No. 22-20482
United States Court of Appeals for the Fifth Circuit

Donald Woods, individually and on behalf of the estate of Danny Thomas; Marketta Chanta Thomas, individually and on behalf of the estate of Danny Thomas; Naisha Bell, as next friend of M.K. Thomas; Diane Turner, as next friend of B.D. Turner; Necole West, as next friend of D.R. Thomas; Denise Matthews, as next friend of D.R. Thomas; Ronshell Hampton, as next friend of L.N. Hampton; Adenike Thomas, individually,

Plaintiffs - Appellants

v.

Harris County, Texas; Cameron Brewer,

Defendants - Appellees

Appeal from the United States District Court for the Southern District of Texas in Case No. 4:18-CV-1152, the Honorable Ewing Werlein, Jr.

BRIEF OF APPELLEE HARRIS COUNTY, TEXAS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Fifth Circuit Rule 28.2.3, Appellee Harris County believes the dispositive issues have been authoritatively decided, the facts and legal arguments in this appeal are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

This case involves the straightforward application of law to an incident documented by multiple videos and witnesses with facts that cannot reasonably be disputed. The magistrate judge prepared a well-reasoned opinion that the district court adopted which properly found Harris County could not be liable under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978) and the Americans with Disabilities Act and Rehabilitation Act. Because the facts and law are well established, oral argument would not significantly aid the Court's decisional process.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

STATEMENT OF THE ISSUES

Harris County respectfully suggests Appellants' Statement of the Issues does not accurately reflect the issues before the Court with respect to Harris County. A more accurate Statement of the Issues is as follows:

I. Did the district court properly dismiss Plaintiffs' use of force and failure to render medical aid claims against Harris County when Harris County had no policy or custom permitting Sheriff patrol officers to use unreasonable force or deny medical aid, and no County policy or custom was the moving force behind Danny Thomas's injury?

II. Did the district court properly dismiss Plaintiffs' failure to train claim against Harris County when the Sheriff's Office had an accredited training program that trained Deputy Cameron Brewer in compliance with state law, there was no notice or reason to believe Brewer was inadequately trained, his training was not the moving force behind Danny Thomas's injury, and Brewer was fired as a result of his action?

III. Did the district court properly dismiss Plaintiffs' Americans with Disabilities Act and Rehabilitation Act claims against Harris County when Plaintiffs failed to show Danny Thomas had a qualifying disability, when Thomas did not request an accommodation and was not excluded from participation in or denied services, programs, or activities, or otherwise discriminated against, and when Thomas fell outside the ADA's protections by his active illegal drug use during an exigent circumstance where a police officer needed to secure a quickly unfolding scene?

STATEMENT OF THE CASE

I.
FACTS

A. Deputy Cameron Brewer tried to deescalate an emerging street fight and was forced to retreat backwards "in circles" into a busy intersection.

On March 18, 2018, Deputy Cameron Brewer was on duty and driving south on Imperial Valley Lane. Without warning, a white car was forced to abruptly stop for Danny Thomas, a pedestrian standing in traffic with his pants "pulled down to his ankles exposing his boxer shorts" and a "white substances around his mouth area." ROA.1342, 1344, 2356 ("cellphone video", marked Bates No. HC01095 filed under seal), and ROA.2357 ("dashcam video", marked Bates No. HC01091 filed under seal). Thomas began banging on the white car's hood with his fists, which caused the driver to get out and confront him. ROA.1387-1388.

Thirty-four seconds into Brewer's dashcam video, Thomas walks toward the driver. ROA.2357 (dashcam video at :34). The smaller driver retreats behind his car and then pushes Thomas to slow his advance.[1]

[1] ROA.2357 (dashcam video at :37). Witnesses support this interpretation of the video. Veronica Garcia reported two men "fighting in the middle of the street" and expressed relief that Deputy Brewer arrived to "get them and arrest them." ROA.1350.

Brewer tries to deescalate the fight, and the driver retreats off camera. Instead of withdrawing, Thomas redirects his attention to Brewer. Forty seconds into the dashcam video, Thomas points at Brewer and methodically walks toward him. ROA.2357 (dashcam video at :40). Brewer shouts warnings, and—at least seven times—instructs Thomas to stop. Forty-six seconds into the dashcam video, Brewer—who was holding a weapon—shouted "I'll shoot your ass!" ROA.2357 (dashcam video at :40) and ROA.1364. Thomas ignored these commands and continued advancing toward Brewer. ROA.1387-1381.

Bystander video from Kaaryn Young establishes that as Brewer ordered Thomas to stop, Thomas passed the white car, approached Brewer's squad car (with lights activated), and confronted Brewer on the other side of the squad car. Brewer was forced to retreat backwards into a busy intersection as Thomas continued to advance. ROA.2356 (Young cell phone video, Bates labeled HC01095, filed under seal, at :10-:37).

Brewer circled around his vehicle to maintain a safe distance between himself and Thomas. However, Thomas continued to ignore the warnings and walk toward Brewer. ROA.2356 (Young cell phone video, Bates labeled HC01095, filed under seal, at :10-:37). When Thomas was

only four feet away and within "striking distance" of Brewer (ROA.1358, 1393-1395), Brewer fired one shot, which killed Thomas. Brewer called for medical assistance. ROA.1343 and ROA.2357 (dashcam video at 1:28).

Witnesses support this interpretation of the video. Veronica Garcia reported Brewer was "going in circles" to retreat, but "the guy kept coming at the officer . . . he kept coming in an angry way" until he "got so close to the officer." ROA.1351.

Paul Wanza noted Brewer "made a complete circle backing up and the guy kept coming toward the officer." He explained "the officer was steadily trying to get away from the guy and the guy kept coming. . . the officer was going in a circle trying to get away from the guy." ROA.1351. A witness who saw Thomas immediately prior to the incident noted he had been clinching his fists, growling, and "trying to fight with people" ROA.1352. Other witnesses report he was threatening other drivers, beating on cars, and "being very aggressive." ROA.1365.

B. Brewer shot Thomas, and the Harris County Sheriff's Office fired Brewer for violating policy.

Harris County issued a Taser to Brewer, but he made the "split-second decision" to draw his service weapon and shoot Thomas because he believed Thomas was experiencing "excited delirium," during which

people exhibit "extraordinary strength" that makes non-lethal force less effective. ROA.1358-1359 and 1393-1396. Brewer also feared Thomas would get close enough to "get control of my weapon." ROA.1359-1361.

After the incident, the Harris County Sheriff's Office prepared a Use of Force Report (ROA.1346), and the Internal Affairs Department conducted a thorough investigation. ROA.1338-1368. The investigation concluded that Brewer violated two Sheriff's Office Policies—Policy 501, which governs an officer's use of force and Policy 202, which required Brewer to notify the dispatcher of his location and situation before taking police action. ROA.1338-1368 at 1338, 1432, and 2369-2370.

