No. 16-

In The
Supreme Court of the United States

ANTONIO FRANCIS BUEHLER,

Petitioner,

v.

AUSTIN POLICE DEPARTMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a third-party finding of probable cause—including a post-arrest grand jury indictment—precludes a false arrest suit under 42 U.S.C. § 1983, as the Fifth Circuit has held pursuant to its "independent intermediary doctrine," in conflict with precedent of this Court and other courts of appeals.

PARTIES TO THE PROCEEDINGS

Petitioner Antonio Francis Buehler was the plaintiff in the district court and the appellant in the court of appeals.

The City of Austin/Austin Police Department, Officer Patrick Oborski, Officer Robert Snider, Officer Justin Berry, and Sergeant Adam Johnson were defendants in the district court and appellees in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 824 F.3d 548. The memorandum opinion and order of the district court (App., *infra*, 15a-48a) is not reported, but is available at 2015 WL 737031.

JURISDICTION

The court of appeals entered its judgment on June 1, 2016. Buehler timely filed a petition for rehearing en banc, which was denied on July 6, 2016. On September 21, 2016, Justice Thomas extended the time for filing a petition for certiorari to and including November 3, 2016. On October 18, 2016,

Justice Thomas further extended the time for filing a petition for certiorari to and including December 2, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Section 1 of the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983, provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

INTRODUCTION

In the decision below, the Fifth Circuit reaffirmed its fidelity to the "independent intermediary doctrine," which insulates defendants in unlawful arrest actions under section 1983—regardless of actual malice—if an impartial intermediary (such as a magistrate or grand jury) has made a finding of probable cause. The basic premise of the doctrine—*i.e.*, that the intermediary's decision breaks the causal chain between the defendant and the unlawful arrest—has been expressly rejected by this Court. And in direct conflict with the decision

below, five courts of appeals have held that the doctrine's application is especially indefensible where, as here, the causal chain would be broken by a grand jury indictment returned *after* the arrest was effectuated.

For good reason: what matters for false arrest liability under section 1983 are the facts *known to the arresting officer at the time of the arrest*. It makes no sense that an *after-the-fact* grand jury determination—focused on whether an indictment should issue based on the entirety of a more developed evidentiary record than available to the officer at the time of arrest—would cut off section 1983 liability *even where the arresting officer lacked probable cause to make the arrest*.

This Court should grant certiorari to eliminate the conflict among the circuits and to reaffirm that the independent intermediary doctrine—at least in the sweeping manner applied below—has no place in section 1983 jurisprudence.

STATEMENT OF THE CASE

A. Legal Framework

"Section 1983 provides a cause of action against any person who deprives an individual of federally guaranteed rights 'under color' of state law." *Filarsky v. Delia*, 132 S. Ct. 1657, 1661 (2012) (quoting 42 U.S.C. § 1983). As reflected in the language of the statute, "the central purpose of § 1983 is to 'give a remedy to parties deprived of constitutional rights, privileges and immunities by an Official's abuse of his position.'" *Imbler v.*

Pachtman, 424 U.S. 409, 433 (1976) (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)).

Although section 1983 is "broader" than the common law "in that it reaches constitutional and statutory violations that do not correspond to any previously known tort," *Rehberg v. Paulk*, 132 S. Ct. 1497, 1504-1505 (2012), it "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," *Monroe*, 365 U.S. at 187; *see Imbler*, 424 U.S. at 417 (stating that section 1983 "creates a species of tort liability"). At the same time, section 1983 preserves protections for government actors at common law, such as qualified immunity. *Filarsky*, 132 S. Ct. at 1662.

B. Factual and Procedural History

1. Petitioner Antonio Buehler—a former Army Ranger and Iraq war veteran with degrees from West Point, Harvard, and Stanford—was arrested three times by City of Austin police while exercising his constitutional right to document police conduct. This section 1983 action arises from those unlawful arrests, described below, in violation of Buehler's First and Fourth Amendment rights.[1]

In January 2012, Buehler encountered Officers Patrick Oborski and Robert Snider conducting a sobriety test on an individual suspected of driving

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[1] The following facts are drawn from the summary judgment record, with all justifiable inferences drawn in favor of Buehler as the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

while intoxicated. As Snider "yank[ed] a passenger out of the suspect's vehicle," Buehler (at the passenger's encouragement) began taking cell phone photos from about twenty feet away. App., *infra*, 2a. After handcuffing the passenger, Oborski approached, shoved, pushed, and poked Buehler, who gestured that he was not a threat. Oborski then repeatedly accused Buehler of interfering with the police investigation. Following a verbal altercation and the use of physical force against a non-resisting Buehler, Oborski placed Buehler under arrest for felony harassment of a public servant and misdemeanor resisting arrest. *Id.* at 2a-3a, 19a-21a, 24a-26a.

In the aftermath of his arrest, Buehler and other activists formed the Peaceful Streets Project, a "grassroots initiative to translate *** support [of Buehler] into a more engaged citizenry focused on holding police accountable and into broader support for victims of police abuse." App., *infra*, 3a-4a (alteration and ellipsis in original). In addition to training people on their rights when interacting with police and on how to record police interactions, the organization coordinates "cop watch" events intended to deter police misconduct. *Id.* at 4a, 21a.

Buehler's second arrest, in August 2012, arose out of one such event. Buehler was videotaping police officers as they executed an arrest warrant and walked the arrestee to a booking facility. Officer Justin Berry asked Buehler, who was standing farther away from the officers than other observers, to back up. Buehler asked Berry for his badge number and, after receiving a warning, was arrested

for interfering with public duties. App., *infra*, 4a-5a, 21a-22a, 27a-28a.

Two days later, the Austin Police Department issued a training bulletin addressing interference with public duties and the lawfulness of individuals recording the actions of police officers. D. Ct. Doc. 92-14. The bulletin instructs officers to give clear verbal commands to individuals documenting police officer activity, to instruct those individuals to stand in a specific area or location, and to provide two warnings before making an arrest for interfering with public duties. *Id.*

In September 2012, Buehler was arrested a third time during a cop watch. Buehler initially positioned himself about twenty-five feet from Oborski's squad car to videotape a traffic stop, but moved back ten feet on Oborski's instructions. After Sergeant Adam Johnson arrived on the scene, Buehler was instructed to move to the other side of the traffic stop, and was warned that a failure to obey would result in arrest. Because he would not be able to film or gather audio from that location, Buehler declined to move; instead, Buehler backed up to at least eighty feet from the scene. Johnson then reiterated that Buehler should either stand at the designated location or leave the scene altogether. As Buehler indicated that he was going to leave, he asked why Johnson was being a bully. Johnson then

arrested Buehler for interfering with public duties. App., *infra*, 5a-6a, 22a, 29a-30a.[2]

During its January 2013 term, a single grand jury considered the charges related to Buehler's three arrests. Although the grand jury did not indict Buehler for felony harassment of a public servant, misdemeanor resisting arrest, or twice interfering with public duties—*i.e.*, the crimes for which he was charged at the time of arrest—the grand jury found probable cause to prosecute Buehler for the less serious misdemeanor charge of failing to obey a lawful order on three occasions. Buehler was tried and acquitted with respect to his first arrest; the charges relating to the second and third arrests were dismissed prior to trial. App., *infra*, 6a, 21a-22a.

2. Buehler filed suit under 42 U.S.C. § 1983 in the U.S. District Court for the Western District of Texas against respondents City of Austin/Austin Police Department, the City's police chief, and certain officers involved in the arrests. As pertinent here, the operative complaint alleged that respondents (i) violated Buehler's Fourth and Fourteenth Amendment rights by detaining, searching, and prosecuting him without probable cause; (ii) violated his First and Fourteenth Amendment rights by interfering with his recording efforts; and

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[2] Following each arrest, an officer (not necessarily the one involved in the arrest) obtained a warrant from a state magistrate. App., *infra*, 3a-7a. The courts below did not consider the magistrate proceedings in entering judgment in favor of respondents. *Id.* at 14a n.10.

(iii) conspired to deprive him of his constitutional rights. App., *infra*, 7a, 16a-17a.

The district court upheld those claims against a motion to dismiss. Accepting the factual allegations in the complaint (which did not include the grand jury's indictments of Buehler), the court reasoned that the officers were not entitled to qualified immunity. That was "because filming and photographing a police officer performing official duties is a clearly established constitutional right, and a reasonable officer would not have arrested Buehler for exercising that right." App., *infra*, 17a-18a.

On summary judgment, the district court "reiterated the findings that Buehler's right to record police officers in the commission of their official duties and right to be free from unlawful arrest are clearly established," but determined that qualified immunity nevertheless shielded respondents from suit. App., *infra*, 35a-36a. The court explained that because Buehler's constitutional claims were premised on unlawful arrests, those claims could succeed, and qualified immunity could be overcome, only if Buehler was arrested without probable cause. Looking past the facts of Buehler's arrests, the court held that the grand jury's indictments of Buehler precluded such a finding under the "independent intermediary doctrine": "a grand jury's finding of probable cause to charge an arrestee with a crime—even when the indictment occurs post-arrest—breaks the chain of causation." *Id.* at 36a-38a.

The district court recognized that "[o]ther circuits have agreed with Buehler's contention that a

grand jury indictment post-arrest does not break the chain of causation." App., *infra*, 38a-39a (citing Second, Eighth, and Eleventh Circuits as supporting Buehler, but drawing support for its position from Fourth Circuit). The district court declined to embrace the reasoning of those other circuits, however, in view of "clear" Fifth Circuit precedent endorsing the independent intermediary doctrine. *Id.* Finding insufficient evidence that the grand jury's probable cause determinations were "tainted" and thus incapable of breaking the causal chain, *id.* at 42a-46a, the district court entered judgment in favor of respondents, *id.* at 47a.

3. The Fifth Circuit affirmed. Surveying its precedent applying the independent intermediary doctrine, the court of appeals explained that "even an officer who acted with malice *** will not be liable if *the facts* supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or grand jury, for that intermediary's 'independent' decision 'breaks the causal chain' and insulates the initiating party." App., *infra*, 8a-9a (ellipsis in original) (citation omitted). The court of appeals noted that, as developed in the Fifth Circuit, the doctrine would shield an officer "even if the independent intermediary's action occurred after the arrest, and even if the arrestee was never convicted of any crime." *Id.* (footnotes omitted). Because a grand jury returned indictments for Buehler related to each arrest, and Buehler was unable to demonstrate that the grand jury process was tainted, the court of appeals held that the doctrine compelled entry of judgment for respondents. *Id.* at 10a-14a.

Like the district court, the court of appeals acknowledged that "other circuits' decisions [are] in varying degrees of tension with our independent intermediary doctrine." App., *infra*, 9a. It pointed to, *inter alia*, an Eleventh Circuit decision "holding that a grand jury indictment insulated police officers from damages accruing after, but not before, the indictment," as well as an Eighth Circuit decision "rejecting the argument that a grand jury indictment insulated police officers from false arrest claims." *Id.* at 9a n.6 (citations omitted). The court of appeals nonetheless persisted in its application of the independent intermediary doctrine, holding that the absence of an intervening change in law did not permit a departure from circuit precedent. *Id.* at 9a-10a.

The Fifth Circuit denied rehearing en banc. App., *infra*, 49a-50a.

REASONS FOR GRANTING THE WRIT

This case presents the important question of whether an after-the-fact third-party finding of probable cause—here, in the form of a post-arrest grand jury indictment—precludes a false arrest suit under 42 U.S.C. § 1983, as the Fifth Circuit has held pursuant to its "independent intermediary doctrine." This Court in *Malley v. Briggs* made clear that common law principles of causation incorporated into section 1983 foreclose the doctrine's application. The Fifth Circuit initially acquiesced, but ultimately resurrected—and extended—the doctrine.

As the decision below acknowledges, the courts of appeals disagree over the legitimacy and scope of the independent intermediary doctrine. Although the

First and Fourth Circuits have followed the Fifth Circuit's lead to a certain extent, five other circuits have declined to do so. The Second, Third, Sixth, Eighth, and Eleventh Circuits hold that that the *post*-arrest determinations of an "independent intermediary" cannot cut off section 1983 false arrest liability.

