IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JUAN HERNANDEZ, DEQUAN KIRKWOOD, KENT WHEATFALL, and MANUEL TREVINO, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE CITY OF HOUSTON, TEXAS, Defendant.	Case No. 16-CV-3577 (Class Action) Jury Trial Demand

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S AMENDED MOTION TO DISMISS, OR IN THE ALTERNATIVE, AMENDED MOTION FOR SUMMARY JUDGMENT

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Plaintiffs Juan Hernandez, DeQuan Kirkwood, Kent Wheatfall, and Manuel Trevino (collectively "Plaintiffs"), on behalf of themselves and others similarly situated, submit this memorandum in opposition to Defendant's Motion to Dismiss Plaintiffs' Amended Complaint or, in the alternative, for summary judgment.

I. STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDINGS

On December 5, 2016, Plaintiffs Juan Hernandez and James Dossett filed a Complaint, on behalf of themselves and others similarly situated, alleging that the Defendant, the City of Houston ("the City" or "Houston"), maintains a policy of failing to release arrestees who have been detained for unreasonable periods of time without receiving a judicial determination of probable cause. (Dkt. No. 1.) On February 9, 2017, Defendant moved to dismiss the Complaint under Rule 12(b)(6), or in the alternative, for summary judgment under Rule 56. (Dkt. No. 15.)

Plaintiffs Juan Hernandez, Kent Wheatfall, DeQuan Kirkwood, and Manuel Trevino filed an Amended Complaint on March 1, 2017. (Dkt No. 19.) Plaintiff James Dossett voluntarily dismissed his claims against the City without prejudice the same day. (Dkt No. 18.) The Court denied the City's initial motion to dismiss as moot. (Dkt. No. 24.) On March 15, 2017, the City filed its Amended Motion to Dismiss Plaintiffs' Complaint under Rule 12(b)(6), or in the alternative, for summary judgment under Rule 56. (Dkt. No. 25.)

II. STATEMENT OF THE ISSUES TO BE RULED UPON BY THE COURT

1. Have Plaintiffs adequately pleaded a *Monell* claim against the City of Houston where they have alleged that: (1) the City's chief policymakers adopted (2) a policy and practice of failing to release arrestees who had been detained for unreasonable periods of time without receiving a neutral determination of probable cause (3) that was the moving force behind the violations of Plaintiffs' rights under the United States Constitution and Texas state law? This Court's decision on Defendant's motion to dismiss, or in the alternative, for summary judgment,

will be reviewed *de novo* on appeal. *Rose v. Tennessee Gas Pipeline Co.*, 508 F.3d 773, 775 n.6 (5th Cir. 2007).

2. Have Plaintiffs adequately pleaded that each of the named Plaintiffs was harmed by the City's unlawful policy? This Court's decision on Defendant's motion to dismiss, or in the alternative, for summary judgment, will be reviewed *de novo* on appeal. *Id*.

3. Does this Court have jurisdiction over Plaintiffs' state-law claims where this Court's longstanding precedent supports civil liability under the articles of the Texas Code of Criminal Procedure upon which Plaintiffs rely? *Id*.

III. SUMMARY OF THE ARGUMENT

The City's police force arrests hundreds of people each week without a warrant. The Fourth Amendment to the United States Constitution and Texas state law require that anyone arrested without a warrant be released promptly—after 48 hours at the longest—unless a neutral magistrate has determined that there was probable cause for his arrest and continued detention. The City has a policy and practice of disregarding this simple obligation.

In its motion to dismiss, the City makes three categories of arguments: (1) that Plaintiffs have failed to state a claim for municipal liability because they do not allege an unconstitutional City "policy" within the meaning of the relevant case law; (2) that Plaintiffs individually were not subjected to an unconstitutional City policy; and (3) that the Court lacks jurisdiction to hear the Plaintiffs' state-law claims.

Plaintiffs' well-pleaded facts show that the City does exactly the same thing to every single person it arrests without a warrant: it continues to detain him, no matter how long it takes to transfer him to Harris County ("the County") custody, and, therefore, no matter how long it takes for a neutral magistrate to determine whether there was probable cause for his arrest and continued detention. Plaintiffs' well-pleaded facts show that the City had actual knowledge that

the County Jail was severely overcrowded throughout the class period and, therefore, that it often would not accept inmates from the City Jail. Still, the City chose to keep warrantless arrestees in its jail without a neutral finding of probable cause until the County would accept them for transfer to the County Jail. The City's policy and practice of keeping arrestees in its jail until Harris County was ready to take them, despite the fact that Texas state law makes it the City's responsibility to ensure that they are promptly brought before a magistrate, and despite the fact that federal law requires the City to release them if they are not promptly brought before a magistrate, was the moving force behind Plaintiffs' illegal detention.

