs 41 – 45 of Plaintiff’s First Amended Complaint, no response from this Defendant is necessary regarding what the law allegedly is as it relates to the claims alleged. Otherwise, denied.

**iii. Qualified Immunity Under § 1983.**

30. As to the allegations contained in Paragraph 46, Defendant adopts and incorporates his responses to the previous Paragraphs of the Complaint.

31. As to the allegations contained within Paragraphs 47 – 54 of Plaintiff’s First Amended Complaint, no response from this Defendant is necessary regarding what the law allegedly is as it relates to the claims alleged. Defendant specifically denies that Barton and those around him posed no immediate threat to officers, and denies that Barton was not disobeying a lawful command, and/or was not suspected of a crime. Defendant denies the remaining allegations and characterizations therein.

**iv. Governmental Liability Under 42 U.S.C. §1983 (*Monell*) and the First and Fourth Amendment to the U.S. Constitution applied through the Fourteenth Amendment.**

32. As to the allegations contained in Paragraph 55, Defendant adopts and incorporates his responses to the previous Paragraphs of the Complaint.

33. As to the allegations contained in Paragraphs 56 – 65, no answer is necessary from this Defendant. To the extent any answer is deemed necessary, Defendant denies the allegations therein.

**v. Damages, Relief Requested, Jury Demand, & Prayer.**

34. As to the allegations contained in Paragraphs 66 – 73, no answer is necessary from this Defendant. To the extent any answer is deemed necessary, Defendant admits that Plaintiff seeks the relief requested therein, but denies that any of his own alleged conduct at issue amounted to an injustice of any kind.

**III.**

**AFFIRMATIVE DEFENSES & IMMUNITIES**

35. 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.*

36. 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 him from using force to defend himself and/or other persons from an active or imminent assault with a potentially deadly weapon or projectile, whether during a riot or otherwise.

37. 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 Plaintiff himself. To the extent legally applicable herein, Defendant invokes the comparative responsibility provisions of the Texas Civil Practice & Remedies Code.<sup>22</sup>

38. 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.

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

40. 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.

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

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

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

#### IV.

#### **JURY DEMAND**

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

#### V.

#### **PRAYER FOR RELIEF**

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

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<sup>22</sup> See TEX. CIV. PRAC & REM. CODE ANN. § 33.001.



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

**BOMANI BARTON**  
*Plaintiff*

v.

**CITY OF AUSTIN AND KYU AN**  
*Defendants*

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CIVIL ACTION No. 1:22-CV-00221-RP

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

TO THE HONORABLE JUDGE ROBERT PITMAN:

Defendant City of Austin (“the City”) files this Answer and Affirmative Defenses to Plaintiff’s First Amended Complaint (Doc. No. 30). Pursuant to Rules 8 and 12 of the Federal Rules of Civil Procedure, the City respectfully shows the Court the following:

**ORIGINAL ANSWER**

Pursuant to Federal Rule of Civil Procedure 8(b), the City responds to each of the specific averments in Plaintiffs’ First Amended Complaint as set forth below. To the extent that the City does not address a specific averment made by Plaintiffs, the City expressly denies that averment.<sup>1</sup>

**NATURE OF THE CASE**

1. The City admits that Plaintiff is seeking relief under the First and Fourth Amendments of the Constitution. The City denies the remaining allegations contained in Paragraph 1.
2. The City admits that Plaintiff is seeking relief pursuant to 42 USC § 1983 and constitutional provisions but denies that Plaintiff is entitled to such relief.

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<sup>1</sup> Paragraph numbers in Defendant’s Answer correspond to the paragraphs in Plaintiffs’ First Amended Complaint.

3. The City admits that Plaintiff is asserting a *Monell* claim against the City but denies the remaining allegations contained in Paragraph 3.

#### **PARTIES**

4. Upon information and belief, the City admits the allegations contained in Paragraph 4.
5. The City denies that any APD officer can be served at 715 E. 8<sup>th</sup> Street, Austin Texas 78701 but admits the remaining allegations contained in Paragraph 5.
6. The City admits the allegations contained in Paragraph 6.