That the Fifth Circuit finds itself in the minority of that well-developed circuit conflict is unsurprising. Beyond *Malley*'s explicit rejection of the reasoning underlying the independent intermediary doctrine, the Fifth Circuit has never explained how an after-the-fact probable cause determination can break a causal chain for an event that has already occurred. Moreover, treating a grand jury as an independent intermediary makes even less sense given that its focus is on whether prosecution is appropriate based on the entire evidentiary record before it, not whether there was probable cause to arrest based on the officer's knowledge at the time of arrest.

Allowing unlawful arrest claims to be thwarted on such thin reasoning gives outsized insulating effect to "independent intermediary" determinations and undermines the core purposes of section 1983. The Fifth Circuit's continued reliance on the independent intermediary doctrine to foreclose section 1983 claims prematurely—even where, as here, the insulating determination is an after-the-fact grand jury indictment—weakens constitutional protections for individuals in everyday interactions with law enforcement. That reality warrants this Court's review.

I. THE COURTS OF APPEALS ARE DIVIDED OVER THE INDEPENDENT INTERMEDIARY DOCTRINE

As the Fifth Circuit acknowledged, its application of the independent intermediary doctrine is in conflict with the decisions of other courts of appeals. App., *infra*, 9a (noting "varying degrees of tension"; citing Fourth Circuit favorably and Second, Eighth, and Eleventh Circuits unfavorably); *accord id.* at 38a-39a ("Other circuits have agreed with Buehler's contention that a grand jury indictment post-arrest does not break the chain of causation."). That disagreement is unsurprising. As other courts of appeals have recognized, this Court's decision in *Malley* has spawned "a great deal of tension in the caselaw about when official conduct counts as an intervening cause"—to the point that "the cases on intervening causes are legion and difficult to reconcile." *Hector v. Watt*, 235 F.3d 154, 161 (3d Cir. 2000); *see Zahrey v. Coffey*, 221 F.3d 342, 349, 350-354 (2d Cir. 2000) (discussing "alternative approaches"). This Court's intervention is necessary to resolve that mature and intractable conflict.

A. Fifth Circuit Law Reveals The Doctrine's Checkered Development

The independent intermediary doctrine's foothold in section 1983 jurisprudence has been wobbly from the start—a fact borne out by the Fifth Circuit's case law. In *Rodriguez v. Ritchey*, 556 F.2d 1185 (5th Cir. 1977) (en banc), an influential decision in the development of the doctrine, a series of investigative coincidences led federal agents to misidentify Rodriguez as the target of their

investigation. *Id.* at 1187-1188. Upon hearing what turned out to be erroneous information linking Rodriguez to illegal gambling activity, a grand jury returned an indictment and the agents then arrested Rodriguez. *Id.* In the ensuing *Bivens* action (the judge-made analog to section 1983 for federal defendants), the *en banc* Fifth Circuit held that Rodriguez could not state a claim for false imprisonment. Citing the Restatement (Second) of Torts, the court reasoned that "if the facts supporting an arrest are put before an intermediate such as a magistrate or grand jury, the intermediate's decision breaks the causal chain and insulates an initiating party." *Id.* at 1193.

Less than a decade later, this Court rejected the rationale of the independent intermediary doctrine in *Malley v. Briggs*, 475 U.S. 335 (1986). There, the plaintiffs brought various section 1983 claims alleging that they were arrested pursuant to a deficient warrant. *Id.* at 337-338. The district court granted a directed verdict for the defendants not only because immunity attached, but in the alternative because under *Rodriguez* "the approval of the arrest warrant by the judge removed any causal connection between the acts of the police officer and the damage suffered by the plaintiffs due to their improper arrest." *Briggs v. Malley*, 748 F.2d 715, 717 (1st Cir. 1984). The First Circuit reversed, finding that "[t]he 'chain of causation' theory" set forth in *Rodriguez* "does not withstand scrutiny." *Id.* at 720-721. The First Circuit reasoned that "[i]t is the decision of the police officer to bring the matter to the magistrate that is the active cause of the search or arrest," and that "[w]here that decision is the result of negligence,

i.e., failure to exercise a modicum of judgment about the presence of probable cause, that negligence is the cause of the improper search or arrest." *Id.* at 721.

This Court agreed with the First Circuit. Although the question presented focused on the degree of immunity afforded to the officer, the Court left no doubt that the alternative rationale the district court coopted from the Fifth Circuit would not save the defendants on remand: "It should be clear *** that the District Court's 'no causation' rationale in this case is inconsistent with our interpretation of § 1983." *Malley*, 475 U.S. at 344 n.7. Reiterating that "§ 1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," the Court reasoned that because "the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link." *Id.* (citation and internal quotation marks omitted).

In the immediate wake of *Malley*, the Fifth Circuit explicitly acknowledged that this Court had foreclosed application of the independent intermediary doctrine. Confronting the United States' argument that a magistrate's issuance of a warrant broke the causal chain and insulated the government actors from liability for an unlawful search, the Fifth Circuit deemed "correct[] *** that the Supreme Court rejected the rationale underlying that broadly-stated rule in *Malley v. Briggs*." *United States v. Burzynski Cancer Research Inst.*, 819 F.2d 1301, 1309 (5th Cir. 1987).

Yet less than a year later, the Fifth Circuit—citing *Rodriguez* but ignoring *Malley* and *Burzynski*—held that the independent intermediary doctrine negated a jury finding of causation in favor of a false arrest verdict. *Hand v. Gary*, 838 F.2d 1420, 1427-1428 (5th Cir. 1988). Since then, the Fifth Circuit has repeatedly declined to abandon the independent intermediary doctrine, *see, e.g.*, *Murray v. Earle*, 405 F.3d 278, 292 (5th Cir. 2005)—including in the First and Fourth Amendment contexts, *see, e.g.*, *Russell v. Altom*, 546 F. App'x 432, 436-437 (5th Cir. 2013); *Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010). To the contrary, the Fifth has extended it: the doctrine now sweeps in *post*-arrest determinations of an "independent intermediary," such that a grand jury's after-the-fact indictment retroactively breaks the causal chain for an arrest that has already been effectuated. *See, e.g.*, *Taylor v. Gregg*, 36 F.3d 453, 455, 456-457 (5th Cir. 1994), *overruled on other grounds by Castellano v. Fragozo*, 352 F.3d 939, 949 (5th Cir. 2003) (en banc).

Finding themselves bound by that circuit precedent, the courts below applied the independent intermediary doctrine. In their view, the grand jury's indictments of Buehler following his arrests indicated that respondents' arrests were supported by probable cause and therefore precluded liability under section 1983. *See* App., *infra*, 8a-10a, 38a-39a; pp. 8-10, *supra*.

B. The Majority Of Courts Of Appeals Reject The Doctrine's Application To Post-Arrest Grand Jury Indictments

No less than eight courts of appeals have staked out a position on the independent intermediary doctrine. The Fifth Circuit, the leading proponent of the doctrine, lies among the clear minority.

Although the Fifth Circuit appears to stand alone in applying the doctrine to post-arrest intermediary findings, two other courts of appeals (neither of which have considered the timing of the intermediary's actions) generally adhere to the doctrine. The decision below points to the Fourth Circuit's decision in *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012), as "articulating principles similar to [the Fifth Circuit's] in[dependent] intermediary doctrine and citing two Fifth Circuit cases with approval." App., *infra*, 9a n.6. And while the First Circuit's decision in *Malley* rejected the Fifth Circuit's approach, *see* pp. 13-14, *supra*, the First Circuit more recently affirmed a directed verdict on false arrest and related claims because a "grand jury found there was probable cause to arrest [plaintiffs] in connection with this incident." *Kennedy v. Town of Billerica*, 617 F.3d 520, 534-535 (1st Cir. 2010).

The Fifth Circuit's decision, however, conflicts squarely with those of the Second, Third, Sixth, Eighth, and Eleventh Circuits. In language that would apply equally to the facts here—*i.e.*, an arrest followed by a grand jury indictment proffered as a defense to a section 1983 claim—those courts of appeals have held that a post-arrest indictment does *not* preclude a section 1983 action for false arrest.

See Savino v. City of New York, 331 F.3d 63, 75 (2d Cir. 2003) (holding in post-arrest indictment case that "the presumption of probable cause arising from an indictment *** 'is totally misplaced when applied in false [arrest] actions'") (alteration in original) (quoting *Broughton v. State*, 335 N.E.2d 310, 313 (N.Y. 1975)); *McClellan v. Smith*, 439 F.3d 137, 145 (2d Cir. 2006) (same); *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 307 n.13 (6th Cir. 2005) (rejecting argument that "a *subsequent* grand jury indictment can establish probable cause for an earlier arrest"); *Arnott v. Mataya*, 995 F.2d 121, 124 n.4 (8th Cir. 1993) (finding argument that grand jury's indictment "insulates them from § 1983 liability for false arrest" to be "without merit"); *Jones v. Cannon*, 174 F.3d 1271, 1287 (11th Cir. 1999) (holding that falsely arrested plaintiff may recover "for his detention prior to the grand jury indictment"); *Garmon v. Lumpkin Cty.*, 878 F.2d 1406, 1409 & n.2 (11th Cir. 1989) ("A subsequent indictment does not retroactively provide probable cause for an arrest that has already taken place."); *Cox v. Pate*, 283 F. App'x 37, 39 (3d Cir. 2008) (concluding that court "appropriately recognized that the subsequent indictment had no bearing on [the plaintiff's] claim for false arrest").[3]

This conflicting body of circuit precedents underscores and informs the Fifth Circuit's woefully

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[3] *Accord Ojo v. Lorenzo*, 64 A.3d 974, 979 (N.H. 2013) (concluding that "post-arrest indictments do not operate retroactively to establish the existence of probable cause at the moment of arrest").

understated acknowledgment of "tension" among the courts of appeals on the applicability of the independent intermediary doctrine in section 1983 cases, App., *infra*, 9a—and, in particular, whether a post-arrest indictment precludes a false arrest claim. Only this Court can resolve the intractable conflict and bring uniformity to section 1983 jurisprudence.

II. THE DECISION BELOW IS INCORRECT

Beyond perpetuating the conflict among the courts of appeals, the Fifth Circuit's reliance on the independent intermediary doctrine flouts this Court's precedent and established tort principles. That is especially true in the present context of post-arrest grand jury indictments.

1. The decision below follows (and extends) a doctrine that this Court unequivocally rejected decades ago. As explained above (pp. 13-14, *supra*), the Court in *Malley* thought it "clear" that the "'no causation' rationale" of the independent intermediary doctrine is "inconsistent with [the Court's] interpretation of § 1983." 475 U.S. at 344 n.7. That is because the common law against which section 1983 is read "recognized the causal link between the submission of a complaint and an ensuing arrest," notwithstanding the (but-for yet legally irrelevant) actions of an independent intermediary. *Id.*

Malley therefore repudiated the central premise of the Fifth Circuit's independent intermediary doctrine: that an arresting "officer should not be liable because [a] judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest." 475 U.S. at 344 n.7. Rather than follow that

explicit guidance, the Fifth Circuit not only resurrected the doctrine, but expanded it to include post-arrest intermediaries. *See* App., *infra*, 8a; pp. 14-15, *supra*. That the Fifth Circuit's application of the independent intermediary doctrine runs headlong into *Malley* alone demonstrates that the decision below cannot stand.

2. To the extent the independent intermediary doctrine survives *Malley* at all, its application is untenable where, as here, the intermediary makes a probable cause determination *after* the arrest. Treating a third party's post-arrest decision as a superseding cause that "breaks the causal chain" between an officer's actions and the resulting unlawful arrest, as the Fifth Circuit did below, defies logic. App., *infra*, 8a (internal quotation marks omitted). The intermediary's decision is neither "intervening" nor "intermediary" because it happened after the constitutional violation occurred.

Bedrock principles of tort liability reinforce that straightforward conclusion. Under the common law, an intervening action may, in certain cases, constitute a "superseding cause" that insulates a wrongdoer from liability. *See* RESTATEMENT (SECOND) OF TORTS § 440. But those intervening actions break the causal chain of liability only when they "come[] into effective operation *at or before* the time of the damage," not *after* the damage has already been done. James A. McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 159-160 (1925) (emphasis added).

The Fifth Circuit's contrary approach not only ignores those well-established precepts, but also turns the probable cause requirement on its head.