Despite these well-pleaded facts, the City nevertheless argues that it does not have a "policy" of keeping people in its jail for unreasonable periods of time without a judicial determination of probable cause, and insists that it is the County's policies, not the City's, that caused Plaintiffs to be unconstitutionally detained. The City confuses two distinct questions: whether Plaintiffs have pleaded an unconstitutional municipal policy under *Monell* against the City, and whether the County owes the City some separate legal or contractual duty to receive inmates and to conduct prompt probable cause hearings. The County may separately be required to accept inmates from the City and, therefore, might ultimately owe the City indemnification. If that is the case—and the Plaintiffs need not, and do not, take a position on that question—the proper remedy for the City is to implead the County. The City is, however, still liable for its own decisions to confine people in its jail in violation of the United States Constitution and Texas law.

The rest of the City's arguments fail to address Plaintiffs' allegations. Plaintiffs allege the existence of one City policy: do not release arrestees until the County can take them, even though there has been no neutral finding of probable cause. That policy is undertaken with

deliberate indifference to (indeed, actual knowledge of) the fact that it consistently results in unconstitutional detentions. And that policy is the moving force behind the Plaintiffs' illegal detention. Plaintiffs do not contend that the City violates state law merely because it elects not to transfer its inmates to another jurisdiction. Instead, Plaintiffs allege that state law *allows* the City to transfer its inmates to another county for a prompt probable cause hearing and that the City has done nothing to avail itself of this option, and of many other options, to avoid these unlawful detentions.

The City's argument that extraordinary circumstances justified the extended detention of Plaintiffs Wheatfall, Kirkwood, and Trevino is without merit because it fails to accept Plaintiffs' well-pleaded facts as true, and because a pervasive, widespread, and utterly routine practice cannot constitute an "extraordinary" circumstance. Defendant's motion to dismiss should be denied.

The City's motion in the alternative for summary judgment as to Mr. Hernandez's individual claims should be denied because genuine disputes of material fact exist. The City has introduced its own computerized jail records that purport to show that it held Mr. Hernandez for slightly less than 48 hours. The County's public records show otherwise. According to the Harris County Clerk's records, Mr. Hernandez was not booked into County custody, and was not given a probable cause hearing, until well over 48 hours after his arrest. Moreover, the City's *own* exhibit says that Mr. Hernandez was held for "3" days before being transferred to County. (*See* Dkt. No. 25-2, Exhibit B, at 3 ("Days in Jail[:] 3."). Because Plaintiffs have not had any discovery to confirm which records are correct, and because the Court cannot resolve the factual dispute between the County's records and the City's records (or the internal inconsistencies

within the City's records) at this stage, the City's motion for summary judgment as to Mr. Hernandez should be denied as well.

Finally, the City's motion to dismiss Plaintiffs' state-law claims should be dismissed because, under this Court's longstanding precedent, the articles of the Texas Code of Criminal Procedure on which Plaintiffs rely support civil liability.

IV. FACTS

The City arrests approximately 80,000 people every year. (*See* Dkt. No. 19, Amended Complaint ¶ 18.[1]) Ninety percent of those arrests are effected without a warrant. (*Id.*) When Houston police arrest someone without a warrant, they bring him to the City Jail. If the arrestee cannot pay a pre-set secured money bail amount immediately, he is held at the City Jail until the County Jail accepts him for transfer. (¶¶ 19–22.) There, the arrestee receives a probable cause hearing. The County conducts probable cause hearings many times per day, every day of the year. (¶ 19.) These hearings occur by video link: the arrestees remain in the County Jail, and a hearing officer and an assistant district attorney participate from a room in the courthouse. (*Id.*)

Arrestees never receive probable cause hearings while they are in City custody. (¶ 20.) The City never takes warrantless arrestees to any other county for probable cause hearings (¶ 29), never conducts probable cause hearings on its own (¶ 20), and never releases anyone who does not deposit the money bail amount (¶ 23.) Therefore, anyone in City custody who was arrested without a warrant has not yet had a probable cause hearing. (¶ 21.)