Although Brewer had never fired a weapon in the line of duty and had a good service record (ROA.1384), the Sheriff's Office fired him. ROA.1399-1417. Sheriff Ed Gonzalez testified that he believed Brewer used force that was "excessive for the circumstances" (ROA.2361-2364) and should have deployed his Taser instead of his gun. ROA.1427 and 1432. The Harris County District Attorney's Office investigated Brewer and charged him with aggravated assault by a public servant. In August 2019, a jury acquitted him. ROA.1433 and 2704.

II.
PROCEDURAL HISTORY

Appellants filed suit on April 11, 2018 and filed their Second Amended Complaint, which is their live pleading, on September 25, 2018. ROA.138-169. Appellants asserted a *Monell* claim for excessive force (Count 4), a *Monell* claim for failure to train (Count 5), and an Americans with Disabilities Act and Rehabilitation Act claim (Counts 10 and 11) against Harris County. They later withdrew their Fourteenth Amendment Equal Protection Claim (Count 3). Appellants' Brief at fn 1; ROA.3638-3639 and 3652.

On November 10, 2021, after extensive discovery, Harris County moved for Summary Judgment. ROA.508-1061. On February 21, 2022, Harris County filed an Amended Motion for Summary Judgment. ROA.1859-2021. Appellants responded (ROA.2571-3374), and Harris County replied. ROA.3392-3441. Appellants filed objections to certain Harris County exhibits (ROA.3375-3382) and then Amended Objections (ROA.3383-3390), to which Harris County responded. ROA.3442-3480. Harris County moved to strike some of Appellants' summary judgment exhibits (ROA.3481-3497), Appellants responded (ROA.3497-3506), and Harris County replied. ROA.3508-3512.

District Judge Ewing Werlein, Jr. referred the pending matters to Magistrate Judge Yvonne Ho. ROA.3513-3515. On May 11, 2022, Judge Ho heard oral argument.[2] On May 26, 2022, Judge Ho issued a 52-page Memorandum and Recommendation granting both Brewer and Harris County's motions for summary judgment and denying the evidentiary motions as moot. ROA.3526-3577.

Judge Ho found that a reasonable jury could conclude Deputy Brewer used objectively unreasonable force. ROA.3533-3541. However, Brewer is entitled to qualified immunity because there is no binding legal authority or robust consensus of persuasive authority, and it is not obvious, that deadly force cannot be used when a suspect has "white foam around the mouth" and continues advancing to within four feet of a deputy while ignoring instructions. ROA.3541-3552 at 3546. See also, ROA.1368 and 1396.

Judge Ho found Plaintiffs failed to state a claim against Harris County for excessive force because they failed to show that the Sheriff's Office had a policy (or a persistent widespread practice so common and

[2] On May 9, 2022, Judge Ho issued an order to help the parties identify relevant issues for oral argument. ROA.3524-3525. The transcript is at ROA.3669-3774.

well-settled as to constitute a custom) of patrol officers using excessive force. ROA.3553-3563.

Judge Ho found Plaintiffs failed to state a claim against Harris County for denial of medical care because the Sheriff's Office does not have a policy or custom of permitting patrol officers to deny medical care. ROA.3563-3564.

Judge Ho found Plaintiffs failed to state a claim against Harris County for the process by which the Sheriff's Office reviews policies. Only policies themselves—not the process by which they are drafted—is actionable, there is no showing of deliberate indifference, and there is no evidence of direct causation between the review process and Thomas's injuries. ROA.3564-3567.

Judge Ho found Harris County equipped officers with options to use less-lethal force, such as Tasers. ROA.3567-3568. Judge Ho found no evidence to support Plaintiffs' claim that the Sheriff's Office inadequately trained Brewer, and it was uncontroverted that Brewer was trained in accordance with state requirements. ROA.3568-3572.

Finally, Judge Ho found Plaintiffs failed to state a claim under the Americans with Disabilities Act or Rehabilitation Act because they failed

to show Harris County had actual knowledge that Thomas had a qualifying disability or was excluded from participation in or denied services, programs, or activities, or otherwise discriminated against. Plaintiffs failed to show that Thomas requested a specific accommodation, and he was also excluded from ADA protection by his active illegal drug use and because Brewer was faced with the exigent need to secure Thomas in a quickly unfolding scene. ROA.3572-3576.

Plaintiffs objected to Judge Ho's Report and Recommendation (ROA.3650-3669), Harris County responded (ROA.3610-3615), and Plaintiffs replied. ROA.3627-3633. On August 22, 2022, the district court issued a detailed order affirming the Recommendation and issued a Final Judgment with respect to the claims against Harris County. However, Appellants' state law claims against Brewer remain, and the district court declined to exercise supplemental jurisdiction. ROA.3647-3657.

SUMMARY OF THE ARGUMENT

(Response to pages 11-12.)

To reverse summary judgment on their 42 U.S.C. § 1983 claims against Harris County, Appellants must identify how the Sheriff promulgated an official policy of using unreasonable force or providing inadequate training that was the moving force causing Thomas's

constitutional injuries. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).

Appellants admit the Sheriff's use of force policy is constitutional (Appellants' Brief at 28, citing ROA.2531), and they cannot dispute that the Sheriff provides training that meets or exceeds state and national standards. See response at 35-48, *infra*. These facts are dispositive of Appellants' § 1983 claims against Harris County.

On appeal, Appellants take a scattershot approach trying to connect inaccurate, irrelevant, and disparate facts to argue the Sheriff permitted a culture of using excessive force. While recognizing the Sheriff's policy is constitutional, they claim the process by which he created it was somehow defective. Appellants' Brief at 38-41; see response at 17-21, *infra*. They never explain how that is even actionable—much less how it satisfies their burdens under *Monell*.

In the court below, Appellants cited 23 inapposite cases and reports they contend showed a pattern of excessive force. On appeal, they cite only two reports and one case. One report dealt with conditions in the jail (not among patrol officers) under a different administration 10 years earlier. The second dealt with racial disparities in traffic stops, was

published three years *after* the incident at bar, and found no "prima facia evidence of racial profiling, biased policing, or prejudicial policing." Appellants' Brief at 43-46; See response at 24-30, *infra*, citing ROA.3269.

Appellants similarly claim the Sheriff had an unconstitutional training program. The Sheriff's Office was accredited, and Brewer was a licensed peace officer in compliance with state law who had 5,428 hours of relevant training and coursework, which included classes on using a Taser and a class that trained him how to handle a situation when a person is suffering from excited delirium. See pages 37-38 and fn.5, *infra*, citing ROA.1347 and 1364-1365.

Appellants respond with unsupported speculation that Brewer should have taken more courses and the Sheriff should have given him bean bag shotguns and other equipment instead of a Taser. Appellants' Brief at 50-58; see response at pages 38-40, *infra*. That argument is contradicted by evidence that Tasers are the best non-lethal option when someone is experiencing excited delirium, and that Brewer was trained to use a Taser under the circumstances, but chose not to do so. ROA.1365.