#### **JURISDICTION**

7. The City admits the allegations contained in Paragraph 7.

#### **VENUE**

8. The City admits the allegations in Paragraph 8.

#### **CONDITIONS PRECEDENT**

9. The City is without information sufficient to admit or deny the allegations in Paragraph 9.

#### **FACTUAL BACKGROUND**

10. The City admits that the Austin Police responded and to and provided law enforcement support for large crowds of people gathered on May 30, 2020. The City denies the remaining allegations contained in Paragraph 10.
11. The City admits that on May 30, 2020, Plaintiff was in downtown Austin. Otherwise, the City lacks sufficient information to admit or deny the remainder of the allegations of Paragraph 11.
12. The City lacks sufficient information to admit or deny the allegations contained in Paragraph 12.

13. The City lacks sufficient information to admit or deny the allegations contained in Paragraph 13.
14. The City admits police use of force included OC Spray in response to violence and threats of violence by large crowds gathered on May 30, 2020. The City lacks sufficient information to admit or deny the remaining allegations in Paragraph 14.
15. The City lacks sufficient information to admit or deny the allegations contained in Paragraph 15.
16. The City admits that there were large crowds of people gathering at or near the Capitol Complex on May 30, 2020. The City further admits police use of force included OC Spray in response to violence and threats of violence by large crowds gathered. The City denies the remaining allegations in Paragraph 16.
17. The City admits that there were large crowds of people gathering at or near Austin Police Headquarters on May 30, 2020.
18. The City admits police use of force included OC Spray in response to violence and threats of violence by large crowds gathered on May 30, 2020. The City lacks sufficient information to admit or deny the remaining allegations in Paragraph 18.
19. In response to Paragraph 19, the City admits that there were large crowds of people gathered and walking in the traffic lanes of Interstate Highway 35 (“IH 35”). The City admits that video recordings, the contents of which speak for themselves, show Plaintiff on IH 35, including on the concrete median. Otherwise, denied.
20. In response to Paragraph 20, the City admits that video recordings, the contents of which speak for themselves, show Plaintiff, Officer Kyu An, and other officers on IH 35. Otherwise denied.

21. In response to Paragraph 21, the City admits that video recordings, the contents of which speak for themselves, show Plaintiff and Officer Kyu An on IH 35. The City admits that Officer Kyu An discharged his beanbag shotgun resulting in Plaintiff being struck by one or more beanbag rounds. The City lacks sufficient information to admit or deny the remainder of the allegations in Paragraph 21.
22. The City lacks sufficient information to admit or deny the allegations in Paragraph 22.
23. The City lacks sufficient information to admit or deny the allegations in Paragraph 23.
24. The City denies the allegation of police brutality in paragraph 24. Otherwise, the City lacks sufficient information to admit or deny the allegations in Paragraph 24.
25. The City lacks sufficient information to admit or deny the allegations contained in Paragraph 25.
26. The City lacks sufficient information to admit or deny the allegations contained in Paragraph 26.
27. In response to Paragraph 27, the City admits that Officer Kyu An and other officers have been indicted and that the indictments speak for themselves. The City denies the allegation of police brutality. Otherwise, the City lacks sufficient information to admit or deny the allegations contained in Paragraph 27.
28. In response to Paragraph 28, the City states that Plaintiff was unlawfully blocking traffic lanes on IH 35 and therefore denies that he was peacefully protesting. The City admits that Plaintiff was not arrested or charged with a crime for any events of May 30, 2020. Otherwise, the City lacks sufficient information to admit or deny the allegations of Paragraph 28.

### CAUSES OF ACTION

29. Paragraph 29 does not allege facts and does not require a response.
30. The allegations contained in Paragraph 30 do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within Paragraph 30.
31. The allegations contained in Paragraph 31 do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within Paragraph 31.
32. Paragraph 32 contains a restatement of the legal requirements needed to assert a cause of action for excessive force and for that reason does not require a response.
33. Paragraph 33 contains a legal conclusion and further does not appear to be directed to the City. To the extent a response is required, the City denies the allegations in Paragraph 33.
34. The allegations contained in Paragraph 34 do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within Paragraph 34.
35. The allegations contained in Paragraph 35 do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within Paragraph 35. Upon information and belief, the City admits that Plaintiff was not arrested or charged with any crimes related to the May 30, 2020, protest.
36. Paragraph 36 does not appear to be primarily directed to the City. The City admits that police use of beanbag shotgun rounds in response to violence and threats of violence by large crowds at the May 30, 2020, protests resulted in Plaintiff being struck with beanbag

round. Otherwise, the City lacks information sufficient to admit or deny the remainder of the allegations in Paragraph 36.