Of the 80,000 people it arrests each year, the City held at least several hundred—and probably more than a thousand—in excess of 48 hours without any judicial authorization. (*See* ¶¶ 33–34.) This unconstitutional practice is longstanding. (¶ 35.) It began long before the class

[1] All citations in the form of "¶ __" refer to paragraphs in Plaintiffs' Amended Complaint filed on March 1, 2017 (also referred to as "Amended Complaint"). (Dkt. No. 19.)

period and has persisted throughout the class period. (*See* ¶ 24.) The Mayor and the Chief of Police were aware of the City's policy and its unconstitutional results; the Mayor himself has publicly acknowledged the problem (¶ 28); and a County spokesperson has notified the City of the problem on several occasions (¶ 25).

Pursuant to this policy and practice, each named Plaintiff was held in Houston's City Jail for more than 48 hours without a judicial determination of probable cause.

A. DeQuan Kirkwood

On July 25, 2016, DeQuan Kirkwood drove to visit his probation officer. (¶ 40.) When he arrived, Houston police officers arrested Mr. Kirkwood for evading arrest with a vehicle. (¶ 41.) Mr. Kirkwood's arrest was entered into the City's and the County's electronic records at 11:15 PM on July 25, 2016. (¶ 42.) According to the County's publicly available records, on July 28, 2016, at 1:23 AM, more than 50 hours later, Mr. Kirkwood was transferred to Harris County custody. (¶ 43.)

At 7:00 AM on July 28, 2016—more than 55 hours after his arrest—Mr. Kirkwood appeared for his probable cause hearing. (¶ 44.) The judge found that there was no probable cause for Mr. Kirkwood's arrest and continued detention. (¶ 46.) Mr. Kirkwood was promptly released. (¶ 46.)

B. Manuel Trevino

On July 27, 2016, Manuel Trevino was visiting a friend's house when the Houston Police arrived and searched the house without a warrant. (¶ 47.) The police found narcotics in the home, and arrested Mr. Trevino, along with others in the house. (*Id.*) Mr. Trevino's arrest was entered into the City's and the County's electronic records at 1:55 PM on July 27, 2016. (¶ 48.)

According to the County's publicly available records, on July 30, 2016, at 10:42 PM, Mr. Trevino was booked into Harris County custody. (¶ 49.) He had been detained in City custody

for almost 81 hours without a probable cause hearing. (*Id.*) According to the City's arrest data, Mr. Trevino was released from the City's custody on July 30, 2016, at 9:39 PM, almost 80 hours after his arrest. (¶ 50.)

On July 31, 2016, at 10:00 PM, a judge found probable cause for his arrest and continued detention, *i.e.*, almost 104 hours after his arrest. (¶ 52.) On October 28, 2016, Mr. Trevino pleaded guilty and received a deferred adjudication. (¶ 53.) He was not sentenced to any jail time, and his sentence was not credited with any time he spent in pre-trial custody. (*Id.*)

C. Kent Wheatfall

Kent Wheatfall is a retired U.S. Postal Service worker. (¶ 54.) On January 7, 2016, Mr. Wheatfall was arrested for aggravated assault. (¶ 55.) Mr. Wheatfall's arrest was entered into the City's and the County's electronic records at 10:30 PM on January 7, 2016. (*Id.*) According to the County's publicly available records, on January 10, 2016, at 1:52 AM, Mr. Wheatfall was booked into County custody. (¶ 56.) At that point, he had been in Houston custody for more than 51 hours. (*Id.*) At 4:00 AM that day—more than 53 hours after his arrest—Mr. Wheatfall received a probable cause hearing, where a judge found probable cause for his arrest and continued detention. (*Id.*)

On February 4, 2016, Mr. Wheatfall was released on a surety bond. (¶ 58.) He was indicted on February 18, 2016. (*Id.*) On May 17, 2016, Mr. Wheatfall was rearrested, and could not make bail. (¶ 59.) He was held until he pleaded guilty and received a deferred adjudication on February 10, 2017. (*Id.*) He was not sentenced to any jail time, and his sentence was not credited with any time he spent in pre-trial custody. (*Id.*)

D. Juan Hernandez

On January 7, 2016, at about 4:30 PM, Houston police officers arrested Juan Hernandez, without a warrant, for misdemeanor assault. (¶ 60.) Mr. Hernandez's arrest was entered into the City's and the County's electronic records at 4:53 PM on January 7, 2016. (¶ 61.)

When Mr. Hernandez was brought to the City Jail, a jail employee there told him that the County Jail was full and that his transfer to Harris County would be delayed. (¶ 62.) She told Mr. Hernandez to "be patient." (¶ 62.) Later on, Mr. Hernandez saw a City Jail employee that he knew and the employee said: "You still here? You should've been gone by now." (¶ 63.)