Although there is no evidence Brewer was inadequately trained, that would still not support a *Monell* claim. As the Supreme Court

cautions in *Canton*, the question is not whether one officer (or even a class of officers) lacks training, but whether the policymaker had a policy of failing to provide an adequate training program at all. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389-390 (1989). Appellants fail to identify any systemic deficiencies in the Sheriff's training program.

To reverse summary judgment on their Americans with Disabilities Act and Rehabilitation Act claims against Harris County, Appellants are first required to show Brewer had a disability under the ADA and that Harris County had actual knowledge than an accommodation was necessary. *Smith v. Harris County*, 956 F.3d 311, 319 (5th Cir. 2020).

Appellants admit a reasonable officer could believe Thomas was under the influence of a controlled substance. ROA.2602 and 3574. Brewer believed that (ROA.1393), and he was right. ROA.3576 and 3735. Under 28 C.F.R. § 35.104, a public entity is not liable under the ADA when it responds to a person engaging in the illegal use of drugs.

Appellants also fail to show what accommodation Brewer needed, or how Harris County could have provided it, particularly in light of Brewer's need to secure a rapidly evolving street disturbance while being advanced on. *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000).

ARGUMENT

I.
STANDARD OF REVIEW

A court of appeals reviews summary judgment *de novo* and applies the same standards as the district court. *Mason v. Lafayette City-Parish Consolidated Government*, 806 F.3d 268, 274 (5th Cir. 2015). Federal Rule of Civil Procedure 56 requires a court to grant summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Westfall v. Luna*, 903 F.3d 534, 546 (5th Cir. 2018) (internal quotes omitted). A fact is material "if its resolution could affect the outcome of the action." *Dyer v. Houston*, 964 F.3d 374, 379-80 (5th Cir. 2020), quoting *Sierra Club, Inc. v. Sandy Creek Energy Associates*, 627 F.3d 134 (5th Cir. 2010).

A court reviews facts and reasonable inferences in the light most favorable to the nonmoving party. However, a court resolves factual controversies "only when there is an actual controversy—that is, when both parties have submitted evidence of contradictory facts." *Laughlin v.*

Olszewski, 102 F.3d 190, 193 (5th Cir. 1996), citing *McCallum Highlands, Ltd. v Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995).

Appellants filed suit against Harris County under 42 U.S.C. § 1983, the Americans with Disabilities Act, and the Rehabilitation Act based on Brewer's actions. Under § 1983, "a municipality cannot be held liable *solely* because it employs a tortfeasor…" *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 691 (1978); *Shumpert v. City of Tupelo*, 905 F.3d 310, 316 (5th Cir. 2018), as revised (Sept. 25, 2018).

To establish municipal liability under § 1983, a plaintiff must first prove his constitutional rights were violated. He must then prove (1) the existence of an official policy, custom, or practice, (2) of which a municipal policymaker had actual or constructive knowledge, (3) that was the moving force causing the constitutional violation. *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002).

If the policy is facially innocuous, a plaintiff must prove it was "promulgated with deliberate indifference to the known or obvious consequences that constitutional violations would result." *Piotrowski v. City of Houston*, 237 F.3d 567, 579-80 (5th Cir. 2001) (internal quotation marks and citations omitted). Further, causation is strictly construed,

and there must be a "direct causal link between the municipal policy and constitutional deprivation." *Id.*, 237 F.3d at 580.

With respect to the Americans with Disabilities Act and Rehabilitation Act claims, a plaintiff must show (1) he is a qualified individual within the meaning of the ADA, (2) he is excluded from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity, and (3) this exclusion, denial of benefits, or discrimination is because of his disability. *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 671-672 (5th Cir. 2004).

II.
THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON APPELLANTS' *MONELL* CLAIMS AGAINST HARRIS COUNTY

(Response to Appellants' Brief at 36-58.)

Appellants claim Judges Ho and Werlein erred in not finding a genuine issue of material fact that Harris County is liable for having a defective use of force policy under *Monell* because the Sheriff's Office allegedly (1) did not adopt systemic use of force reviews and evaluations (Appellants' Brief at 38-41), (2) did not equip officers with less-lethal force options (Appellants' Brief at 41-43), (3) showed a pattern of excessive

force and failure to render medical aid based on race (Appellants' Brief at 43-46), (4) was deliberately indifferent, and these policies were the moving force behind Thomas's injuries. Appellants' Brief at 46-50.

Appellants separately claim Judges Ho and Werlein erred in not finding a genuine issue of material fact that Harris County is liable under *Monell* for failing to train its officers. Appellants' Brief at 50-58.

A. The district court properly dismissed Appellants' complaints about the Sheriff's use of force policy and review process.

(Response to Appellants' Brief at 38-41.)

Appellants first claim Harris County violated Thomas's constitutional rights because, at the time of the shooting, newly elected Sheriff Ed Gonzalez modified existing policies on an *ad hoc* basis and had not yet had an opportunity to systematically review every policy. Appellants' Brief at 38-39, citing ROA.2817-2818. Appellants fail to meet any of their three burdens under *Monell* for this claim.

1. Appellants fail to identify what use of force policy they believe the Sheriff should have adopted.

Judge Ho correctly suggested the "lack of a systematic use-of-force review process" would not meet the first element under *Monell* because it does not constitute "an actionable policy or custom." ROA.3564. Appellants do not challenge Harris County's use of force policy—instead,

they give a murky criticism of the deliberative process by which the policy came into effect.[3]

Appellants vaguely infer the Sheriff should have implemented a different policy but do not explain what it should have been, or why the existing policy was unconstitutional. See Appellants' Brief at 38, quoting *Sanchez v. Gomez*, No. EP-17-CV-133-PRM, 2020 WL 1036046, at *36 (W.D. Tex. Mar. 3, 2020) ("a department's decision not to implement a policy set forth in a proposal may constitute an official policy of failing to implement such a policy.") This line of analysis is easily refuted by Appellants own admission that the Sheriff did have a use of force policy:

> Harris County Sheriff Ed Gonzalez testified that the HCSO [Harris County Sheriff's Office] deadly force policy in effect at the time of the incident permits a deputy to use lethal force only in the protection of his life or the life of another.

Appellants' Brief at 28, citing ROA.236, 2531. Appellants further admit the Sheriff's policy was constitutional, as it "directly adopt[s] the *Graham* reasonableness factors, and provides:

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[3] The Supreme Court has long held public entitles are entitled to a deliberative privilege to protect "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 at 8 (2001), quoting *Sears, Roebuck & Co.*, 421 U.S. 132 at 150 (1975).