That requirement "seek[s] to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime" by ensuring that police have a justification to arrest individuals *before* the arrest occurs. *Brinegar v. United States*, 338 U.S. 160, 176 (1949). Sanitizing otherwise unlawful arrests through after-the-fact probable cause determinations cannot be squared with the central purpose of requiring probable cause in the first instance.

3. Worse still, shielding officers from liability for false arrests based solely on a grand jury's post-arrest probable cause determination, as the Fifth Circuit did below, is particularly problematic for two reasons.

First, a grand jury's finding of probable cause to indict is not coterminous with a finding that the defendant-officer possessed probable cause to arrest. A grand jury "inquire[s] into all information that might possibly bear on its investigation" to determine whether, at the time it acts, there is probable cause to believe "a crime has been committed." *United States v. R. Enters., Inc.*, 498 U.S. 292, 297-298 (1991). That task "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way." *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972) (internal quotation marks omitted).

A determination of probable cause to arrest, by contrast, focuses on an earlier point in time and a far narrower record: "upon whether, *at the moment the arrest was made* *** the facts and circumstances *within (the arresting officers') knowledge* *** were sufficient to warrant a prudent man in believing that

the (suspect) had committed or was committing an offense." *Adams v. Williams*, 407 U.S. 143, 148 (1972) (first ellipsis in original) (emphasis added) (internal quotation marks omitted).

Accordingly, in presuming that an arresting officer had probable cause to arrest simply because a grand jury later finds probable cause to indict, the Fifth Circuit's application of the independent intermediary doctrine conflates distinct inquiries. By way of example, in a situation where an individual is arrested for drunk driving, but upon fingerprinting is linked to a series of armed robberies, a grand jury's indictment on the latter has no bearing on whether the officer had probable cause to arrest the individual in the first place. This is a case in point: the grand jury indicted Buehler only on a less serious charge based on a record encompassing evidence compiled beyond the time of arrest, App., *infra*, 6a, 43a; it does not follow that the facts and circumstances known to the arresting officer at the time supported probable cause to arrest.

Second, applying the independent intermediary doctrine to grand jury proceedings insulates unlawful arrests from any meaningful scrutiny. Unlike a magistrate or judge, "[t]he grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime." *Kaley v. United States*, 134 S. Ct. 1090, 1098 (2014); *see United States v. Calandra*, 414 U.S. 338, 343 (1974) (describing "wide latitude" given to grand juries, including secret deliberations). That makes it difficult (if not impossible) to show that the grand jury's indictment was "tainted" by misinformation under the limited exception to the

doctrine employed by some courts. *See* App., *infra*, 10a-14a (finding Buehler unable to produce evidence that the grand jury's deliberations were tainted).

Moreover, the fact that grand juries overwhelmingly return indictments only broadens the insulating sweep of the independent intermediary doctrine. Recent data show that federal grand juries returned a "no true bill" in only 11 of 193,021 criminal matters investigated by federal prosecutors. *See, e.g.*, MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2010—STATISTICAL TABLES 11-12 (Dec. 2013).[4] And grand juries in Travis County (the local jurisdiction where Buehler was arrested and charged) indict in more than 96% of cases presented to them. *See* Kevin Schwaller, *Recent Travis County Grand Juries Indict 96 Percent of Cases*, KXAN-TV (Aug. 3, 2015).[5]

At a minimum, this Court's intervention is needed to block the Fifth Circuit's indefensibly broad extension of the independent intermediary doctrine to the post-arrest grand jury context.

III. THE VIABILITY AND SCOPE OF THE INDEPENDENT INTERMEDIARY DOCTRINE PRESENT AN IMPORTANT AND RECURRING QUESTION

Resolving whether the independent intermediary doctrine may be applied in section 1983

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[4] http://www.bjs.gov/content/pub/pdf/fjs10st.pdf.

[5] http://kxan.com/2015/08/03/recent-travis-county-grand-juries-indict-96-percent-of-cases/.

false arrest suits is a question of exceptional importance. Congress enacted section 1983 to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citing *Carey v. Piphus*, 435 U.S. 247, 254-257 (1978)). Those federally guaranteed rights encompass Fourth Amendment protections against unlawful arrests as well as established First Amendment freedoms, such as those implicated in this case. The Fifth Circuit's doctrine severely frustrates section 1983's purpose with respect to false arrest claims on the theory that an intermediary's determination—including (as here) one made *after* the arrest has occurred—washes away the unconstitutionality of the arrest, thereby insulating officers from liability.

As evidenced by the persistent circuit conflict, as well as the continued confusion over *Malley*, the question presented is anything but academic. At least eight courts of appeals have now weighed in on the independent intermediary doctrine, and claims identical to Buehler's undeniably would be permitted to proceed in a clear majority of those circuits.

In the Fifth Circuit alone, just within the last year, district courts have applied the independent intermediary doctrine repeatedly to false arrest claims. *See, e.g.*, *Lock v. Torres*, No. 4:14-CV-2766, 2016 U.S. Dist. LEXIS 125243, at *19-*23 (S.D. Tex. Aug. 11, 2016) (post-arrest probable cause findings break causal chain, irrespective of fact that charges were later dismissed); *Joseph v. City of Cedar Hill Police Dep't*, No. 3:15-CV-2443-K-BK, 2016 U.S. Dist.

LEXIS 50839, at *5-*6 (N.D. Tex. Mar. 21, 2016) (false arrest claim fails because plaintiff was indicted after arrest); *Rollins v. Hattiesburg Police Dep't*, No. 2:14-CV-61-KS-MTP, 2015 U.S. Dist. LEXIS 91315, at *18-*19 (S.D. Miss. July 14, 2015) (municipal court judge's post-arrest finding of disorderly conduct broke the chain of causation for false arrest, even though the county court later dismissed all criminal charges). Indeed, in *Lock v. Torres*, the court relied specifically on the decision below in "conclud[ing] that the independent intermediary doctrine precludes Plaintiffs' [false arrest] claims." 2016 U.S. Dist. LEXIS 125243, at *21-*23.

District courts in other circuits likewise continue to grapple with the application of the doctrine. *See, e.g.*, *Mohammadi v. Michael*, No. 1:14-CV-2197-RDB, 2015 U.S. Dist. LEXIS 38191, at *21-*22 (D. Md. Mar. 26, 2015) (post-arrest indictments prevented plaintiffs from stating claim for false arrest); *Leonhardt v. Strollo*, No. 1:15-CV-2507, 2016 U.S. Dist. LEXIS 50397, at *10 (N.D. Ohio Apr. 14, 2016) (later indictment did not preclude section 1983 action against police officer, but only because plaintiff alleged that officer misled others to obtain indictment).

Thirty years ago, this Court in *Malley* rejected the rationale underlying the independent intermediary doctrine. Yet confusion reigns in the courts of appeals—perpetuated most notably by the Fifth Circuit's resurrection of that flawed doctrine and its perplexing extension to cases like this one. This Court's review is necessary to correct (again) the Fifth Circuit's undercutting of section 1983's

protections and to restore uniformity to the courts of appeals once and for all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 2, 2016

APPENDIX

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15–50155

ANTONIO FRANCIS BUEHLER,

Plaintiff – Appellant

v.

CITY OF AUSTIN/AUSTIN POLICE DEPARTMENT; OFFICER PATRICK OBORSKI; OFFICER ROBERT SNIDER; OFFICER JUSTIN BERRY; SERGEANT ADAM JOHNSON,

Defendants – Appellees

Appeal from the United States District Court
for the Western District of Texas

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

Officers of the Austin Police Department thrice arrested Antonio Buehler for interfering with police duties while he filmed APD interactions with other citizens. State magistrates and a grand jury found probable cause for each arrest, though the grand jury did not indict Buehler on more serious charges cited when he was arrested. Buehler sued the officers and

the City of Austin for violating his constitutional rights. The district court granted summary judgment for the defendants, reasoning that under this court's "independent intermediary doctrine," the officers could not be held liable for arrests the grand jury found supported by probable cause. Because the independent intermediary doctrine is established circuit law and Buehler presented insufficient evidence to support a finding that defendants "tainted" the grand jury proceedings, we affirm.

I.

We first recount the underlying facts, beginning with Buehler's three arrests.

A.

On January 1, 2012, Buehler was driving his friend Ben Muñoz home from New Year's Eve parties. When the pair stopped for gas, they noticed a DWI stop in progress. They watched Officer Patrick Oborski conduct a sobriety test and, at some point, saw him and Officer Robert Snider yank a passenger out of the suspect's vehicle and, in Buehler's opinion, mistreat her.[1] Buehler and Muñoz began photographing the encounter on cell phones, which the passenger encouraged. As Buehler attempted to take pictures from about twenty feet away, he cursed

[1] Snider claims that he acted to stop the passenger from texting and talking on her cell phone, which officers are trained to prevent because dangerous individuals could be summoned to the location of the traffic stop.

at the officers and asked them why they were mistreating the passenger.

After the passenger was handcuffed, Oborski moved toward Buehler. It is undisputed that Oborski then touched Buehler: on Buehler's account, the officer shoved, pushed, and poked him while Buehler gestured that he was not a threat; on Oborski's account, he merely placed his hand on Buehler's shoulder to maintain a safe distance because Buehler was "out of control." Oborski repeatedly accused Buehler of interfering with his investigation, which Buehler denied while criticizing Oborski. Eventually, Oborski took out handcuffs, ordered Buehler to put his hands behind his back, and (along with Snider) attempted to physically subdue him. Buehler initially resisted to some degree but submitted after Snider threatened to taze him. Oborski maintains that he arrested Buehler only after Buehler spit in his face, which Buehler denies. Buehler was cited with felony harassment of a public servant and misdemeanor resisting arrest.

That same day, a state magistrate reviewed an affidavit filed by Oborski, who swore that Buehler was "verbally aggressive," spit in his face, and violently resisted arrest. The magistrate determined that probable cause existed for the issuance of an arrest warrant.

After this arrest, Buehler and other activists launched the Peaceful Streets Project, a "grassroots initiative to translate . . . support [of Buehler] into a more engaged citizenry focused on holding police accountable and into broader support for victims of

police abuse." PSP trains people on their rights when interacting with police, teaches them how to record police interactions, and shares stories of alleged APD abuses. The group also organizes "cop watch" events intended to deter police misconduct, document evidence for victims of police misconduct, and allow victims to "regain some agency over their lives." According to Buehler, APD officers have attempted to hinder cop watches by making it difficult or impossible for PSP members to effectively record police-citizen interactions. Buehler also avers that APD officers have assaulted and arrested PSP members without justification, though he admits that group members sometimes ignore what Buehler terms "illegal or arbitrary orders." The defendants maintain that Buehler and other PSP members frequently yell obscenities at APD officers, draw resources away from investigations, and have harassed officers by, for example, posting the address and pictures of Oborski's home on the internet.

B.

In the early hours of August 26, 2012, Buehler and other PSP members began filming Officer John Evers interacting with Christopher Williams—who was being arrested—and his fiancee, Courtney Sadler. Williams became agitated at Buehler's filming and eventually said that he wanted to press harassment charges. The parties dispute whether Sadler was also angry at Buehler. As Evers walked Williams to a detention center, Officer Justin Berry told Buehler to step back and accused him of interfering. Berry repeated his order to back up, but Buehler protested that he had done nothing wrong.

After giving Buehler another warning, Berry arrested him for interfering with public duties.

That same day, Berry swore in an affidavit that Buehler's filming and refusals to back up agitated Williams and Sadler to the point that it created a safety hazard. A state magistrate found probable cause for the issuance of an arrest warrant.

C.

During another cop watch on September 21, 2012, Buehler positioned himself about twenty-five feet from Oborski's squad car to film a DWI stop. Oborski repeatedly ordered Buehler to back up until he told him to stop. But Sergeant Adam Johnson subsequently told Buehler and another PSP member to move toward and past Oborski to join two other filmers. Buehler began to back up and asked Johnson why he couldn't film from farther back in the same area, claiming that he wouldn't be able to see from the spot to which Johnson was ordering him. Johnson responded that he had given an order, and that Buehler would be arrested if he refused to obey. Buehler protested that Johnson hadn't "give[n] [him] like a really good reason before [he] start[ed] barking orders." Buehler continued to back up—to, he claims, at least eighty feet from the DWI stop—and asked Johnson why he could not stay put. Johnson reiterated his order, telling Buehler that he could either stand where had been told to or leave the scene altogether. Buehler said that he was leaving, but asked Johnson several times why he was "bossing [them] around" and being a "bully," at which point

Johnson said, "OK, you're going to jail," and arrested Buehler.