37. Paragraph 37 contains a legal conclusion and further does not appear to be directed at the City. If a response is required of the City, the City denies the allegations contained within Paragraph 37.
38. The allegations contained in Paragraph 38 do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within Paragraph 38.
39. The allegations contained in Paragraph 39 do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within Paragraph 39.
40. Paragraph 40 does not allege facts and does not require a response.
41. Paragraph 41 contains a restatement of the legal requirements needed to assert a cause of action for retaliation and for that reason does not require a response.
42. The allegations contained in Paragraph 42 do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City admits that Plaintiff was present in the crowd of people assembled in and near the downtown areas on May 30, 2020, it is without sufficient information to admit or deny what rights if any Plaintiff purported to exercise on May 30, 2020. The City states that Plaintiff was unlawfully blocking traffic lanes on IH 35 and therefore denies that he was engaged in peaceable assembly.

43. The allegations contained in Paragraph 43 do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within Paragraph 43.
44. The allegations contained in Paragraph 44 do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City admits that it does not have any information indicating that Plaintiff was in possession of a weapon or that he was arrested or charged with any crime on May 30, 2020. The City denies the remaining allegations contained within Paragraph 44. The City states that Plaintiff was unlawfully blocking traffic lanes on IH 35 and therefore denies that he was engaged in peaceful protest.
45. The allegations contained in Paragraph 45 do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within Paragraph 45.
46. Paragraph 46 does not allege facts and does not require a response.
47. Paragraph 47 is a restatement of the law related to qualified immunity and any allegations contained within that legal restatement do not appear to be directed at the City. To the extent a response is required, the City admits Officer Kyu An was carrying out a governmental function and denies the remainder of the allegations of Paragraph 47.
48. Paragraph 48 contains a reference to Fifth Circuit case related to qualified immunity and legal requirements. The case speaks for itself and beyond that does not require a response.
49. Paragraph 49 contains a reference to and quote from Fifth Circuit case involving the use of tasers. The case speaks for itself and beyond that does not require a response.

50. Paragraph 50 contains a reference to a Fifth Circuit case involving an arrestee. As such, it does not require a response from the City.
51. Paragraph 51 is a legal conclusion. To the extent a response is warranted, the City denies allegations of paragraph 51.
52. Paragraph 52 does not appear to be directed to the City. To the extent a response is required, other than the fact that Plaintiff was in a large crowd of people unlawfully blocking traffic lanes on IH 35 and that the crowd included people who were engaged in violent or otherwise threatening or unlawful behavior, the City admits that it does not have any information indicating that Plaintiff was guilty of any criminal conduct on May 30, 2020. Otherwise, the City lacks sufficient information to admit or deny the allegations in Paragraph 52.
53. The allegations contained in Paragraph 53 do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within Paragraph 53.
54. The allegations contained in Paragraph 54 do not appear to be addressed to the City and therefore no response is required. If a response is required of the City, the City denies the allegations contained within Paragraph 54.
55. Paragraph 55 does not allege facts and does not require a response.
56. Paragraph 56 is a policy statement behind the cause of action and does not contain factual allegations for the City to admit or deny. The City denies that it is liable for any constitutional violations as described.
57. Paragraph 57 is a statement of the legal elements for a *Monell* claim and does not contain

allegations that require the City to admit or deny. To the extent the cited elements contain factual allegations or references against the City, the City denies Paragraph 57.