> Unreasonable force is that force that is unnecessary or excessive given the totality of the circumstances presented to the deputy/detention officer at the time the force is applied. Unreasonable force is prohibited. The use of unreasonable force will subject the deputy/detention officer applying such force to discipline and/or prosecution."

Appellants' Brief at 28, citing ROA.2531. See also Policy 501 at ROA.1997-2015 and Sheriff Gonzalez's testimony at ROA.1420-1422. Thus, Appellants acknowledge the Sheriff adopted an appropriate use of force policy and fail to explain how the Sheriff had a constitutional mandate to use a different process to select that policy.

2. Appellants fail to show how the Sheriff was deliberately indifferent in creating the use of force policy.

Judge Ho next recognized that, even if the process by which the Sheriff adopted policies could be construed as a "policy" under *Monell*, Appellants provide no evidence the Sheriff was deliberately indifferent in promulgating it.[4] The Sheriff already had a constitutional use of force policy at the time of the incident, and his decision to review policies on an *ad hoc* basis could not have been made with "deliberate indifference

[4] When a policy is not facially unconstitutional, a plaintiff must show that the policymaker adopted the policy with deliberate indifference. *Piotrowski v. City of Houston*, 237 F.3d 567, 579-80 (5th Cir. 2001).

to the known or obvious consequences that the constitutional violations would result." *Piotrowski*, 237 F.3d at 579-80.

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). "[I]t must amount to an intentional choice, not merely an unintentionally negligent oversight." *James v. Harris County*, 577 F.3d 612, 617-618 (5th Cir. 2009), quoting *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir. 1992).

Further, Appellants do not dispute that the Sheriff's Office Internal Affairs Division reviews use of force incidents, and Appellants acknowledge the Office investigated Brewer and terminated him because he violated the use of force policy. Appellants' Brief at 29, citing 2361-64, 2370. Thus, Appellants cannot claim the Sheriff was deliberately indifferent in adopting his policies or creating an incident review process.

3. Appellants fail to meet their causation burden.

Even if Appellants had identified an actionable policy and shown the Sheriff was deliberately indifferent in implementing it, they could never show that the process of reviewing policies was "the moving force

behind the constitutional violation" that directly caused Thomas's death.

James, 577 F.3d at 617. Judge Ho correctly held:

> The notion that a hypothetical review process would have prevented Mr. Thomas's death requires a series of inferences for which Plaintiffs offer no proof. The Court would need to conclude that a review process would have led to certain changes in the use-of-force policies, and that those changes would have altered Deputy Brewer's actions. But Plaintiffs do not identify any policy changes that emerged from the new review process, much less attempt to show a "causal link" between those unspecified changes and what ultimately transpired. *See James*, 577 F.3d at 617; *see also Estate of Bonilla v. Orange Cnty.*, 982 F.3d 298, 311 (5th Cir. 2020) (affirming summary judgment for county when "[a] jury would have to resort to impermissible speculation to conclude that there was a 'direct causal link' between the alleged constitutional violation … and [Bonilla's] death").

ROA.3566-3567. Judge Ho further recognized:

> Notably, both the County and Plaintiffs maintain that Deputy Brewer violated the County's *existing* policies and procedures on use of force—and was terminated as a result. *See* Dkt. 66 at 12 (County "agreed" that Deputy Brewer violated HCSO policies and fired him); Dkt. 66-4, DX3 at HC0069 (Brewer's termination letter); Dkt. 86 at 11-12 (Plaintiffs' response to Brewer's motion for summary judgment). This leaves no reason to think that Deputy Brewer would have acted differently if the County had implemented a new system for *reviewing* the same policies that already were in place, but that Brewer disregarded. The lack of causation evidence merits summary judgment.

ROA.3567. Accordingly, nothing about the Sheriff's policies or process of creating policies could cause Harris County to be liable.

B. The district court properly dismissed Appellants' claims regarding non-lethal equipment because Harris County provides officers with Tasers.

(Response to Appellants' Brief at 41-42.)

1. Appellants fail to identify what non-lethal equipment Harris County should have provided.

It is undisputed that the Harris County Sheriff's Office provides officers less-lethal equipment such as Tasers. ROA.3567, and 1358. Nevertheless, Appellants contend Harris County adopted an unconstitutional policy of failing to "equip its officers with critical instruments of less-lethal force…" Appellants' Brief at 41.

Appellants suggest Harris County had an obligation to weigh down field officers with an arsenal of equipment, such as pepper spray, batons, and even bean bag shotguns. Appellants' Brief at 41. However, Appellants provide no case law or argument suggesting this is a constitutional requirement. Indeed, Appellants do not even identify which equipment they believe Harris County should have provided. Thus, Appellants fail to identify what specific policy they believe is unconstitutional, and what policy should have been adopted in its place.

2. Appellants fail to show how the Sheriff was deliberately indifferent in providing Tasers to his patrol officers.

Assuming, *arguendo*, Appellants had identified what equipment they believe the Sheriff had a constitutional obligation to provide, they have no evidence to suggest the Sheriff had any knowledge of the need to provide this equipment, or was deliberately indifferent in not doing so.

3. Appellants fail to meet their causation burden.

Finally, even if Appellants had identified an actionable policy related to the Sheriff's decision about which non-legal equipment to supply officers, and even if Appellants had shown the Sheriff was deliberately indifferent in not adopting it, Appellants fail to show causation. As Judge Ho explained, Brewer had a Taser available to him, and:

> Brewer just chose not to use the taser before drawing and firing his gun at Mr. Thomas. Under these circumstances, Plaintiffs' theory that Brewer would have used other, alternative devices like a baton, pepper spray, or beanbag shotgun, is purely speculative.

ROA.3568.[5]

[5] Also, the district court was provided evidence that using a baton, pepper spray, or beanbag shotgun is *less* effective than a Taser on someone with excited delirium. ROA.1347.

C. The district court properly dismissed Appellants' claims of excessive force because there is no relevant pattern of excessive force.

(Response to Appellants' Brief at 43-46.)

Next, Appellants allege a pattern of excessive force against African American males and those in medical crisis and of failing to render medical aid. "A pattern is tantamount to official policy when it is 'so common and well-settled as to constitute a custom that fairly represents municipal policy.'" *Peterson v. City of Fort Worth, Texas*, 588 F.3d 838, 850 (5th Cir. 2009), quoting *Piotrowski*, 237 F.3d at 579. That high threshold requires showing unconstitutional conduct with "similarity and specificity; prior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question." *Peterson*, 588 F.3d at 850 (5th Cir. 2009) (internal quotation marks omitted).

A pattern also requires "sufficiently numerous prior incidents," as opposed to "isolated instances." *Id.*, quoting *McConney v. City of Houston*, 863 F.2d 1180, 1184 (5th Cir. 1989). The size of a police department and number of arrests "may be relevant to determining whether a series of incidents can be called a pattern." *Id.*, quoting *Pineda*, 291 F.3d at 329. In *Pineda*, 11 incidents of Fourth Amendment violations "cannot support

a pattern of illegality in one of the Nation's largest cities and police forces [Houston]." *Pineda*, 291 F.3d at 329.