An Officer Holmes—not a defendant in this action—swore an affidavit stating that Johnson gave a minimum of three orders and told Buehler that he could continue to film if he moved to where Johnson had directed. According to Holmes, Buehler was standing on the sidewalk where Oborski intended to conduct a field sobriety test, and Buehler's refusals to move interfered with the investigation by forcing Holmes and Johnson to focus on him, leaving Oborski without backup. A magistrate reviewed the affidavit and found probable cause for the arrest.

D.

A single grand jury considered the charges relating to all three arrests. For each incident, the grand jury indicted Buehler for the misdemeanor of failing to obey a lawful order: Oborski's order for Buehler to put his hands behind his back on January 1, Berry's order to back up on August 26, and Johnson's order to move to a specified location on September 21. A person commits the offense of failing to obey a lawful order if he "knowingly fails or refuses to comply with an order or direction of a peace officer that is given by a visible or audible signal." Austin Mun. Ord. § 9-4-51. The grand jury did not indict Buehler on the more serious charges cited each time he was arrested. In October 2014, a jury found Buehler not guilty of failing to comply with a lawful order during the January incident. Buehler has not been tried on the other charges.

In December 2013, Buehler filed this lawsuit against the City, Officers Oborski, Snider, Berry, and Johnson, and Police Chief Art Acevedo. In addition to state-law claims, Buehler alleged that the defendants (1) violated his Fourth and Fourteenth Amendment rights by detaining, searching, and prosecuting him without probable cause, (2) violated his First and Fourteenth Amendment rights by interfering with his filming efforts, and (3) conspired to deprive him of his constitutional rights. Citing the independent intermediary doctrine, the district court granted summary judgment in favor of defendants on all of Buehler's federal claims.[2] *Buehler v. City of Austin*, No. A–13–CV–1100–ML, 2015 WL 737031 (W.D. Tex. Feb. 20, 2015). This appeal timely followed.

II.

"We review a district court's grant of summary judgment de novo, applying the same standard on appeal as that applied below." *Rogers v. Bromac Title Servs., L.L.C.*, 755 F.3d 347, 350 (5th Cir. 2014). Summary judgment is appropriate "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 genuine dispute of material fact exists if a reasonable jury could find for the nonmovant. *Rogers*, 755 F.3d at 350.

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[2] Having dismissed all of Buehler's federal claims, the district court declined to exercise supplemental jurisdiction over his state-law claims. *See* 28 U.S.C. § 1367(c)(3).

III.

Buehler first asks that we "overrule" our cases applying the independent intermediary doctrine, which becomes relevant when—as here—a plaintiff's claims depend on a lack of probable cause to arrest him. *See Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010) (applying the independent intermediary doctrine to Fourth Amendment claims); *Russell v. Altom*, 546 F. App'x 432, 436–37 (5th Cir. 2013) (applying the doctrine to First Amendment claims).[3] Under this doctrine, "even an officer who acted with malice . . . will not be liable if *the facts* supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or a grand jury, for that intermediary's 'independent' decision 'breaks the causal chain' and insulates the initiating party." *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988) (quoting *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982)). Our precedents have applied this rule even if the independent intermediary's action occurred after the arrest,[4] and even if the arrestee was never convicted of any

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[3] *See also Mesa v. Prejean*, 543 F.3d 264, 273 (5th Cir. 2008) (explaining that a First Amendment claim based on arrest fails if probable cause existed); *Brown v. Lyford*, 243 F.3d 185, 189 (5th Cir. 2001) ("The 'constitutional tort[]' of false arrest . . . require[s] a showing of no probable cause.").

[4] *See Taylor v. Gregg*, 36 F.3d 453, 455, 456–57 (5th Cir. 1994) (applying doctrine where presentment to magistrate and grand jury occurred after arrest), *overruled on other grounds by Castellano v. Fragozo*, 352 F.3d 939, 949 (5th Cir. 2003) (en banc).

crime.[5] As discussed below, however, the "chain of causation is broken only where all the facts are presented to the grand jury, or other independent intermediary where the malicious motive of the law enforcement officials does not lead them to withhold any relevant information from the independent intermediary." *Cuadra*, 626 F.3d at 813 (quoting Hand, 838 F.2d at 1428).

Though Buehler cites other circuits' decisions in varying degrees of tension with our independent intermediary doctrine,[6] this court has consistently applied the doctrine in published opinions. "It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court." *Robinson v. J&K Admin. Mgmt. Servs.*, 817 F.3d 193, 197 (5th Cir. 2016) (quoting *Jacobs v. Natl Drug Intelligence Ctr*,

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[5] *See Russell*, 546 F. App'x at 434, 436–37; *see also Smith*, 670 F.2d at 526 ("The constitution does not guarantee that only the guilty will be arrested.").

[6] *See Jones v. Cannon*, 174 F.3d 1271, 1287 (11th Cir. 1999) (holding that a grand jury indictment insulated police officers from damages accruing after, but not before, the indictment); *Arnott v. Mataya*, 995 F.2d 121, 124 n.4 (8th Cir. 1993) (rejecting the argument that a grand jury indictment insulated police officers from false arrest claims); *cf. McClellan v. Smith*, 439 F.3d 137, 145 (2d Cir. 2006) (holding under New York law that a grand jury indictment does not create a presumption of probable cause for false arrest claims). *But see Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) (articulating principles similar to this court's intermediate intermediary doctrine and citing two Fifth Circuit cases with approval).

548 F.3d 375, 378 (5th Cir. 2008)). Because Buehler cites no such intervening change, we are governed by our existing independent intermediary doctrine.

IV.

Buehler also argues that the district court erred in granting summary judgment despite evidence creating a genuine dispute of material fact regarding the independent intermediary doctrine's "taint" exception. Under this exception, an independent intermediary's probable cause finding does not protect law enforcement officials whose "malicious motive . . . lead[s] them to withhold any relevant information," *Cuadra*, 626 F.3d at 813, or otherwise "misdirect[] the magistrate or the grand jury by omission or commission," *Hand*, 838 F.2d at 1428.

"[M]ere allegations of 'taint,' without more, are insufficient to overcome summary judgment." *Cuadra*, 626 F.3d at 813. Rather, the plaintiff must "affirmatively show[]" that the defendants tainted the intermediary's decision. *Craig v. Dall. Area Rapid Transit Auth.*, 504 F. App'x 328, 332 (5th Cir. 2012); *Shields v. Twiss*, 389 F.3d 142, 150 (5th Cir. 2004). To satisfy the taint exception, omissions of exculpatory information must be "knowing[]." *Cuadra*, 626 F.3d at 813–14; *see Allen v. Jackson County*, 623 F. App'x 161, 162 (5th Cir. 2015). And because the intermediary's deliberations protect even officers with malicious intent, *Hand*, 838 F.2d at 1427, that an officer "harbored ill-will toward" the defendant does not suffice, *Craig*, 504 F. App'x at 333.

Here, the district court concluded that Buehler failed to show a triable issue whether the grand jury's findings of probable cause were tainted by false or misleading statements by the arresting officers. *Buehler*, 2015 WL 737031, at *12–13. Having reviewed Buehler's brief and cited evidence, we find no error in that conclusion.[7]

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[7] Buehler often eschews precise record citations in his appellate brief, instead citing entire exhibits—including a five-hundred-page trial transcript and lengthy videos—for important factual propositions. This violates our rule that "[e]very assertion in the briefs regarding matter in the record must be supported by a reference to the page number of the original record," 5th Cir. R. 28.2.2, and fails to satisfy Buehler's burden "to identify specific evidence in the record, and to articulate the 'precise manner' in which that evidence supported [his] claim," *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994); *see also Williams v. Merck & Co., Inc.*, 381 F. App'x 438, 444 (5th Cir. 2010) ("Citations on the order of '*See Pelkowski entire Deposition*' and '*See deposition of Williams*' are not what we, as a court bound to apply the law to the facts, are looking for. Page numbers are important . . . ."). "It is not our function to scour the record in search of evidence to defeat a motion for summary judgment; we rely on the nonmoving party to identify with reasonable particularity the evidence upon which he relies." *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). We nonetheless have done our best to review the evidence identified in the argument section of Buehler's brief. But we have not gone to extraordinary lengths to review those cited video exhibits that Buehler failed to send to this court with the record on appeal, did not move to add to the record until after oral argument, *and* provided to the district court in file formats we have been unable to view. Nor have we reviewed evidence that Buehler chose not to cite in the argument section of his brief, but listed with scant explanation in a postargument letter. *See Forsyth*, 19 F.3d at 1537; *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1546 (10th Cir. 1995) ("Without a specific reference, we will not search the record in an effort to determine

Primarily, Buehler attempts to show taint by pointing to alleged inconsistencies between (1) videos of the arrest incidents, his own affidavit, and other witnesses' accounts; and (2) the officers' reports, arrest affidavits, and deposition testimony—which he connects to the grand jury proceedings by citing statements that the officers testified to the same matters before the grand jury. Buehler cites no direct evidence of what was actually presented to the grand jury, though the record does suggest that Snider and Oborski testified similarly to the grand jury as they did in their depositions on some matters. Even assuming that the evidence Buehler points to mirrors grand jury testimony, it does not show that the grand jury's findings of probable cause that Buehler failed to obey lawful orders were tainted by the officers' knowing misstatements or omissions.[8] Much of Buehler's evidence simply shows that his actions and those of the arresting officers were

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whether there exists dormant evidence which might require submission of the case to a jury." (quotation marks omitted)).

[8] "Probable cause exists when the totality of facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *United States v. Ramirez*, 145 F.3d 345, 352 (5th Cir. 1998). There need only be probable cause to support the arrest, not "each individual charge made during the course of the arrest." *Price v. Roark*, 256 F.3d 364, 369 (5th Cir. 2001). So to the extent Buehler argues that there was not probable cause that he committed the more serious crimes the grand jury no-billed (*e.g.*, his argument that video of the January 1 incident shows that he did not spit on Oborski as would support a felony harassment charge), that fails to show that the grand jury's findings of probable cause for failure to obey lawful orders were tainted. *See Russell*, 546 F. App'x at 437.

subject to different interpretations. *See Anderson v. City of McComb*, 539 F. App'x 385, 387 (5th Cir. 2013) (affirming court's ruling that the independent intermediary doctrine shielded a police chief where he presented one version of legitimately disputed facts to a magistrate judge). Other alleged inconsistencies are not material to the grand jury's findings of probable cause, or do not stem from knowing falsehoods or omissions attributable to the defendants. *Cf. Kugle v. Shields*, No. 93–5567, 1995 WL 450219, at *4 (5th Cir. July 7, 1995) ("[O]fficers who maliciously or reckless[ly] misrepresent or omit material information in presenting such information are not shielded from liability.").

Such evidence is especially unpersuasive here because the grand jury heard testimony from Buehler and several witnesses who testified in Buehler's favor at his criminal trial—and presumably would have been favorable to Buehler before the grand jury as well—but still returned indictments. We have rejected taint arguments even where the grand jury did not hear from pro–plaintiff witnesses and the plaintiff "dispute[d] the version of the facts presented as well as the prosecutor's failure to present potentially exculpatory evidence," explaining "that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge." *Russell*, 546 F. App'x at 437 (quoting *United States v. Williams*, 504 U.S. 36, 51 (1992)).

Buehler also relies on an expert report opining that the arresting officers did not have probable cause to arrest Buehler in any of the three incidents,

and that the APD targeted Buehler for arrest and prosecution. But this expert's disagreement with the grand jury's probable cause findings does not show the grand jury proceedings were tainted.[9] Nor does evidence arguably showing that APD officers may have borne ill will toward Buehler create a triable issue. *See Hand*, 838 F.2d at 1427 (explaining that the independent intermediary doctrine insulates even officers who act with malice); *Smith*, 670 F.2d at 526. In sum, the district court did not err in finding no genuine dispute of material fact whether the defendant officers tainted the grand jury's deliberations.[10]

V.