According to the County's publicly available records, on January 10, 2016, at 12:49 AM, Mr. Hernandez was booked into County custody without having received a probable cause hearing—almost 56 hours after his arrest. (¶ 64.) Mr. Hernandez remembers being held for three days in the City jail. (¶ 65.) Although, the County's records reflect that Mr. Hernandez was booked into County custody about 56 hours after his arrest, the records reflect that he received a probable cause hearing before a judge on January 9, 2016, at 6:00 PM—more than 49 hours after his arrest. (¶ 66.) Five days after his hearing—after a week in custody—Mr. Hernandez pleaded guilty. (¶ 68.) He was released and given community supervision without jail time, and his sentence was not credited with any time he spent in pre-trial custody. (*Id.*)

V. ARGUMENT

To survive a motion to dismiss under Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The standard of "facial plausibility" is met when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* With respect to the City's argument that it does not maintain an

unconstitutional policy, the only question is whether Plaintiffs' well-pleaded factual allegations are sufficient to give rise to a reasonable inference that the City's policies violated the Plaintiffs' legal rights.

When a defendant introduces evidence outside the pleadings, its motion may be treated as a motion for summary judgment under Rule 56 unless the introduced documents are "referred to in the pleadings and are central to a plaintiff's claims." *Brand Coupon Network, L.L.C. v. Catalina Mktg. Corp.*, 748 F.3d 631, 635 & n.10 (5th Cir. 2014) (collecting cases). A defendant is entitled to summary judgment when the evidence in the record shows that there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A fact is material if it "might affect the outcome of the suit under the governing law," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and a dispute is genuine if, considering the record as a whole, a rational jury could find in favor of the non-moving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A. Plaintiffs Adequately Allege a *Monell* Claim Against the City

Municipalities are liable under 42 U.S.C. § 1983 for actions taken pursuant to municipal policy. *Monell v. Dep't. of Social Services*, 436 U.S. 658, 694 (1978). A municipal policy can be established in two ways: (1) the municipality's government adopts an official policy by way of a statement, ordinance, regulation, or administrative decision; or (2) the municipality employs a custom or practice so persistent and widespread as to fairly represent municipal policy. *Id.* at 690–91; *see also Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986); *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992). "*Monell*," the Court has held, "is a case about responsibility." *Pembaur*, 475 U.S. at 478. The core inquiry is whether the challenged action is the municipality's action, rather than its employees'. *Id.* at 481.

The Fifth Circuit has established a three-part test to determine whether a municipality can be liable under *Monell*. The Plaintiffs must show (1) a policymaker,[2] (2) a policy, and (3) that the policy was the "moving force" behind the plaintiff's injury. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001).

The Amended Complaint satisfies these three requirements. The well-pleaded facts show that Houston's Mayor and Chief of Police, among others, had actual knowledge that the City's uniform practice of continuing to detain warrantless arrestees until the County could accept them resulted in widespread constitutional and statutory violations. (¶¶ 27, 31.) It is the City's responsibility to make sure that warrantless arrestees receive prompt probable cause hearings. *See* Tex. Crim. Proc. Code Ann. art. 14.06 (2016) ("[T]he person . . . having custody of the person arrested shall take the person arrested or have him taken without unnecessary delay, but not later than 48 hours after the person is arrested, before the magistrate . . . ."). The well-pleaded facts show that the City has a practice from which it never deviates: when the City arrests someone without a warrant, it confines her in its custody until the County accepts her—regardless of how long that takes—and it does nothing to ensure that the person receives a prompt probable cause determination. (¶ 29.) Finally, the well-pleaded facts show that the City's policy is the moving force behind the Plaintiffs' complained-of injury. (¶ 38.)

1. The City's Policymakers Had Actual Knowledge of Houston's Unlawful Practices

To satisfy the first requirement, "[a]ctual or constructive knowledge of [a] custom must be attributable to the governing body of the municipality or to an official to whom that body

[2] In *Groden v. City of Dallas, Texas*, 826 F.3d 280, 283 & n.3 (5th Cir. 2016), the Fifth Circuit clarified this statement in *Piotrowski*. The *Groden* court made clear that plaintiffs need not plead the *identity* of the municipal policymaker in their Complaint. The question of whether a "policymaker" has been alleged is a legal one. *Id.* at 284. Therefore, "for purposes of Rule 12(b)(6), . . . a plaintiff is not required to single out the specific policymaker in his complaint." *Id.* at 282. Regardless, Plaintiffs' Amended Complaint both pleads facts sufficient to give rise to the inference that there is a policymaker *and* identifies who those policymakers are.