58. The City admits that on May 30, 2020, Kyu An was employed by the City of Austin as a full-time and licensed police officer. The City admits it provided Officer An with City-issued equipment applicable to full-time officers for the City of Austin.
59. The City admits that Officer Kyu An was employed as a peace officer on May 30, 2022, and was on duty on May 30, 2020, as a City of Austin police officer. The City denies the remaining allegations contained in Paragraph 59.
60. The City denies the allegations contained in Paragraph 60.
61. The City admits that former Chief Brian Manley served as a law enforcement policy maker, including policy maker for law enforcement training, during the May 2020 protests. The City denies the remaining allegations in Paragraph 61.
62. The City admits that multiple individuals have filed lawsuits alleging excessive force related to the May 2020 protests and other incidents. Otherwise the City denies the allegations of Paragraph 62.
63. The City admits that the Travis County District Attorney issued indictments to APD officers, including Officer Kyu An and that the indictments speak for themselves. The City denies the remaining allegations in Paragraph 63.
64. The City denies the allegations in Paragraph 64.
65. Per Texas state law, the disciplinary process for an officer remains open regarding the allegations in this lawsuit. The disciplinary process is deferred until 30 days after the conclusion of the related criminal process. Otherwise, the City denies the allegations in Paragraph 65.

### **DAMAGES**

66. Paragraph 66 does not allege facts and does not require a response.
67. The City denies the allegations contained in Paragraph 67 and denies Plaintiff is entitled to the relief requested in Paragraph 67 a-f.
68. The City denies the allegations contained in Paragraph 68.
69. The City admits Plaintiff seeks punitive damages against Defendant but denies that Plaintiff is entitled to such relief.

### **ATTORNEY'S FEES AND COSTS**

70. The City admits that Plaintiff seeks an award of attorney's fees and expenses under 42 U.S.C. § 1988 but denies that Plaintiff is entitled to such relief.

### **RELIEF REQUESTED**

71. Paragraph 71 does not allege facts and does not require a response.
72. The City denies liability for the damages sought in Paragraph 72 and denies Plaintiff is entitled to the relief requested in subparagraphs a-f.

### **JURY DEMAND**

73. Paragraph 73 is a request for a trial by jury and does not contain allegations that require the City to admit or deny.

### **AFFIRMATIVE DEFENSES**

74. 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.

75. 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.
76. As a political subdivision, Defendant City of Austin denies that it can be liable for exemplary/punitive damages under 42 U.S.C. § 1983.
77. 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 Plaintiff be denied, that the Court dismiss this case with prejudice, and that the Court award Defendant costs and attorney's fees, and any additional relief to which it is entitled under law or equity.

Respectfully submitted,

*/s/ Daniel R. Richards*

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**ATTORNEYS FOR THE CITY OF AUSTIN**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 15, 2023, a true and correct copy of the foregoing document was served via email to the following:

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*/s/ Daniel R. Richards*

\_\_\_\_\_ **DANIEL R. RICHARDS**

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

**BOMANI BARTON**  
*Plaintiff*

v.

**CITY OF AUSTIN AND KYU AN**  
*Defendants*

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CIVIL ACTION No. 1:22-CV-00221-RP

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Now come, through undersigned counsel, Plaintiff, Bomani Barton and Defendants, The City of Austin and Kyu An (hereinafter referred to as “Parties”), and pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), file this Joint Stipulation of Dismissal with Prejudice as follows:

The parties have resolved all matters in dispute by agreement. The parties agree that this suit is dismissed with prejudice to the refiling of the claims made herein. The parties agree that each party shall bear their own attorney’s fees and costs of court.

Respectfully submitted,

By: /s/ Myles Lenz  
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By: /s/ Daniel R. Richards

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**ATTORNEYS FOR THE CITY OF AUSTIN**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on August 3, 2023, a true and correct copy of the foregoing document was served via email to the following:

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*/s/ Daniel R. Richards*

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**DANIEL R. RICHARDS**

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

BOMANI BARTON,

Plaintiff,

v.

CITY OF AUSTIN and KYU AN,

Defendants.

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1:22-cv-221-RP

**ORDER**

On August 3, 2023, the parties dismissed all claims in this case with prejudice by joint stipulation of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). (Dkt. 38).

“Stipulated dismissals under Rule 41(a)(1)(A)(ii) . . . require no judicial action or approval and are effective automatically upon filing.” *Yesh Music v. Lakewood Church*, 727 F.3d 356, 362 (5th Cir. 2013).

As nothing remains to resolve, **IT IS ORDERED** that the case is **CLOSED**.

**SIGNED** on August 4, 2023.



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ROBERT PITMAN  
UNITED STATES DISTRICT JUDGE