In *Peterson*, in the absence of record evidence, this Court looked to the City of Fort Worth's website to show it employed 1,500 officers and dealt with 67,000 incidents of crime per year to conclude that "27 incidents of excessive force over a period of four years do not reflect a pattern that can be said to represent official policy of condoning excessive force…" *Peterson*, 588 F.3d at 852.

The Harris County Sheriff's Office has "more than 5,000 employees to protect the 4.5 million residents living with the 1,700 square miles of Harris County."[6] Judge Ho reviewed 23 incidents or government reports cited by Appellants in their briefing and found they were dissimilar and did not show "a pattern of sufficiently similar and specific conduct." ROA.3554. On appeal, Appellants abandon many of these examples and identify only a few isolated incidents they contend show a pattern of conduct. These remaining incidents are easily distinguished.

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[6] "About Sheriff Ed Gonzalez", retrieved on March 15, 2023 from https://harriscountyso.org/AboutUs/AboutMe. At summary judgment, counsel discussed *Peterson* and how Harris County has grown to approximately 4.7 million people. ROA.3711-13.

1. The Justice Administration Department report is inconclusive and relates to traffic stops of drivers two years after the incident.

First, Appellants cite a 2021 report by the Justice Administration Department, which suggested there may have been racial or ethnic disparity in rates of arrests, citations, and use of force against drivers during traffic stops in 2020. ROA.3269. Harris County objected to the use of this report because Appellants failed to timely disclose it. ROA.3481-3497 at 3484.

On appeal, Appellants cite ROA.3279 and 3293 for the proposition that "Harris County Law Enforcement Agencies use force that result in bodily injury against Black and Hispanic drivers more frequently than against other racial and ethnic groups." That statement does not appear on either of the pages cited by Appellants. One of the key findings of the report actually says:

> *Some* Harris County Law Enforcement Agencies use force that results in body injury against Black drivers and *Some* Harris County Law Enforcement Agencies use force that results in bodily injury against White drivers more frequently than against other racial and ethnic groups.

ROA.3275 (emphasis added). Harris County has eight constable offices and a Sheriff's Office. ROA.3284-3285. The report concluded that

different agencies have different levels of disparity in how they handle traffic stops. Further, as Judge Ho pointed out, the report is careful to note there is not enough data to reach any conclusion. ROA.3555 and 3269. The report specifically did not find "prima facia evidence of racial profiling, biased policing, or prejudicial policing." ROA.3269.

Judge Ho also noted the report is too factually dissimilar to support an actionable custom or policy because the case at bar "involved a County deputy who witnessed a pedestrian committing a misdemeanor and confronted him on the street" (ROA.3556) rather than a motorist being pulled over for a traffic violation.

Finally, *Monell* requires a policymaker to have actual or constructive knowledge of an alleged custom before the incident. *Pineda*, 291 F.3d at 328. The incident leading to this lawsuit took place in 2018, but the report did not exist until 2021. The Sheriff could not have read the report three years before it existed.

2. The U.S. Department of Justice report is outdated and relates only to the jail—not the patrol work Brewer was conducting.

Next, Appellants cite a 2009 report by the United States Department of Justice that accused the jail of various constitutional violations. Harris County objected to the use of this report because it was

unreliable. ROA.3481-3497 at 3485-3486. The report's findings were also not substantiated and did not result in litigation or enforcement action. Further, the report was issued under a different Sheriff nearly a decade before the incident giving rise to this lawsuit and is not temporally connected to this case. *See Hicks-Fields v. Harris County, Texas*, 860 F.3d 803, 809 (5th Cir. 2017) (finding that two years between the U.S. Department of Justice Report and an incident is "irrelevant to showing a pattern of unconstitutional behavior at that time.")

In *Hicks-Fields,* this Court found the Department of Justice report also failed to establish a policy or custom against Harris County under circumstances far less attenuated. A guard punched a jail detainee with a history of mental health problems, and the detainee died after a delay in medical care. The family alleged the Department of Justice report established a custom of jailers using excessive force, denying medical care, and failing to train. This Court held that the examples given in the report "do not resemble—with sufficient similarity—the constitutional violations alleged by Plaintiffs so as to establish the required pattern of that unconstitutional conduct." *Hicks-Fields*, 860 F.3d 803, 810.

The case at bar has even less in common with the Department of Justice Report than the *Hicks-Fields* case did. As Judge Ho recognized, the policies and customs of patrol officers are very different from those in the jail, and:

> [d]ifferences between the demands of maintaining security in jails and the challenges of policing the streets necessarily affect the policies developed for each environment. Those differences foreclose inferring that the County adopted a policy for one environment based on its employees' actions in another. Jail-related incidents cannot sustain Plaintiffs' claim.

ROA.3557, citing *Hicks-Fields*, 860 F.3d at 811.

Appellants cite *LaGatta* for the notion that the Department of Justice letter should be considered evidence of a custom in this case. Appellants' Brief at 44. However, that case is distinguished. In *LaGatta*, a jail detainee filed suit in 2008 after an unprovoked assault by a jailer. That case involved a pre-discovery motion to dismiss, and the incident took place in the jail during the same period as the Department of Justice letter and under similar facts. Under those limited circumstances—which differ from the ones at bar—the district court allowed suit to continue. *LaGatta v. Harris County*, No. H-08-3189, 2011 WL 1100170 (S.D. Tex. 2001). Even if that case was factually similar, the lower court opinion would not be binding on this Court.

3. *Coats* does not involve the Sheriff's Office, and the facts are distinguished.

Next, Appellants claim *Coats* supports a custom of excessive force at the Sheriff's Office because a jury found an officer used excessive force by covering a person's nose and mouth with a boot to suffocate him. However, *Coats* involved a deputy constable from Precinct Four—not the Sheriff's Office. That decision was also reversed because "the County lacked final decision-making authority over Precinct Four's use-of-force policies." ROA.3560, citing *Harris County v. Coats*, 607 S.W.3d 359 (Tex. App.—Houston [1st Dist.] 2020, no pet.).

As Judge Ho noted, the facts at bar are also "significantly" different from those in *Coats*. The officer in *Coats* never used a gun or other weapon, and the use of force occurred on someone motionless and handcuffed on the ground, while the force in this case was against someone "advancing toward Deputy Brewer despite repeated commands to stop." ROA.3561, citing *Coats*, 607 S.W.3d at 382-383, 385. Accordingly, *Coats* cannot be used to show a Sheriff's Office custom.