ha[s] delegated policy-making authority." *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc). A policymaker is an official "who speak[s] with final policymaking authority for the local governmental actor concerning the action alleged to have caused . . ." the constitutional violation. *Flores v. Cameron Cty., Tex.*, 92 F.3d 258, 264 (5th Cir. 1996). A policymaker's knowledge of an unconstitutional custom may be inferred "on the ground that [she] would have known of the violations if [she] had properly exercised [her] responsibilities, as, for example, where the violations were so persistent and widespread that they were the subject of prolonged public discussion or of a high degree of publicity." *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984).

The well-pleaded facts of the Amended Complaint—which are accepted as true at this stage of the case—establish that city officials with final authority over the jail were on notice of the widespread practice of unconstitutional detention. The Amended Complaint plausibly alleges that hundreds, if not thousands, of people were detained in the City Jail in violation of the United States Constitution and Texas law (¶¶ 33–34), and that a County representative explicitly told members of the Houston Police Department about overcrowding at the County Jail that caused the backlogs (¶ 25). Moreover, the Amended Complaint details the extensive news coverage of the overcrowding at Harris County's Jail and the resulting delays of inmate transfers from Houston's Jail, and more than adequately alleges that the "violations were so persistent and widespread" as to have earned "a high degree of publicity." *Bennett*, 728 F.2d at 768; (¶¶ 24–28.).

The Houston City Council has delegated policymaking authority over the City jail to the Chief of Police. At all relevant times, Houston's Chief of Police had actual knowledge of the widespread unconstitutional detentions at the City jail, and had the power to remedy them. (¶

25.) He could have arranged for arrestees to be transferred to another nearby county whenever the County refused to accept arrestees. (¶ 36 (describing other counties within an hour-and-a-half drive of Houston).) He could have arranged for a similar video-link system to be installed in the City Jail so that inmates could receive the same probable cause hearings while in City custody, or taken some other action to ensure that arrestees received a neutral determination of probable cause within the required time. (¶ 19.) He did not pursue these avenues. (¶ 22.) And so he was required to release the warrantless arrestees once the length of detention became unreasonable under *Gerstein* and *McLaughlin*. Acting with deliberate indifference to the widespread violation of Plaintiffs' constitutional rights, he continued to allow arrestees to be confined in his jail beyond the constitutionally permissible period.

Alternatively, the Mayor of Houston holds ultimate executive authority in the City. At all relevant times, the Mayor was on notice of these unconstitutional detentions. In fact, the current Mayor publicly spoke about the "notorious" overcrowding at the Harris County Jail that resulted in "needlessly jailing Houstonians pretrial."[3] (¶ 28.)

Because the Amended Complaint alleges policymakers[4] with actual and constructive knowledge of a pattern of constitutional deprivations occurring on their watch, it sufficiently demonstrates the City's deliberate indifference to the harms these policies cause. *See Vouchides v. Houston Cmty. Coll. Sys.*, 2011 WL 4592057, at *12 (S.D. Tex. Sept. 30, 2011) ("'Deliberate indifference . . . may be inferred from a municipality's lack of appropriate response to repeated

[3] Although Mayor Turner attributed the "needless jailing" to Harris County, his public statements demonstrate that he was aware of (1) the notorious overcrowding in the County Jail and (2) that "needless" jailings resulted.

[4] At this stage of the case, Plaintiffs need not specify who, specifically, is the City's policymaker on these issues. *Groden*, 826 F.3d at 284.

complaints of [constitutional] violations.'") (quoting *Jackler v. Byrne*, 658 F.3d 225, 236 (2d Cir. 2011)).

2. The City's Custom and Practice of Unlawful Detentions Is So Persistent and Widespread as to Fairly Represent Municipal Policy