Under established circuit law, Buehler had the burden of affirmatively showing that the grand jury's deliberations were tainted, and failed to do so. The judgment is AFFIRMED.

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[9] For similar reasons, the testimony of a law enforcement expert called by the City during Buehler's criminal trial, who said that citizens generally have the right to question and film officers and should not be assaulted for doing so, does not show any taint in the grand jury proceedings.

[10] In light of this holding, we, like the district court, need not consider the parties' arguments about the magistrates' findings of probable cause. Also, because we affirm dismissal of Buehler's federal claims and the district court did not abuse its discretion in declining supplemental jurisdiction over Buehler's state-law claims, *see Noble v. White*, 996 F.2d 797, 799 (5th Cir. 1993), we do not address Buehler's claims under Texas law.

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

ANTONIO FRANCIS BUEHLER,	§	
	§	
	§	
	§	
Plaintiff,	§	
	§	
V.	§	A–13–CV–1100–ML
	§	
	§	
CITY OF AUSTIN/AUSTIN POLICE DEPARTMENT; AUSTIN POLICE OFFICER PATRICK OBORSKI; AUSTIN POLICE OFFICER ROBERT SNIDER; AUSTIN POLICE OFFICER JUSTINE BERRY; and SERGEANT ADAM JOHNSON,	§	
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Defendants.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Defendants' Motion for Summary Judgment, filed November 11, 2014 (Clerk's Dkt. No. 92); Plaintiff's Response to Defendant's Motion for Summary Judgment, filed December 12, 2014 (Clerk's Dkt. No. 97); Defendants' Objections and Motion to Strike Plaintiffs Summary Judgment Evidence, filed December 23, 2014 (Clerk's Dkt. No. 101); Defendants' Reply to Plaintiff's

Response to Defendants' Motion for Summary Judgment, filed December 23, 2014 (Clerk's Dkt. No. 102); Plaintiff's Response to Defendants' Motion to Strike Plaintiff's Summary Judgment Evidence, filed January 6, 2015 (Clerk's Dkt. No. 105); Defendants' Objections and Supplemental Motion to Strike Plaintiff's Summary Judgment Evidence, filed January 7, 2015 (Clerk's Dkt. No. 106); Defendants' Reply to Plaintiff's Response to Motion to Strike Plaintiff's Summary Judgment Evidence, filed January 7, 2015 (Clerk's Dkt. 107); Plaintiff's Response to Defendants' Objections and Supplemental Motion to Strike Plaintiff's Summary Judgment Evidence, filed January 14, 2015 (Clerk's Dkt. No. 108); Defendants' Reply to Plaintiff's Response to Supplemental Motion to Strike Plaintiff's Summary Judgment Evidence, filed January 15, 2015 (Clerk's Dkt. No. 111); and Defendants' Motion to Quash Subpoenas, filed February 13, 2015 (Clerk's Dkt. No. 115).

The parties consented to this Court's jurisdiction, and the case was assigned to this Court's docket for all purposes on March 18, 2014. (Clerk's Dkt. No. 21). Having considered the briefing and the applicable case law, Defendant's Motion for Summary Judgment (Clerk's Dkt. No. 92) is **GRANTED** as fully set forth below.

I. BACKGROUND

Plaintiff brought this cause of action against the City of Austin ("City"), Austin Police Department ("APD"); Police Chief Art Acevedo ("Chief Acevedo"); Police Officers ("Officers") Patrick Oborski ("Officer

Oborski"), Robert Snider ("Officer Snider"), and Justin Berry ("Officer Berry"); and Sergeant Adam Johnson ("Sergeant Johnson"). By way of his second amended complaint, Plaintiff alleges he was on multiple occasions unlawfully arrested, wrongfully detained in jail, wrongfully prosecuted, and wrongfully deprived of his camera for filming police officers in the commission of their duties. (2d Am. Compl.). He further alleges APD and Chief Acevedo were aware Plaintiffs rights had been violated, but took no action to remedy the violations. *(Id.)*.

Defendants filed a motion to dismiss the action. (Clerk's Dkt. No. 18). The Court granted in part and denied in part the motion to dismiss. (Clerk's Dkt. No. 54). Accepting the facts alleged in the complaint as true, as the Court is required to do at the motion to dismiss stage, the Court found Buehler had stated: (1) Section 1983 claims against the Officers in their individual capacities for First Amendment freedom of speech, assembly, and retaliation violations, and Fourth and Fourteenth Amendment false arrest and unlawful search and seizure violations; (2) claims for failure to establish a policy, failure to train, and failure to supervise asserted against the City; (3) claims against the City and the Officers in their individual capacities for equitable relief brought under Sections 8, 9, 19, and 27 of the Bill of Rights to the Texas Constitution; and (4) state-law tort claims against the Officers in their individual capacities for conversion, false arrest, and false imprisonment. (Clerk's Dkt. No. 54 at 36). The remaining claims were dismissed. *(Id.)*.

The Court further found, accepting the factual allegations in the complaint as true, the Officers were not entitled to qualified immunity at that stage because filming and photographing a police officer performing official duties is a clearly established constitutional right, and a reasonable officer would not have arrested Buehler for exercising that right. *(Id.* at 20–21).[1] The City, APD, Officers Oborski, Snider, and Berry, and Sergeant Johnson (collectively, "Defendants") remain as defendants in this case. The other named defendants were dismissed.

Defendants filed a motion for summary judgment as to the remaining claims and defendants, to which Plaintiff responded. The motion is now ripe for the Court's consideration.

II. STANDARD OF REVIEW

A. Summary Judgment

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure only "if the movant shows there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Royal v. CCC & R Tres Arboles, L.L.C.,* 736 F.3d 396, 400 (5th Cir. 2013) (citing *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 254

[1] At the motion to dismiss stage, the Court was not provided with any evidence relating to a grand jury

(1986)). The Court will view the summary judgment evidence in the light most favorable to the non-movant. *Distribuidora Mari Jose, S.A. de C.V. v. Transmaritime, Inc.,* 738 F.3d 703, 706 (5th Cir. 2013).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Davis v. Fort Bend Cty.,* 765 F.3d 480, 484 (5th Cir. 2014) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Celotex,* 477 U.S. at 323; *Celtic Marine Corp.* v. *James C. Justice Co., Inc.,* 760 F.3d 477, 481 (5th Cir. 2014). The parties may satisfy their respective burdens by tendering depositions, affidavits, and other competent evidence. *Celtic Marine,* 760 F.3d at 481 (citing *Celotex,* 477 U.S. at 325). Once the non-movant has been given the opportunity to present evidence to create a genuine issue of fact, the court will grant summary judgment if no reasonable juror could find for the non–movant. *Boos v. AT&T, Inc.,* 643 F.3d 127, 130 (5th Cir. 2011).

III. SUMMARY JUDGMENT EVIDENCE

A. Undisputed Facts

On January 1, 2012 in the early morning, Officer Oborski and Officer Snider were engaged in a DWI traffic stop in front of a gas station. (Def. Exs.

2, 3; Pltf. Exs. 1, 11). Officer Oborski was conducting a sobriety test on the driver of the car ("DWI suspect"), when Buehler stopped at the gas station. (Pltf. Ex. 11). Buehler was driving a truck accompanied by a single passenger. (Pltf. Ex. 1). After a verbal exchange with the passenger of the DWI suspect ("DWI passenger"), Officer Snider began attempting to remove the DWI passenger from the car. Buehler got out of the truck and started taking cell phone photos of the Officer Snider as he continued his attempts to remove the DWI passenger. (Def. Exs. 2–4). Although the events that occurred next are disputed, it is undisputed that Buehler was arrested and charged with resisting arrest.[2] On January 1, 2012, a magistrate for the Municipal Court of Travis County, Austin, Texas issued an arrest warrant finding probable cause to arrest Buehler for third-degree felony harassment of a public servant, in violation of Texas Penal Code

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[2] The Court takes judicial notice of the public records related to this arrest, available on the Travis County Clerk's website, http://www.traviscountyclerk.org/eclerk/, which specify that Buehler was arrested on this date for Resisting Arrest, Search, or Transportation. The Court also takes judicial notice of the public records related to the August 26, 2012 and September 21, 2012 arrests, available on the Austin Municipal Court Public Inquiry website, https://www.austintexas.gov/AmcPublicInquiry/search/psnsearch.aspx, which specify that the cases were dismissed and terminated, respectively. *Funk v. Stryker Corp.,* 631 F.3d 777, 783 (5th Cir. 2011) (approving judicial notice of public records by district court reviewing motion to dismiss). The Court finds that these facts are not subject to reasonable dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See id.* (citing FED. R. EVID. 201(b)).

§ 22.11. (Def. Ex. 1 at 1–2). During the January 2013 term, a grand jury no-billed the charge for felony harassment of a public servant, and indicted Buehler for the lesser charge of knowing failure to obey a lawful order of a peace officer, a Class C Misdemeanor, in violation of City of Austin Municipal Ordinance § 9–4–51, for failing to put his hand behind his back. (Def. Ex. 1 at 3). In October 2014, a jury trial was held on the charge of failure to comply with a lawful order of a peace officer. On October 23, 2014, the jury found Buehler not guilty of the charge. (Pltf. Ex. 38).

Buehler formed the Peaceful Streets Project ("PSP") after his January 1, 2012 arrest. (Pltf. Ex. 22 at 14–20). PSP is a nonprofit watchdog group aimed at monitoring police conduct. PSP began routinely filming police officers conducting arrests and investigations. *(Id.)*.

On August 26, 2012, Officer Evers was in the process of executing an outstanding arrest warrant. (Def. Ex. 5). During the arrest, Buehler and members of PSP arrived and began videotaping. Officer Berry thereafter requested backup and Officer Evers arrived on the scene. (Def. Exs. 5, 6). After an exchange with Buehler, the details of which are disputed, Officer Berry arrested Buehler and seized his camera (*Id.*). Buehler was charged with interference with public duties. On August 26, 2012, a magistrate for the Municipal Court of Travis County, Austin, Texas issued an arrest warrant finding probable cause to arrest Buehler for interference with public duties, a Class B Misdemeanor, in violation of Texas Penal Code

§ 38.15. (Def. Ex. 1 at 4–5). During the January 2013 term, a grand jury no-billed Buehler for interference with public duties, and indicted Buehler for knowing failure to obey a lawful order of a peace officer, a Class C Misdemeanor, in violation of City of Austin Municipal Ordinance § 9–4–51, for failing to back up when ordered to do so by Officer Berry. (Def. Ex. 1 at 6). According to public records related to this arrest, the charge was ordered dismissed by an Austin Municipal Court judge on February 19, 2015.

On September 21, 2012, Officer Oborski was conducting a DWI traffic stop when Buehler and four members of PSP arrived and began filming. (Pltf. Exs. 19, 20, 22). Officer Oborski requested backup and Sergeant Johnson arrived on the scene. After a confrontation with Buehler, the facts of which are disputed, Sergeant Johnson and another officer arrested Buehler and charged him with interference with public duties. (Def. Exs. 7, 8). On September 21, 2012, a magistrate for the Municipal Court of Travis County, Austin, Texas issued an arrest warrant finding probable cause to arrest Buehler for interference with public duties, a Class B Misdemeanor, in violation of Texas Penal Code § 38.15. (Def. Ex. 1 at 7–8). During the January 2013 term, a grand jury no–billed Buehler for interference with public duties, and indicted Buehler for knowing failure to obey a lawful order of a peace officer, a Class C Misdemeanor, in violation of City of Austin Municipal Ordinance § 9–4–51, for failing to move as instructed by Sergeant Johnson. (Def. Ex. 1 at 10). According to public records related to this arrest, the case was terminated on July 29, 2013.

B. Disputed Facts

Defendants contend that on each occasion Buehler was arrested, he either refused an order from an Officer or otherwise interfered with an Officer's official duties. Buehler contends he was unlawfully arrested for filming the Officers in the commission of their official duties and for forming PSP. The factual discrepancies are detailed below.