D. Appellants fail to state a claim for ratification.
(Response to Appellants' Brief at 45.)

Without citing relevant law or evidence, Appellants—in a single sentence—claim Harris County "ratified and condoned a custom and practice of allowing officers to use excessive force against suspects who posed no threat of serious harm." Appellants' Brief at 45. Ratification is limited to "extreme factual situations" where a policymaker knows of a subordinate's unconstitutional conduct and clearly approves it. It is not enough for a policymaker to defend conduct later shown to be unlawful or make good faith statements defending complaints of constitutional violations. *Davidson v. City of Stafford, Texas*, 848 F.3d 384, 395-396 (5th Cir. 2017), as revised (Mar. 31, 2017). In this case, the Sheriff not only refused to defend Brewer—he fired him. ROA.1399-1417. That could never be ratification.

E. The district court properly dismissed Appellants' claims regarding failure to provide medical care.
(Response to Appellants' Brief at 50.)

It is undisputed that the Sheriff's Office use of force policy requires officers to render aid and medical attention after the use of force. ROA.2003-2004. Dashcam video establishes that eight seconds after Brewer shot Thomas, he got on the ground, secured him, and stayed with

him. ROA.1343, 2357 (dashcam video—shot fired at :55 and rendering aid at 1:03). Twenty-five seconds later, Brewer notified dispatch that shots were fired and he needed emergency medical services. ROA.2357 (dashcam video at 1:28). Two minutes later, dashcam audio captures the sirens of vehicles en route to help. ROA.2357 (dashcam video at 3:34).

Despite this, Appellants claim Harris County should be liable for having a policy of failing to render medical care because their expert opined Brewer's actions fell "below the standard of care" because he did not perform cardiopulmonary resuscitation (CPR) while waiting for the ambulance to arrive. Appellants' Brief at 50, citing ROA.2635.

While a police officer has a duty to provide reasonable, constitutional access to medical treatment, Brewer is not a physician. He was alone and responsible for securing a tense scene following a shooting. Appellants provide no caselaw to suggest he was required to comply with a medical provider's "standard of care" by providing CPR.

Assuming, *arguendo*, that Brewer had this obligation, Appellants fail to show any Harris County policy of patrol officers being instructed not to provide medical care or that Sheriff Gonzalez adopted such a policy with deliberate indifference. Appellants also fail to show that any such

policy was the moving force behind Thomas's injury. At a minimum, causation requires evidence that CPR would have saved Thomas's life and that the Sheriff's policy prevented Brewer from performing CPR.

In *Anderson*, this Court held that even in a controlled jail setting with undisputed evidence that CPR would have saved a man's life, "prison officials' failure to perform CPR cannot create county liability" because there was no policy preventing them from performing CPR. *Anderson v. Dallas County Texas*, 286 Fed. Appx. 850, 862 (5th Cir. 2008).

Appellants cite *Salcido*, an unreported district court case. That case involved a jail detainee who died while being restrained. A former sheriff testified that officers complied with jail policy by continuing to restrain the detainee rather than provide medical care. That testimony created a genuine issue of material fact as to the jail's policy, whether the former sheriff was deliberately indifferent in adopting that policy, and whether that policy caused plaintiff's death. *Salcido as Next Friend of K.L. v. Harris County, Texas*, No. CV H-15-2155, 2018 WL 6618407, at *9 (S.D. Tex. Dec. 18, 2018). That stands in stark contrast to the case at bar.

F. The district court properly dismissed Appellants' failure to train claim.

(Response to Appellants' Brief at 50-58.)

Appellants' last § 1983 claim is that the Sheriff's Office had a custom or policy of failing to train its officers. "In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of Section 1983." *Connick*, 563 U.S. at 61. "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Id.*, citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 822-833 (1985).

"That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390-391 (1989). "And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable." *Canton*, 489 U.S. at 391. Permitting failure to train cases to proceed on a "lesser standard of fault would result in *de*

facto respondeat superior liability on municipalities—a result rejected in *Monell*." *Canton*, 489 U.S. at 391, citing *Monell*, 436 U.S. at 694.

For Appellants to survive summary judgment on their failure to train claim, they must demonstrate: "(1) [the municipality's] training policy procedures were inadequate, (2) [the municipality] was deliberately indifferent in adopting its training policy, and (3) the inadequate training policy directly caused [the constitutional violation]." *Hicks-Fields*, 860 F.3d at 811 (internal citations omitted).

1. The Sheriff's Office is a CALEA "flagship agency" that trains in accordance with best practices.

The Harris County Sheriff's Office is accredited by and complies with standards set by the Commission on Accreditation for Law Enforcement Agencies (CALEA), which is an association of national and international law enforcement agencies. Accreditation is not required, and the Sheriff's Office received it only after complying with 443 professional standards and passing a rigorous assessment. ROA.1460-1461. The Sheriff's Office was first accredited in 2002, and in 2008, it became a CALEA Flagship Agency, which serves as an example for other law enforcement agencies. ROA.1461.

Under Sheriff's Office Policy 501 § VII, the Office conducts "yearly in-service training programs" to teach deputies their obligations when using force and "stay focused on the objective during a crisis, calmly analyze problems, assess their resources and use those resources to resolve the problem." ROA.1459-1460. See also, ROA. 1421-1422. The Sheriff requires employees to document use of force incidents. ROA.1464.

Brewer was a licensed Texas Peace Officer who complied with all Texas Commission on Law Enforcement (TCOLE) requirements. His TCOLE records show he had a bachelor's degree, 54 credits toward a master's degree, more than six years as a licensed peace officer, and certificates as a Basic Peace Officer, Intermediate Peace Officer, and Advanced Peace Officer. ROA.1467-1468. He also had 3,660 hours of training and 1,768 hours of coursework. ROA.1467 and 1473.

Brewer was trained by the Sheriff's Office and Precinct Four Constable's Office in how to use less lethal force, such as Taser, pepper spray, and baton. ROA.1374-1377, 1470, 1472, and 3052-3053. He was trained on the use of force continuum (ROA.1379-1382), de-escalation (ROA.3057), and for dealing with people in crisis. ROA.1469.

Brewer was required to review and be familiar with Harris County policies and show proficiency at the academy, Precinct Four, and with the Sheriff's Office for "every aspect of training." ROA.1371-1372. Brewer testified he was "familiar with and or knew and were proficient at the use of force and use of deadly force policies for the Harris County Sheriff's Department…" and the Sheriff's Department would not allow him "to go out on the street and act as a deputy without having knowledge of these policies." ROA.1374.

As part of Brewer's training, both the Precinct Four Constable's Office and Sheriff's Office taught him how to use a Taser, when to use a Taser, and "things like that." To complete his first training prior to working at the Sheriff's Office, Brewer was actually subjected to a Taser shock. ROA.1374-1375-1376, and 3053.