To satisfy *Monell's* second requirement, the Plaintiffs must show "a persistent, widespread practice of City officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Webster*, 735 F.2d at 841. "[A] customary policy consists of actions that have occurred for so long and with such frequency that the course of conduct demonstrates the governing body's knowledge and acceptance of the disputed conduct." *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 169 (5th Cir. 2010). The longer the duration and more frequent the repetition of a pattern of alleged violations, the greater the likelihood that the municipality has adopted an unconstitutional custom as official policy. *See, e.g., Lopez v. City of Houston, Tex.*, 2008 WL 437056, at * 9 (S.D. Tex. Feb. 14, 2008). A particularly severe pattern of violations, such as violations of a clear rule established by the Supreme Court, may evince an unconstitutional custom adopted as policy even if it occurred over a relatively short period of time. *See James v. Nocona Gen. Hosp.*, 2004 WL 2002425 (N.D. Tex. Sep. 8, 2004), *aff'd sub nom. Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 255–56 (5th Cir. 2005) (holding that defendant state hospital's knowledge that death rate over a two-month period had dramatically increased was sufficient to allege deliberate indifference); *cf. Maddux v. Officer One*, 90 F. App'x 754, 776 n. 47 (5th Cir. 2004) ("Even [a] 'short pattern of conduct' . . . may sometimes prove sufficient to demonstrate a custom when the violations are 'flagrant or severe'" (quoting *Bennett*, 728 F.2d at 768) (emphasis original)). Finally, "a facially innocuous policy will support

liability if it was promulgated with deliberate indifference to the 'known or obvious consequences' that constitutional violations would result." *Piotrowski*, 237 F.3d at 579.

The City's policy is simple, long-standing, and consistent: keep arrestees in its own jail until they can be transferred to County for a probable cause hearing.[5] The overcrowding at the County jail was notorious, and the County *told* the City about its overcrowding problem. (¶¶ 24–28.) The City was on notice that the unreasonable delays that resulted were unlawful. Houston, after all, "operates under a permanent injunction preventing it from detaining persons arrested without a warrant for more than twenty-four hours without taking the person before a magistrate." (¶ 16.) Texas Law requires the same. (¶¶ 13–15.)

Throughout the class period, hundreds, if not thousands, of people were consistently detained in excess of 48 hours without a probable cause hearing. (¶ 33–34.) The City continued to employ its policy regardless, despite known constitutional alternatives.[6] Although it remains unknown whether this policy is written, regardless of its form the City does not deviate from this practice. (¶ 22.) In light of the facts pleaded in the Amended Complaint, which are taken as true at this stage, it strains credulity to imagine that City officials were unaware of the fact that there was a problem with the Harris County jail that delayed the arrival of City arrestees. Indeed, City officers participate in the transfer of those arrestees and publicly available City records memorialize the delays in transferring City arrestees for probable cause hearings. At the very

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5 According to the City, Plaintiffs "do not allege that the City's continuing to detain an arrestee after he or she has received a probable cause hearing violates anyone's constitutional rights." (Dkt. No. 25, at 8.) Plaintiffs do not raise this issue because such a practice does not exist. (*See* ¶ 20 ("[J]udicial determinations of probable cause for warrantless arrests are not conducted while an individual is in the City['s] . . . custody.").)

6 The City argues that Plaintiffs fail to allege a legal violation caused by the City's failure to transfer inmates to another county. (Dkt. No. 25, at 11.) The City misunderstands Plaintiffs' allegations. Plaintiffs allege only that state law *authorizes* the City to bring an arrestee to another county as an example of one of the many constitutional alternatives available to the City. Plaintiffs do not allege that the City violates state law merely because it does not do so.

least, officials were deliberately indifferent to the violation of Plaintiffs' constitutional rights: The well-pleaded facts show that competent officials would have known of a pattern of constitutional violations resulting from the City's policy.

3. The City's Policy is the Moving Force Behind Plaintiffs' Harms

To satisfy *Monell*'s final requirement, the plaintiff must show that the defendant's policy meaningfully caused the resulting constitutional violations. *See*, *e.g.*, *Piotrowski*, 237 F.3d at 579.

Plaintiffs adequately plead that it is the City's responsibility to ensure that warrantless arrestees receive a prompt and neutral determination of probable cause, or that they be released. *See* Tex. Crim. Proc. Code Ann. art. 14.06 (2016). When the County does not accept a warrantless arrestee in time to provide a prompt probable cause determination, the City has two choices: (1) ensure that she receives a prompt probable cause determination, either at another county or through another means; or (2) release the warrantless arrestee. (¶ 29.) Given that the County's probable cause determinations are done via video-link, there is no reason that the City could not work to arrange probable cause determinations for warrantless arrestees in its custody. (¶ 19.) Or, indeed, the City could arrange for a procedure of probable cause determinations based on a sworn affidavit. Instead, the City maintained a policy of continued, unconstitutional detention. *See Pembaur*, 475 US at 483–84 (holding "that municipal liability under § 1983 attaches where . . . a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.").