1. January 2, 2012 Incident

a. Defendants' Version

Defendants maintain that on January 1, 2012, the DWI driver admitted she had been drinking and her passenger was intoxicated. Officer Oborski testified the DWI passenger would not stop yelling while Officer Oborski conducted a field sobriety test on the driver. (Def. Exs. 2, 3). Officer Oborski called for backup, and when Officer Snider arrived, the DWI passenger refused Officer Snider's verbal directives to stop yelling and texting on her cell phone. According to Officer Snider, APD officers are trained to not allow talking or texting because the subject may be attempting to recruit others to interfere with the traffic stop. (Def. Exs. 13, 4). The Officers contend that when they attempted to remove the DWI passenger from the car for refusing their orders, Buehler began shouting accusations and profanities. (Def. Ex. 1). The Officers further testified that the DWI passenger refused to stand, went limp, and began yelling when she realized she was being filmed. (Def. Ex. 2–4). Buehler apparently moved

closer to take photos, while his passenger stayed back and filmed.

After the DWI passenger was handcuffed and in the patrol car, Officer Oborski purportedly asked Buehler why he was interfering with an arrest. (Def. Exs. 2–3). According to Defendants, Buehler became verbally aggressive, and Officer Oborski "placed his hand on [Buehler's] shoulder to keep a distance" between himself and Buehler. (Def. Ex. 3 ¶ 20). Officer Oborski believed Buehler spit in his face and confronted Buehler about it, although Buehler denied spitting. Officer Oborski then arrested Buehler for spitting on him and repeatedly commanded Buehler to stop resisting and put his hands behind his back. (Def. Exs. 2–4). Buehler would not comply. Because a prolonged struggle risks injuring those involved, Officer Snider drew his taser and warned Buehler to comply. Buehler became compliant and was handcuffed. Defendants further maintain that while Buehler was being escorted to the patrol vehicle, he made accusations that the Officers were going to beat him up. The Officers never asked Buehler or his passenger to stop filming and gave them both assurances that APD had no problem with being filmed while performing their duties. (Def. Exs. 2–3).

b. Plaintiff's Version

Buehler contends the DWI passenger was attempting to tell the DWI driver she could refuse to submit to a field sobriety test. When the Officers began pulling the DWI passenger out of the car, she purportedly yelled in pain and fear. (Pltf. Ex. 15). Buehler states that he asked Officer Oborski why he

was pulling the DWI passenger out of the car, to which Officer Oborski responded, "Worry about yourself." (Pltf. Ex. 14). The DWI passenger pleaded with Buehler to record her as she was being detained. Buehler, believing the Officers were abusing the DWI passenger, moved within about 17 feet of Officer Oborski to take photos. (Pltf. Ex. 1). Officer Oborski placed the DWI passenger in the police cruiser. He then approached Buehler, who was standing against the tailgate of the truck. Buehler and Officer Oborski got into a verbal altercation regarding the DWI passenger's treatment. Officer Oborski purportedly poked Buehler in the chest, which Buehler contends is an assault. (Pltf. Ex. 13, 15). Buehler asked Officer Oborski why he was touching him. Officer Oborski replied that Buehler was interrupting his investigation, which Buehler denied. (Pltf. Ex. 14). Officer Oborski then pulled out his handcuffs while pushing Buehler towards the tailgate of the truck. Buehler again told Officer Oborski that he was not interfering. Buehler also pointed out to Officer Oborski that he did not approach Officer Oborski, rather, Officer Oborski approached him. (*Id.*).

Officer Oborski pulled Buehler away from the truck and began to wrestle him to the ground. Buehler claims Officer Oborski put him in a chokehold and told him to stop resisting. Buehler responded that he was not resisting. (*Id.*). Buehler contends that Officer Oborski was attempting to dislocate his elbow by placing Buehler in an arm lock and applying force to the back of his elbow. (Pltf. Ex. 1). Buehler and Officer Oborski continued to argue, and Officer Oborski told Buehler he should have just paid attention to himself and listened to the Officers

when they told him what to do. (Pltf. Ex. 14). Another officer took Buehler to the Blood Alcohol Testing ("BAT") bus. Officer Oborski shortly thereafter arrived at the BAT bus, purportedly grabbed and twisted Buehler's hand and wrist, and took Buehler to jail. (Pltf. Ex. 1).

2. August 26, 2012 Incident[3]

a. Defendants' Version

On August 26, 2012, Officer Evers was patrolling downtown Austin at night on foot to execute an outstanding arrest warrant. (Def. Ex. 5). Officer Evers located the subject and the subject's girlfriend and began arresting the subject. During the course of the arrest, PSP members surrounded Officer Evers and the subject and began videotaping. The subject and his girlfriend purportedly became uncooperative and Officer Evers could not effectuate the arrest while keeping a visual on the people surrounding him. Officer Evers made three calls for backup because he was concerned for his safety and the situation was escalating. (Def. Ex. 5–6). Officer

[3] Defendants' summary judgment evidence includes reference to an incident that occurred on August 24, 2012. Defendants contend that on that date, Officer Berry encountered Buehler while conducting an undercover operation. According to Officer Berry, Buehler disclosed his undercover status on the video recording, which Buehler later posted to a social media website. This disclosure purportedly caused an undercover operation to be shut down and for Officer Berry to be removed from undercover work. However, Defendants fail to describe why this incident is germane to Buehler's August 26, 2012 arrest.

Berry arrived and made several requests for the PSP members to step back, but repeatedly assured them they could continue filming. Buehler was the only PSP member who did not step back. (Def. Exs. 5–6, 9). The subject and his girlfriend became agitated because Buehler refused to stop filming, and Officer Evers had to restrain the subject. The subject stated Buehler was agitating him and harassing him. According to Officer Evers, the subject tripped as he was confronting Buehler, which caused Officer Evers to stumble. (Def. Exs. 2, 5–6, 9, 13).

Officer Berry warned the PSP members that refusal to back up would result in arrest. He maintains that he then arrested Buehler because of his refusal to move back. Officer Berry assured Buehler that he did not turn off his camera as he was being arrested, and left the camera hanging around Buehler's wrist. (Def. Exs. 5–6, 9).

b. Plaintiff's Version

On August 26, 2012, Buehler and three other PSP members were downtown to "cop watch." Buehler and the PSP members observed Officer Evers arresting a subject and began filming. (Pltf. Exs. 3, 12, 22). The woman with the subject asked Buehler and the other PSP members why they were filming. Buehler approached her and explained the purpose of PSP. The woman then hugged Buehler and returned to the subject. (Pltf. Ex. 22). Officer Castillo joined Officer Evers, and the Officers, subject, and woman began walking toward the booking facility. Buehler and one other PSP member followed them and continued to film. (Pltf. Ex. 5).

The Officers then stopped in the middle of the road. Officer Berry arrived and told Buehler to step back. Buehler contends the other PSP member was nearer to the subject than Buehler. Officer Berry then warned Buehler, "This is your last chance. You're preventing the officer from safely walking . . . . You're agitating this person right here." (Pltf. Ex. 17). Buehler asked Officer Berry for his badge number, and Officer Berry repeated his order to step back. Officer Berry then arrested Buehler, but did not arrest the other PSP member. (Pltf. Exh. 22).

3. September 21, 2012 Incident

a. Defendants' Version

On September 21, 2012, Officer Oborski was engaged in a DWI stop when Buehler and three other PSP members arrived at the scene. (Def. Exs. 7–8). Two PSP members positioned themselves west of the DWI stop and Buehler and another PSP member positioned themselves east of the stop. Purportedly, because Officer Oborski was surrounded by PSP members on both sides, he instructed the PSP members east of the stop to move back. (Def. Ex. 3). After Buehler and the other PSP member refused Officer Oborski's repeated directives, Officer Oborski radioed for backup. (Def. Exs. 7–8). Sergeant Johnson arrived, and Buehler refused his repeated requests to move and stand with the other PSP members to protect the Officers' safety. Buehler was handcuffed and placed under arrest by Sergeant Johnson for his refusal to move. At no time were any of the PSP members asked to stop filming. (*Id.*).

b. Plaintiff's Version

Buehler and three other PSP members observed a traffic stop on West 6th Street. They parked their car and walked up to the scene, about six to eight feet from the subject car, and about 25 feet from the squad car and Officer Oborski. (Pltf. Ex. 22). Officer Oborski saw Buehler and the PSP members, and using the loudspeaker told them to back up. (Pltf. Exs. 19, 20). Buehler asked how far, and Officer Oborski again told him to back up. Buehler again asked how far, and Officer Oborski said to back up until he says to "stop." Buehler and the other PSP member backed up about ten more feet and began filming the traffic stop.

Sergeant Johnson arrived on the scene and told Buehler and the other PSP member to walk toward and past Officer Oborski to where the other PSP members were filming, which was quite a distance away. (Pltf. Ex. 22). Sergeant Johnson stated the Officers needed the space where Buehler and the other PSP member was to conduct the DWI stop. (Pltf. Ex. 7). Buehler believed they were being set up to be arrested, because the two Officers' directives conflicted with each other. Buehler then asked what was wrong with where they were standing, and stated they were not interfering or threatening. (Pltf. Ex. 19). Sergeant Johnson claimed his order was lawful and to stand where the other PSP members were filming on the west side of the stop. Buehler responded that he would not be able to film well or gather audio from that distance.

Buehler began backing away and continued backing away until he was arrested. While backing away, Buehler asked Sergeant Johnson if they were about 50 feet away, and said "is that too close, really?" (Pltf. Ex. 19). Sergeant Johnson asked Buehler if he was going to fail to comply with his directive to stand with the other PSP members. Buehler said he "just want[ed] [Sergeant Johnson] to give [him] like a really good reason before [Sergeant Johnson] start[ed] barking orders." *(Id.).* Sergeant Johnson replied that if Buehler did not comply, he was going to arrest him for failure to obey a lawful order. According to Buehler, at that time he had backed up approximately 65 feet from the DWI suspect. Sergeant Johnson repeated his order and said Buehler could also choose to leave the scene. (Pltf. Exs. 19, 22). Buehler said he was going to leave, but asked why Sergeant Johnson was bossing them around and being a bully. Sergeant Johnson then arrested Buehler.

IV. APPLICABLE LAW

A. Qualified Immunity

Qualified immunity protects state officials from civil damages liability under Section 1983 in their individual capacities unless a plaintiff can show "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd,* 131 S.Ct. 2074, 2080 (2011) (citation omitted); *see Ramirez v. Martinez,* 716 F.3d 369, 375 (5th Cir. 2013) (same). The Fifth Circuit has characterized evaluation of qualified

immunity as "a two–step process," with "the burden [] on the plaintiff to prove that a government official is not entitled to qualified immunity." *Wyatt v. Fletcher,* 718 F.3d 496, 502 (5th Cir. 2013) (citing *Michalk v. Hermann,* 422 F.3d 252, 258 (5th Cir. 2005)). However, courts may choose to address the prongs in either order. *Pearson v. Callahan,* 555 U.S. 223, 225 (2009).

First, the plaintiff must demonstrate a violation of a clearly established right. *Id.* Conduct violates a clearly established right when the contours of the right are sufficiently clear that every reasonable official would have understood that the conduct at issue violates the right. *al-Kidd,* 131 S.Ct. at 2083. To find that a right is clearly established, the court "must be able to point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity." *Morgan v. Swanson,* 659 F.3d 359, 371–72 (5th Cir. 2011) (quoting *al-Kidd,* 131 S.Ct. at 2084) (internal quotation marks omitted). Although a case directly on point is not required, "existing precedent must have placed the statutory or constitutional question beyond debate," *al-Kidd,* 131 S.Ct. at 2083. The Supreme Court recently reiterated this "beyond debate" standard in *Lane v. Franks,* 134 S.Ct. 2369, 2383 (2014).

Second, the court must determine whether the defendant's conduct as alleged was reasonable. *Wyatt,* 718 F.3d at 503. Put another way, "[f]or immunity to apply, the actions of the officer must be objectively reasonable under the circumstances, such

that a reasonably competent officer would not have known his actions violated then-existing clearly established law." *Mesa v. Prejean,* 543 F.3d 264, 269 (5th Cir. 2008) (citation and internal quotation marks omitted); *see also Morgan,* 659 F.3d at 372 ("The *sine qua non* of the clearly-established inquiry is fair warning," meaning that the "right has been defined with sufficient clarity to enable a reasonable official to assess the lawfulness of his conduct." (citations and internal quotation marks omitted)).