Brewer also took a course about excited delirium based on the facts in *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998). He was taught that when a person is experiencing excited delirium, an officer should wait until five or six people are available to help, and because

other methods of control are not as effective on a person with excited delirium, "the best method is to use the TASER."[7]

2. Appellants fail to explain how the Sheriff's training was constitutionally deficient.

Appellants rely on their expert, Scott DeFoe, to support their contention that the Sheriff's Office had inadequate training policies. Harris County moved to exclude many of DeFoe's opinions because they are unreliable. See motion at ROA.3481-3497.

DeFoe opined that Brewer should have been provided additional training on vague and varied topics such as "Working as a Team", "Cover and Concealment", and "Time and Distance". Appellants' Brief at 51-52. Appellants never explain what each course covers, how each course is relevant, or why each course is required by the constitution.

DeFoe hypothesized that on the day Brewer shot Thomas, Brewer lacked situational awareness and made a poor decision. Without providing any evidence, DeFoe claimed Brewer's mistake was caused by "the way which you were trained," and vaguely suggested Brewer needed some type of additional field training. Appellants' Brief at 52. However,

[7] ROA.1347, 1364-1365. Even if Brewer misunderstood this, that does not implicate the training program—it means Brewer made a personal mistake. ROA.1365.

DeFoe fails to identify why Brewer's 5,428 hours of training and coursework (including extensive field training) were constitutionally insufficient and never points to what specific course was constitutionally required that would have prevented Brewer's specific mistake.

DeFoe suggested Brewer should have carried an arsenal of additional weapons such as batons, Oleoresin Capsicum spray, and a Remington 870 Bean Bag Shotgun. Appellants' Brief at 53, citing ROA.2637, 2713, 2715, 2719, 2723, 2748, and 2751-2768.[8] However, DeFoe admitted at deposition he did not know if Texas law required any of this (ROA.2717), and Appellants never explain why the constitution required Harris County to issue each of these weapons to Brewer.

DeFoe did not believe Brewer understood the Taser's capabilities and limitations when used on someone with excited delirium. Appellants' Brief at 53, citing ROA.2709. However, as noted, Brewer had training on this very topic and had previous experience using a Taser on someone with excited delirium. As noted, his training told him that when someone has excited delirium, "the best method is to use the TASER." ROA.1347

[8] Harris County addressed this in Section II (B), *supra*.

and 1364-1365. Brewer's decision not to comply with that training does not make the training unconstitutional.

Finally, Appellants contend Brewer lacked training because he could not recall details about a policy regarding the use of force during a misdemeanor arrest. Appellants' Brief at 54, citing ROA.3055-3056. The issue in this case is not whether Brewer used force to arrest someone for a misdemeanor, but whether Brewer used force because he believed Thomas would gain control over his weapon. ROA.1359-1361. Further, the fact that a former deputy did not recall the details of a policy from memory after he left the County's employment does not mean Harris County had an unconstitutional training policy.

It is well established that "[w]hen officers have received training required by Texas law, the plaintiff must show that the legal minimum of training was inadequate." *Sanders-Burns v. City of Plano*, 594 F.3d 366, 381-82 (5th Cir. 2010). Appellants point out that in extreme circumstances, compliance with state law may not always be dispositive of a failure to train claim. However, Appellants cannot identify any authority from this Court where it was not. See, e.g., *Conner*, where this court rejected a plaintiff's attempt to premise a failure to train claim on

the opinion of an expert witness who failed to cite underlying data. *Conner v. Travis County*, 209 F.3d 794, 798 (5th Cir. 2000).

Appellants conceded at the district court that "Brewer's training regimen comports with state-law requirements" (ROA.3571), but now infer Brewer's training did not comply with state law because he did not repeat his use of force training every year he was on the force. Appellants' Brief at 55-56. However, Appellants provide no evidence that TCOLE or state law required Brewer to complete this training every year. While Harris County may have encouraged annual training standards higher than required by law, that does not mean that when an officer does not meet these heightened standards, the County's training becomes constitutionally defective.

3. Appellants fail to meet their strict burden of causation by showing how the Sheriff's training policies were the moving force behind Thomas's constitutional injury.

Even if Appellants could show Harris County had a constitutionally deficient training program, that program could not be the moving force behind Thomas's constitutional injury. Causation must be more than a "but for" coupling between cause and effect, and "[t]he deficiency in training must be the actual cause of the constitutional violation."

Shumpert v. City of Tupelo, 905 F.3d 310, 317 (5th Cir. 2018), as revised (Sept. 25, 2018). "Mere proof that the injury could have been prevented if the officer had received better or additional training cannot, without more, support liability." *Shumpert*, 905 F.3d at 318, quoting *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005).

As noted, Brewer's 5,428 hours of training and coursework included courses specific to the use of a Taser, and even included a course specific to the use of a Taser on a person with excited delirium. Appellants cannot identify what additional course or topic could possibly be more specific to this scenario or would have changed the outcome in this case. Their expert states—without evidence—that he believes one more course on Tasers and excited delirium might have made a difference. Appellants' Brief at 57, quoting ROA.2294. No facts or law support that conclusion.

In an effort to manufacture causation, Appellants speculate the problem might not be the courses that Brewer took, but the way they were administered. Appellants' Brief at 57, citing *Sanchez*, 2020 WL 1036046, at *36. First, Appellants hypothesize Brewer might have taken additional use of force training not reflected on his TCOLE records. Appellants' Brief at 57. However, they never explain how an officer's

decision to take supplemental classes in addition to those recorded in his file could cause the Sheriff's training policy to be unconstitutional.

Second, Appellants cite *Sanchez* to argue that Brewer's training had "gaps" and may have been stale. *Sanchez* is an unpublished Western District of Texas opinion noting that officers had not received even basic mental health training in 10 years. *Sanchez*, 2020 WL 1036046, at *36. In contrast, it is undisputed that Brewer had extensive use of force training within the three years prior to the incident and training on how to use a Taser when a person experiences excited delirium. Appellants' Brief at 55-56, citing ROA.2247-2249.

Appellants have no evidence to suggest that a reasonable jury could find that Harris County's training program was the moving force behind Thomas's constitutional injury.

4. Appellants fail to show how the Sheriff was deliberately indifferent to training needs.

Finally, Appellants contend the Sheriff was deliberately indifferent to his office's training needs because "Sheriff Gonzalez was aware of the training deficiencies of his employees, however, did nothing about it until after Mr. Thomas' shooting." Appellants' Brief at 58, citing ROA.2359, 2816-2818. The portion of the record Appellants cite is where the Sheriff

testified his new policy review committee is systematically evaluating policies, as discussed, *supra*. At no point does the Sheriff testify that he was aware of, and deliberately indifferent to, any training deficiencies.

Appellants had the burden of showing the Sheriff was deliberately indifferent in failing to provide constitutionally adequate training. They cannot do that.

III.
THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON APPELLANTS' AMERICANS WITH DISABILITIES ACT AND REHABILITATION ACT CLAIMS

(Response to Appellants' Brief at 58-60).