The City argues that it was the *County*'s policy of failing to promptly accept custody of the Plaintiffs that caused their injury.[7] The case the City relies on does not support its argument. (*See* Dkt. No. 25 (citing *Jones v. Lowndes Cty., Miss.*, 678 F.3d 344, 350 (5th Cir. 2012)).). In *Jones*, the plaintiffs alleged that the county's policy "is a target to take the detainee to a Judge within 48 hours but no later than 72 hours and as soon as reasonably possible and without any unnecessary delay." *Id.* The plaintiffs argued that the policy was unconstitutional *only* because the policy contemplated the *possibility* that more than 48 hours might pass before a probable cause hearing. The Fifth Circuit rejected the argument that the policy *itself* subjected the County to liability because, in the plaintiffs' individual cases, the delay in providing a probable cause hearing was due to the unavailability of a magistrate to hear the plaintiffs' cases. They did not allege that any entity or officer was deliberately indifferent to *recurring* delays (¶ 37); they did not allege a consistent municipal practice of failing to release arrestees every time the delay exceeded constitutional requirements (¶ 22); and they did not allege that state law, as here, mandated that any specific entity be responsible for ensuring a prompt probable cause hearing (¶ 99). *See Brown v. Sudduth*, 675 F.3d 472, 479 (5th Cir. 2012) (distinguishing between cases of isolated delays and cases of persistent "objectionable" policies that create delays).

If the County is unable to take the City's arrestees, and if there is no other way to ensure that the arrestees get their constitutionally required probable cause hearings promptly, then the

[7] The City also seems to be arguing that it cannot conduct probable cause hearings because district attorneys are state agents, not City agents, and because only district and county courts, not municipal courts, have jurisdiction over cases punishable by imprisonment. (Dkt. No. 25, at 9.) Plaintiffs do not argue that the City must conduct probable cause hearings itself. Plaintiffs argue that it is the City's responsibility to *ensure* that people arrested without a warrant are promptly brought before a neutral magistrate. The City's argument is inapposite. As pleaded in the Amended Complaint, Harris County conducts probable cause hearings by video-link. (¶ 19.) The City has identified no legal or practical impediment to installing a video-link system in its jails and providing arrestees with prompt judicial determinations of probable cause. In any event, the minimal requirements of *Gerstein* and *McLaughlin* do not require in-person "hearings." They require only a "determination" of probable cause that could be made on the basis of sworn assertions in writing.

City may have recourse against the County. Plaintiffs have no knowledge of the County's legal or contractual obligations to the City. If it is the City's view that the County should indemnify it for failing to accept custody of individuals the City arrested without valid warrants, the City may implead the County. Fed. R. Civ. P. 14(a)(1) ("A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it."). Regardless, the City is liable to the people it held in its own jail cells in violation of the U.S. Constitution and Texas state law.

B. The Well-Pleaded Facts Do Not Show Extraordinary Circumstances

Relying on *Brown*, 675 F.3d at 478, the City argues that extraordinary circumstances justified its prolonged detention of Plaintiffs Kirkwood, Wheatfall, and Trevino. That reliance is misplaced for two principal reasons. First, *Brown* was an appeal from a jury verdict, where the jury's factual findings enjoy great deference. The instant motion is a motion to dismiss a complaint, in which Plaintiffs' well-pleaded facts are accepted as true. Second, as *Brown* itself states, extraordinary circumstances are not present when "objectionable" policies and practices create predictable, recurring, and known delays in the probable cause process.

Under *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), arresting agencies may not detain individuals for unreasonable periods of time without a judicial determination of probable cause.

> [*Gerstein* and *McLaughlin*] created two distinct presumptions. Judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. Delays less than 48 hours also can violate an arrestee's rights when unreasonable, that is, for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. . . . . Beyond 48 hours, the calculus changes. In that situation, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance.

Brown, 675 F.3d at 477 (citations omitted). Plaintiffs were detained beyond 48 hours without a judicial determination of probable cause. So the City must show that, as a matter of law—and accepting Plaintiffs' factual allegations as true—extraordinary circumstances existed that justified confining Plaintiffs in its jail for longer than 48 hours.