B. First and Fourth Amendments

The First Amendment protects a private citizen's right to assemble in a public forum, receive information on a matter of public concern—such as police officers performing their official duties—and to record that information for the purpose of conveying that information. *See Shillingford v. Holmes,* 634 F.2d 263, 264, 266 (5th Cir. 1981) (stating that police officer's "unprovoked and unjustified" assault of plaintiff who "was photographing what the policeman did not want to be memorialized" and "was not involved in the arrest incident and did not interfere with the police in any fashion" established a deprivation of constitutional rights), *abrogated on other grounds by Valencia v. Wiggins,* 981 F.2d 1440 (5th Cir. 1993). *See, e.g., ACLU of Ill. v. Alvarez,* 679 F.3d 583, 595, 608 (7th Cir. 2012) (stating that making a recording "is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording" and finding that plaintiffs were likely to prevail on their claim that state eavesdropping statute interfered with right to record

police officers "engaged in their official duties in public places"); *Smith v. City of Cumming,* 212 F.3d 1332, 1333 (11th Cir. 2000) (finding, in case involving citizens videotaping police, that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); *Fordyce v. City of Seattle,* 55 F.3d 436, 439 (9th Cir. 1995) (recognizing, in case involving citizen filming police officers, a "First Amendment right to film matters of public interest").

The proposition that an individual cannot be retaliated against for expression protected by the First Amendment is uncontroversial. *See Keenan v. Tejeda,* 290 F.3d 252, 259 (5th Cir. 2002) ("The First Amendment prohibits . . . adverse governmental action against an individual in retaliation for the exercise of protected speech activities" (citation omitted)). Similarly, the Court agrees with Buehler's assertion that "[t]he disclosure of misbehavior by public officials is a matter of public interest and therefore deserves constitutional protection, especially when it concerns the operation of a police department." *Brawner v. City of Richardson, Tex.,* 855 F.2d 187, 191–92 (5th Cir. 1988).

However, "neither the First Amendment right to receive speech nor the First Amendment right to gather news is absolute." *Davis v. E. Baton Rouge Parish Sch. Bd.,* 78 F.3d 920, 928 (5th Cir. 1996). Courts have recognized that the right to record police officers is "subject to reasonable time, place and manner restrictions." *Smith,* 212 F.3d at 1333; *see also Glik v. Cunniffe,* 655 F.3d 78, 84 (1st Cir. 2011)

(same); *Crawford v. Geiger,* __F. Supp. 2d__, 2014 WL 554469, at *11 (N.D. Ohio Feb. 10, 2014) (same). Similarly, the First Amendment does not grant citizens unrestrained license to violate valid criminal laws. *See Peavy v. WFAA-TVInc.,* 221 F.3d 158, 185 (5th Cir. 2000) ("It would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license . . . to violate valid criminal laws" (quoting *Brazenburg v. Hayes,* 408 U.S. 665, 691 (1972)).

The Fourth Amendment to the United States Constitution affords citizens the right to be free from unlawful arrest, that is, arrest without probable cause. *Club Retro, L.L.C. v. Hilton,* 568 F.3d 181, 206 (5th Cir. 2009) (citations omitted); *Gerstein v. Pugh,* 420 U.S. 103, 111–12 (1975); *Beck v. Ohio,* 379 U.S. 89, 91 (1964). To succeed on a claim for false arrest under Section 1983, the plaintiff must demonstrate that he was arrested without probable cause to believe he committed an offense. *Haggerty v. Tex. S. Univ.,* 391 F.3d 653, 655 (5th Cir. 2004). "Probable cause exists when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Id.* at 655–56 (citation and internal quotation marks omitted). "It is well-settled that when probable cause exists to believe that someone is violating a criminal statute, his or her arrest is reasonable." *Johnson v. City of Dallas,* 141 F. Supp. 2d 645, 647 (N.D. Tex. 2001) (citing *Atwater v. City of Lago Vista,* 195 F.3d 242, 245 (5th Cir. 1999)).

V. ANALYSIS

An obvious tension exists between a police officer and an individual observing and recording that police officer. As previously stated in the Court's order on the motion to dismiss, an individual has a constitutional right to assemble in a public place so as to observe and acquire information related to the police as they perform their official duties. At the same time, a police officer must be free to perform his official duties without undue interference so as to protect the officer and everyone in the vicinity. As this tension plays out, the officer on the scene of an arrest or investigation will be the arbiter of what constitutes a reasonable time, place, and manner for the exercise of the individual's First Amendment right to record.

A. Clearly Established Right

The Court reaffirms its finding in the order on the motion to dismiss: In light of the existing Fifth Circuit precedent and the robust consensus among circuit courts of appeals, the Court concludes that the right to photograph and videotape police officers as they perform their official duties was clearly established at the time of Buehler's arrests. (Clerk's Dkt. No. 54 at 20). *See Keenan,* 290 F.3d at 259 (retaliation for First Amendment exercise is unconstitutional); *Enlow v. Tishomingo County,* 962 F.2d 501 (5th Cir. 1992) (arrest for photographing police raid where claimant did not interfere was unconstitutional). *See also Glik,* 655 F.3d at 84 (finding First Amendment right to record police officers was clearly established at time of arrest).

Similarly, "[t]he Fourth Amendment right to be free from false arrest—arrests without probable cause—was clearly established at the time of" Buehler's arrests. *Club Retro, L.L.C.*, 568 F.3d at 206 (citations omitted); *see also Gerstein,* 420 U.S. at 111–12 ("The standard for arrest is probable cause, defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense.'" (quoting *Beck,* 379 U.S. at 91)).

Accordingly, having reiterated the findings that Buehler's right to record police officers in the commission of their official duties and right to be free from unlawful arrest are clearly established, the dispositive issue is whether the officers violated Buehler's statutory or constitutional rights. *See Ramirez,* 716 F.3d at 375 (prongs of qualified immunity are: (1) whether plaintiff makes out violation of constitutional right; and (2) whether the right is clearly established).

B. Violation of Constitutional Right

To overcome qualified immunity, a plaintiff must have suffered a violation of his constitutional rights. *See Russell v. Altom,* 546 F. App'x 432, 436 (5th Cir. 2013) (officers are entitled to qualified immunity in absence of constitutional violation). Because Buehler's constitutional claims arise out of allegedly unlawful arrests, all of Buehler's constitutional claims require an absence of probable cause to support his arrests. *See id.* (First and Fourth Amendment claims arising from allegedly unlawful arrest require lack of probable cause to

arrest); *Mesa,* 543 F.3d at 273 (First Amendment claim is defeated where arresting officer has probable cause to arrest).

"If [probable cause] exists, any argument that the arrestee's speech as opposed to her criminal conduct was the motivation for her arrest must fail, no matter how clearly that speech may be protected by the First Amendment." *Mesa,* 543 F.3d at 273. The undersigned will therefore focus the analysis on whether the arrests at issue were unlawful due to a lack of probable cause. Defendants contend they are shielded from any liability arising out of Buehler's three arrests because an independent intermediary—a grand jury—found probable cause to charge Buehler with a crime after each arrest.

1. Grand Jury Indictments

A grand jury thrice indicted Buehler for knowing failure to obey a lawful order of a peace officer, a Class C Misdemeanor, in violation of City of Austin Municipal Ordinance § 9–4–51. It is well established that a pre-arrest grand jury indictment insulates arresting officers from liability because an independent intermediary has found probable cause to charge a defendant with a crime. *Cuadra v. Hous. Indep. Sch. Dist.,* 626 F.3d 808, 813 (5th Cir. 2010) (citing *Hand* v. *Gary,* 838 F.2d 1420, 1428 (5th Cir. 1988)). "[A]n indictment 'fair upon its face,' and returned by a 'properly constituted grand jury,' we have explained, 'conclusively determines the existence of probable cause' to believe the defendant perpetrated the offense alleged." *Kaley v. United*

States, _____ U.S. _____, 134 S. Ct. 1090, 1097 (2014) (quoting *Gerstein,* 420 U.S. at 117, n.19).

Buehler contends a grand jury's probable cause finding post-arrest does not break the chain of causation because probable cause to arrest is based on an officer's knowledge at the moment of arrest, while a grand jury's finding is often based on more information. *See United States v. McCowan,* 469 F.3d 386, 390 (5th Cir. 2006) (stating the probable cause standard). However, the Fifth Circuit has on several occasions held that a grand jury's finding of probable cause to charge an arrestee with a crime—even when the indictment occurs post–arrest—breaks the chain of causation and creates a presumption of probable cause to arrest. *See Russell,* 546 F. App'x at 434 (man arrested for refusal to move away from dangerous work site and later indicted had no cause of action against arresting officer); *Hale v. Clayton,* 198 F.3d 241, 241 (5th Cir. 1999) (district court properly dismissed false arrest claim based on warrantless arrest because grand jury indictment broke chain of causation); *Taylor v. Gregg,* 36 F.3d 453, 456–57 (5th Cir. 1994), (noting that "[i]t is well settled that if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party" and applying that rule to false-arrest claimants who were indicted post–arrest), *overruled on other grounds by Castellano v. Fragozo,* 352 F.3d 939, 949 (5th Cir. 2003) (en banc).

Other circuits have agreed with Buehler's contention that a grand jury indictment post-arrest

does not break the chain of causation. *See McClellan v. Smith,* 439 F.3d 137, 145 (2d Cir. 2006) ("presumption of probable cause arising from indictment 'is totally misplaced'" when applied to false arrest, unlawful imprisonment, and unreasonable search and seizure actions (quoting *Savino v. City of New York,* 331 F.3d 63, 75 (2d Cir. 2003))); *Jones v. Cannon,* 174 F.3d 1271, 1285 (11th Cir. 1999) (subsequent grand jury indictment after false arrest does not retroactively break chain of causation); *Arnott v. Mataya,* 995 F.2d 121, 124 (8th Cir. 1993) (grand jury's indictment for obstructing law enforcement officer does not insulate officers from liability). While other circuits comport with Buehler's analysis, the Fifth Circuit holdings in *Russell, Hale,* and *Taylor* are clear: A grand jury's finding of probable cause to charge a claimant with a crime insulates the arresting officers from claims arising from an allegedly unlawful arrest even if the indictment occurs post-arrest. The Court is therefore bound by the Fifth Circuit's conclusion and must apply it herein.

Buehler next argues that because the grand jury indictments are for lesser charges than the arrest, the grand jury indictments do not insulate Defendants from liability. He reasons the grand jury did not find probable cause to arrest him for the specific crimes alleged by the Officers, therefore evidencing a lack of probable cause to arrest him. However, "[t]he probable cause inquiry focuses on the validity of the arrest, not the validity of each individual charge made during the course of the arrest." *Russell,* 546 F. App'x at 436 (citing *Price v. Roark,* 356 F.3d 364, 369 (5th Cir. 2001), and *Wells v.*

Bonner, 45 F.3d 90, 95 (5th Cir. 1995)). Therefore, a grand jury indictment that finds probable cause to charge a defendant with a different crime for the same conduct that caused his arrest will nevertheless sever the chain of causation. *See id.* (quoting *Cuadra,* 626 F.3d at 813) (officers were insulated where defendant who refused order to move out of dangerous area when photographing government crew's work, even though the grand jury indicted him on a different charge because "[w]hen the facts supporting an arrest 'are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party'"). The fact that the grand jury later indicted Buehler on charges that differed from those lodged by his arresting officers is thus inconsequential. *See id.* at 437 (where grand jury's indictment is sufficient to establish probable cause, "there is no need to address [the] argument regarding the lack of probable cause to support the initial charge" which was dropped).

Buehler further maintains the Officers attempted to "set him up" and were not actually threatened by his conduct, which evidences a lack of probable cause. However, as established above, a grand jury determined there was probable cause to arrest Buehler on each occasion. Therefore, regardless of the Officers' intent, even if malicious, there was an independent, objective source of probable cause to arrest Buehler. *See al-Kidd,* 131 S. Ct. at 2080 (citing *Whren v. United States,* 517 U.S. 806, 814 (1996)) (Fourth Amendment reasonableness is determined by asking whether "circumstances,

viewed objectively, justify [the challenged] action. . . . If so, that action was reasonable '*whatever*' the subjective intent motivating the relevant officials."); *Webb v. Arbuckle,* 456 F. App'x 374, 380 (5th Cir. 2011) (listing cases that found officer's subjective intent or prextextual [sic] reason for arrest did not render arrest unconstitutional if independent, objective probable cause to arrest existed at time of arrest); *United States v. Castro,* 166 F.3d 728, 734 (5th Cir. 1999) (officers' subjective intent is irrelevant to objective reasonableness analysis). "[E]ven an officer [in Buehler's case] who acted with malice in procuring the warrant or indictment will not be liable if *the facts* supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or grand jury." *Craig v. Dallas Area Rapid Transit Auth.,* 504 F. App'x 328, 332 (5th Cir. 2012) (quoting *Hand,* 838 F.2d at 1427); *see also Atwater,* 532 U.S. at 354 (if officer has probable cause to believe individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the individual).