Finally, Appellants claim Harris County violated Thomas's rights under the Americans with Disabilities Act and Rehabilitation Act. Claims brought under the ADA and Rehabilitation Act "are subject to the same analysis." *T.O. v. Fort Bend Independent School District*, 2 F.4th 407, 416 (5th Cir. 2021), cert. denied, 213 L. Ed. 2d 1038, 142 S. Ct. 2811 (2022), reh'g denied, 213 L. Ed. 2d 1145, 143 S. Ct. 60 (2022). The only material difference between the acts is their respective causation requirements, and "[c]ases concerning either section apply to both." *Id.*, quoting *Doe v. Columbia-Brazoria Independent School District by and through Board of Trustees*, 855 F.3d 681, 690 (5th Cir. 2017).

To state a prima facie claim under Title II of the ADA, a plaintiff must show (1) he is a qualified individual within the meaning of the ADA, (2) he is being excluded from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity, and (3) such exclusion, denial of benefits, or discrimination is by reason of his disability. 42 U.S.C. § 12132; *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 671-672 (5th Cir. 2004).

A. Appellants never establish that Thomas was disabled under the ADA.

A person has a disability under the ADA when he has a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or is regarded as having such an impairment. 42 U.S.C.A. § 12102.

"A critical component" of the ADA claim "is proof that the disability and its consequential limitations were known by the entity providing public services." *Windham v. Harris County*, 875 F.3d 229, 236 (5th Cir. 2017) (internal quotation marks and alteration omitted). Further, regulations interpreting the ADA are clear that: "[t]he term individual with a disability does not include an individual who is currently engaging

in the illegal use of drugs, when the public entity acts on the basis of such use." 28 C.F.R. § 35.104.

The only evidence of a disability that Appellants presented to the district court is that a third party determined Thomas was a danger to himself a year before the incident, and Thomas acted erratically when Brewer found him. ROA.2602 and 3574. Judge Ho held this was insufficient to meet Appellants' burden of establishing that Thomas had a qualifying disability under the ADA. ROA.3574.

Judge Ho further held that while Thomas's behavior of hitting a car, staring blankly, and walking with his pants around his ankles was abnormal, even Appellants' own expert admitted that a reasonable officer could conclude Thomas was *either* experiencing a mental crisis, *or* under the influence of a controlled substance. ROA.2602 and 3574.

Brewer testified that based on his experience, he believed Thomas was "high on PCP [Phencyclidine]," an illegal hallucinogen, and was "a danger to everyone." ROA.1393. Thomas's autopsy confirmed he had ingested PCP. ROA.3576 and 3735 (HC00319 filed under seal). Thus, as a matter of law, Thomas was not an individual with a disability at the time Brewer interacted with him and Harris County had no knowledge

of his alleged disability. On appeal, Appellants do not address this prong of the ADA at all.

B. Appellants never establish that Thomas was excluded from participation in a service, program, or activity, or otherwise discriminated against based on disability.

Assuming, *arguendo*, Thomas had a disability, Harris County knew about it, and Thomas's disability was not related to his PCP ingestion, Appellants still had the burden of showing he was excluded from participation in, or denied benefits of, services, programs, or activities for which the County is responsible, or was otherwise discriminated against by the County because of his disability. *Melton*, 391 F.3d at 671-672. "In the context of a failure-to-accommodate claim, intentional discrimination requires at least actual knowledge that an accommodation is necessary." *Smith v. Harris County*, 956 F.3d 311, 319 (5th Cir. 2020).

Appellants do not identify what services, programs, or activities Thomas was denied, and they do not argue that he requested any accommodation. Because Thomas never requested a specific accommodation, Appellants must show that "the disability, resulting limitation, and necessary reasonable accommodation were open, obvious,

and apparent to the entity's relevant agents." *Windham*, 875 F.3d at 237 (internal quotation marks omitted).

Less than four months ago, this court issued an instructive per curium opinion in *Wilson v. City of Southlake*. In *Wilson*, an officer encountered an eight-year-old child screaming obscenities, swinging a jump rope near a school principal, and threatening to kill the officer. Although the officer knew the child threatened suicide and had prior incidents, that did not put him on notice that the child had a disability associated with Autism, anxiety, and ADHD. The officer also had no duty to know that a reasonable accommodation would have been to speak in a calm tone of voice, provide sufficient space, and take care of objects that "might cause a problem." *Wilson v. City of Southlake*, No. 21-10771, 2022 WL 17604575, at *7-9 (5th Cir. Dec. 13, 2022).

Similarly, while Brewer was aware that Thomas was engaged in abnormal behavior, he did not know that Thomas had any particular disability, or what accommodation Harris County should have provided that would have accommodated this disability. Even on appeal, Appellants have not attempted to show any of these elements.

C. The district court correctly found that the ADA did not apply to the exigent circumstances at bar.

Finally, Judge Ho correctly held that Brewer was entitled to secure the scene before assessing whether Thomas was disabled and needed an accommodation. ROA.3572-3573. This is the only aspect of the district court's ADA ruling that Appellants challenge. In *Hainze*, this Court held:

> Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life. Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents.

Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000).

As noted, Brewer was responding to a street disturbance that stopped traffic and resulted in two men threatening to fight in the middle of an intersection. ROA.1342, 1344, 1387-1388, 2356, and 2357. Brewer had not yet secured the scene, was forced to retreat backwards "in circles" around his patrol vehicle (ROA.1351, 2356, and 2357), and was within four feet of a man he feared would grab his weapon while exhibiting

unusual strength due to the effects of an illegal drug. ROA.1358 and 1393-1396.

Appellants contend that this Court has since distinguished *Hainze*, but they fail to cite any other cases. Instead, they argue that *Hainze* does not apply based on their conclusory statement that "[n]o exigent circumstances existed in this case to preclude compliance with the ADA." Appellants' Brief at 59.

That ignores the facts above and presupposes Brewer: (1) knew Thomas had a disability that Appellants have still not identified, (2) knew what accommodation Thomas needed, though Appellants have still not identified that either, and (3) chose not to provide those accommodations. Appellants' argument also presupposes that Brewer was not under the influence of PCP, which brings him outside the protections of the ADA under 28 C.F.R. § 35.104. The district court properly granted summary judgment to Harris County on Appellants' ADA and Rehabilitation Act claims.

CONCLUSION

The magistrate judge and district court correctly found Appellants failed to create a genuine issue of material fact as to any of their claims against Harris County. For the reasons provided, this Court should affirm the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 26, 2023, I filed a true and correct copy of the foregoing brief via the Court's CM/ECF system, which will automatically serve a copy on all parties' counsel. I further certify that I emailed an electronic copy of this brief to the counsel of record below:

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), and 5th CIR. R. 32.1: this document contains 9,586 words.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5), and 5th CIR. R. 32.1 and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Century Schoolbook.

S/Seth Barrett Hopkins