Buehler also argues that because a jury found him not guilty of failure to obey a lawful order on January 1, 2012, there was no probable cause to arrest him on that date.[4] Specifically, because there was a jury instruction that Officer Oborski needed reasonable suspicion or probable cause to lawfully order Buehler to put his hands behind his back, the jury must have concluded there was no probable

[4] The undersigned also notes that the other charges against Buehler have since been dismissed.

cause. However, whether a charge is later dropped or a defendant is found not guilty is immaterial to the probable cause analysis. *See Baker v. McCollan,* 443 U.S. 137, 145 (1979) ("The Constitution does not guarantee that only the guilty would be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released."); *Russell,* 546 F. App'x at 437 ("It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge. That has always been so . . . ." (quoting *Williams,* 504 U.S. at 51)); *Rodriguez v. Ritchey,* 556 F.2d 1185, 1190 n.21 (5th Cir. 1977), (a warrant is valid even if charges are later dropped or defendant is found not guilty), *overruled on other grounds by Malley v. Briggs,* 75 U.S. 335 (1986). Therefore, the Court may properly presume the grand jury indictments will insulate Defendants from Buehler's claims unless Buehler can show the grand jury deliberations were tainted. *Hand,* 838 F.2d at 1428.

2. Tainted Evidence Exception

If a claimant can show the deliberations of the independent intermediary were in some way tainted by the defendant, the presumption of probable cause is rebutted. *Id.* However, a claimant must actually show the deliberations of the intermediary were tainted by the actions of the defendant. *Craig,* 504 F. App'x at 332–33. This requires an affirmative showing, and more than conclusory allegations or a scintilla of evidence. *Id.* (citing *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994); *Taylor,* 36 F.3d at 457; and *Hand,* 838 F.2d at 1428).

In the response to the motion for summary judgment, Buehler contends for the first time that the evidence presented to the grand jury was tainted by the arresting officers. Accordingly, Buehler urges the Court to find there is a genuine issue of material fact regarding tainted grand jury deliberations.

However, Buehler has provided no direct or actual evidence that the grand jury's deliberations were tainted by any of the defendants. *See Taylor,* 36 F.3d at 457 (quoting *Hand,* 838 F.2d at 1421) ("[A]n independent intermediary breaks the chain of cuasation [sic] unless it can be *shown* that the deliberations of that intermediary were in some way tainted by the actions of the defendants" (emphasis in original)). Regarding the grand jury process, Buehler merely testified in his affidavit that in addition to himself, "it was confirmed that the following individuals testified at the Grand Jury: Ben Munoz, Norma Pizana, Ashley Hill, John Blackford, Elizabeth Mahoney, Carlos Amador, Officer Oborski, and Officer Snider." (Pltf. Ex. 22 at 32 n.197). As addressed above, it appears to be inconsequential in the Fifth Circuit that the grand jury was given information additional to an officer's knowledge at the time of arrest. Buehler therefore failed to address whether the grand jury was presented with or relied on any purportedly false or misleading statements by the arresting officers, and "a mere allegation of taint, without more, is insufficient." *Craig,* 504 F. App'x at 332 (citing *Taylor,* 36 F.3d at 457) (plaintiff did not overcome presumption that independent intermediary breaks chain of causation where "[the plaintiff] has not affirmatively shown, or

attempted to show, what evidence the grand jury relied upon to return an indictment").

Buehler further maintains he has presented a genuine issue of material fact regarding grand jury taint because his law enforcement expert "believes that the [O]fficers' arrests were motivated by their perception of Antonio Buehler as opposed to legitimate law enforcement measures." (Pltf. Resp. at 19). Buehler's law enforcement expert makes only one mention of the grand jury's deliberations: "It has been my experience that a grand jury proceeding is a very one sided proceeding in that district attorneys (prosecutors) present only information to the grand jury that they believes [sic] supports an individual's guilt. Defendants have no rights in this proceeding and are not represented, and therefore have no ability to present contradictory evidence to the members of the grand jury." (Pltf. Ex. 37 at 12). In sum, the law enforcement expert points out that grand jury proceedings are by nature one-sided. However, "to make the [grand jury's] assessment *it has always been thought sufficient to hear only the prosecutor's side*." *Russell,* 546 F. App'x at 437 (quoting *United States v. Williams,* 504 U.S. 36, 51 (1992)) (emphasis added). Therefore, Buehler's law enforcement expert's opinion that grand jury proceedings are one–sided is insufficient to raise a fact issue regarding whether the grand jury deliberations were tainted. *See Craig,* 504 F. App'x at 332–33 (DART employee's affidavit that officer would be willing to taint investigation was insufficient to overcome presumption, even if officers harbored ill-will toward claimant).

Accordingly, Buehler has failed to rebut the presumption that a grand jury indictment cuts off the chain of causation stemming from an allegedly unlawful arrest, insulating the arresting officers from Buehler's claims. *See Hand,* 838 F.2d at 1427–28 (where no evidence grand jury deliberations were tainted, chain of causation is broken). Having found the grand jury indictments returned in relation to each of Buehler's arrests establish probable cause in each instance, Buehler's claims under the Fourth and First Amendment must fail. *See Russell,* 546 F. App'x at 436 (probable cause finding defeats First and Fourth Amendment claims); *Mesa,* 543 F.3d at 273 (probable cause finding defeats First Amendment claim).

Due to the prophylactic effect of the grand jury indictment, as applied in *Russell, Hale,* and *Taylor,* the Court declines to address the remaining probable cause arguments advanced by Buehler. Significantly, the Court declines to conduct its own independent review of the summary judgment evidence as to the issue of objective reasonableness of the Officers' conduct.[5] *See e.g., Spencer v. Rau,* 542 F. Supp. 2d

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[5] In light of the grand jury's independent role in finding probable cause, the Court also declines to address Defendants' contention that the magistrate's warrants insulate the Officers by breaking the chain of causation. *See Murray v. Earle,* 405 F.3d 278, 292 (5th Cir. 2005) (magistrates' probable cause determination breaks chain of causation if facts supporting arrest are placed before magistrate). Similarly, the Court declines to address Buehler's contention that the arrest warrants did not insulate the Officers because the Officers lied or omitted material facts in the warrant affidavits. *See Hand,* 838 F.2d at 1427–28 (the chain of causation is not broken where

583, 591 (W.D. Tex. 2007) (conducting thorough objective reasonableness analysis). Accordingly, as a result of the indictments returned by the Travis County Grand Jury and Buehler's failure to show that the grand jury's investigation was tainted by any of Defendants, the Officers are entitled to qualified immunity. *See Ramirez,* 716 F.3d at 375 (officer entitled to qualified immunity because probable cause existed for claimant's arrest).

B. Municipal Liability

Ordinarily a municipality cannot be held liable for the actions of its employees on a respondeat superior theory. *Monell v. N.Y.C. Dep't of Soc. Servs,* 436 U.S. 658, 692 (1978). Instead, a plaintiff seeking to impose liability on a municipality must identify a policy or custom that caused the plaintiff's injury. *Bd. of Cnty. Comm'rs v. Brown,* 520 U.S. 397, 403 (1997). "[M]unicipal liability under [S]ection 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski v. City of Houston,* 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell,* 436 U.S. at 694). As discussed above, the grand jury indictment establishes the existence of probable cause, consequently no violation of Buehler's constitutional rights has been shown. Therefore, Buehler's claims against the City and APD cannot survive summary judgment.

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law enforcement officials withheld relevant information or misled magistrate).

C. State Law Claims

Buehler argues his state law claims do not fail because he has raised a genuine issue of material fact regarding probable cause. Pursuant to 28 U.S.C. § 1367, a federal court generally has supplemental jurisdiction over claims that are so related to the claims over which the court has original jurisdiction that they form part of the same case or controversy. However, the Court may decline to exercise supplemental jurisdiction over a claim if the court has dismissed all claims over which it has original jurisdiction. Because the summary judgment of Buehler's federal claims is warranted, the Court declines to exercise supplemental jurisdiction over his state law claims.

VI. CONCLUSION

As the grand jury indictments sever the chain of causation and insulate Defendants absent evidence of tainted deliberations, Buehler has not established a violation of his constitutional rights. The Officers are therefore entitled to qualified immunity, and the causes of action against the Officers, APD, and the City must fail. The Court declines to exercise jurisdiction over Buehler's state law claims.

Accordingly, Defendants' Motion for Summary Judgment (Clerk's Dkt. No. 92) is hereby **GRANTED.**

Defendants' Motion for Judgment on the Pleadings (Clerk's Dkt. No. 67), Objections and Motion to Strike Plaintiff's Summary Judgment

Evidence (Clerk's Dkt. No. 101), and Objections and Supplemental Motion to Strike Plaintiff's Summary Judgment Evidence (Clerk's Dkt. No. 106) are hereby **DISMISSED** as moot.[6]

Defendants' Motion to Quash Subpoenas (Clerk's Dkt. No. 115) is hereby **GRANTED**.[7]

SIGNED on February 20, 2015.

/s/ Mark Lane
MARK LANE
UNITED STATES MAGISTRATE JUDGE
Presiding under 28 U.S.C. § 636(c)

[6] Defendants move to strike a number of Buehler's exhibits, arguing they are improperly authenticated, contain hearsay, are inconsistent, and have not been properly served upon Defendants. As found above, summary judgment is granted for Defendants notwithstanding the Court's consideration of the entirety of Plaintiff's exhibits. Accordingly, the pending motions will be dismissed as moot. (Clerk's Dkt. Nos. 101, 106).

[7] Defendants move to quash subpoenas issued in relation to this case. Having granted the motion for summary judgment, the motion to quash will also be granted. (Clerk's Dkt. No. 115).

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15–50155

ANTONIO FRANCIS BUEHLER,

Plaintiff – Appellant

v.

CITY OF AUSTIN/AUSTIN POLICE DEPARTMENT; OFFICER PATRICK OBORSKI; OFFICER ROBERT SNIDER; OFFICER JUSTIN BERRY; SERGEANT ADAM JOHNSON,

Defendants – Appellees

Appeal from the United States District Court for the Western District of Texas, Austin

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ON PETITION FOR REHEARING EN BANC

(Opinion 6/01/16, 5 Cir., _____, _____ F.3d ____)

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for

Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT COURT

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

ANTONIO FRANCIS BUEHLER,	§	
	§	
Plaintiff,	§	
	§	
V.	§	A–13–CV–1100–ML
	§	
CITY OF AUSTIN/AUSTIN POLICE DEPARTMENT; AUSTIN POLICE OFFICER PATRICK OBORSKI; AUSTIN POLICE OFFICER ROBERT SNIDER; AUSTIN POLICE OFFICER JUSTINE BERRY; and SERGEANT ADAM JOHNSON,	§	
	§	
Defendants	§	

FINAL JUDGMENT

The Magistrate Court issues this Final Judgment pursuant to 28 U.S.C. § 636(c). The parties consented to this Court's jurisdiction, and the case was assigned to this Court's docket for all purposes on March 18, 2014 (Clerk's Dkt. No. 21). On February 20, 2015, this Court granted Defendants' motion for summary judgment. The

Court now enters the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS HEREBY ORDERED that all claims and causes of action brought by all parties in this action are **DISMISSED WITH PREJUDICE.** Each party is to bear its own costs.

IT IS FURTHER ORDERED that all pending motions are hereby **TERMINATED.**

IT IS FURTHER ORDERED that all relief not expressly granted is hereby **DENIED.**

IT IS FINALLY ORDERED that the case is hereby **CLOSED.**

SIGNED on February 23, 2015.

/s/ Mark Lane
MARK LANE
UNITED STATES MAGISTRATE JUDGE
Presiding under 28 U.S.C. § 636(c)