The first problem with the City's argument is that it fails to accept Plaintiffs' well-pleaded factual allegations as true. Plaintiffs have alleged widespread, ongoing, and known delays in providing probable cause hearings. In response, the City has submitted the affidavit of Captain Steven Spears, of the Houston Police Department, who avers that he is aware of "time critical magistration procedures to allow prisoners who have not been accepted by the County Sheriff within 44 hours to be brought before a hearing officer on an emergency basis." (Doc. 25-3, at 2.) Presumably—although no explanation can be gleaned from the City's papers—the City introduced this evidence in order to show that the Plaintiffs' cases were anomalous and that it actually *does* provide probable cause determinations in the typical case. Putting aside the fact that the City has offered no evidence that these purported emergency procedures are ever used, let alone used in any of the Plaintiffs' cases, the more fundamental problem is that the court cannot accept the movant's evidence as true when considering a motion to dismiss. Although this Court may consider a defendant's affidavit "as an aid to evaluat[e] the pleadings, [it] should not control to the extent that [the affidavit] conflict[s] with" the allegations in the Complaint. *Bosarge v. MS. Bureau of Narcotics*, 796 F.3d 435, 440 (5th Cir. 2015). The City will have an opportunity to contest the truth of Plaintiffs' allegations. It cannot, however, do so here. Its motion should be denied on this basis alone.

The second problem with the City's argument is that circumstances as common as the delays in the County Jail are simply not extraordinary. Even accepting *Defendant's* facts as

true—which is the opposite of what the Court must do at this stage of the case—there were no extraordinary circumstances. The City's factual contention is that "[t]he County's cancellation of drags[][8] for prisoner transport made magistrates unavailable to adjudicate probable cause for these plaintiffs . . . ." (Dkt. No. 25, at 14.) Plaintiffs have alleged that these "cancellation[s]" are an ongoing, persistent, and known problem in the County Jail. A hurricane is an extraordinary circumstance; overcrowding at the County jail is not. *Compare Waganfeald v. Gusman*, 674 F.3d 475, 480 (5th Cir. 2012) (holding that the detention of warrantless arrestees in New Orleans during Hurricane Katrina fell within the emergency exception to *McLaughlin*'s 48-hour rule), *with McLaughlin*, 500 U.S. at 56–57. The City's motion to dismiss under Rule 12(b)(6) should be denied.

C. Genuine Disputes of Material Fact Exist as to Mr. Hernandez's Individual Claims

In the alternative, the City moves for summary judgment under Rule 56, on the ground that its evidence shows that Mr. Hernandez was held for less than 48 hours.

The City's motion, as it relates to Mr. Hernandez's claims, is properly treated as a motion under Rule 56. "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). Although on a motion under Rule 12(b)(6) defendants are entitled to introduce documents that are attached to the complaint, referred to in the complaint, and "central to" the claims in the complaint, they cannot introduce other evidence without converting the motion into a motion for summary judgment. *E.g.*, *In re*

[8] The Affidavit of Sergeant Amanda Zimmerman, of the Houston Police Department, explains that "drags" are what City and County officials call the periodic transfer of inmates from the City jail to the County jail. (Dkt. No. 25-1, Exhibit A, Affidavit of Sgt. Amanda Zimmerman, at 2.)

Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007). Here, the City seeks to introduce *its* jail records, which the Plaintiffs did not mention in their Complaint, did not attach to their Complaint, and did not rely on in supporting their factual allegations. Plaintiffs relied exclusively on Harris County's records, which are publicly available on the Harris County Clerk's website.[9] The City's motion, therefore, must be considered a motion for summary judgment.

Under Rule 56, the City's motion should be denied. There is a clear dispute of material fact between the County's records (which show that the City detained Mr. Hernandez for well over 48 hours), and the City's records (which partly show that it detained him for under 48 hours). And there is also a conflict within the City's records themselves: although Mr. Hernandez's arrest records purport to show that he was released to County custody within 48 hours of his arrest, those same records also say that he was held in City custody for "3" days before being transferred to the County. (*See* Dkt. No. 25-2, Exhibit B, at 3 ("Days in Jail[:] 3.")

At this stage of the case, the Court cannot resolve this dispute in the City's favor. Plaintiffs have not had any discovery and, accordingly, have no evidence of, among many other things, (1) how the City's and County's records are generated, and, therefore, which are more likely to be correct in this instance; and (2) what happened to Mr. Hernandez between the time he was booked out of City custody and the time that he was booked into County custody. If the Court is inclined to consider the City's motion at this early stage, it should wait until Plaintiffs have had discovery on these questions, among others. *E.g.*, *Brand Coupon Network*, 748 F.3d at 635.

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[9] *See* CHRIS DANIEL, HARRIS COUNTY DISTRICT CLERK: ACCESS OUR RECORDS, http://www.hcdistrictclerk.com/eDocs/Public/Search.aspx (last accessed 2/16/2017, 12:38 PM Central Time).

D. The Court Has Jurisdiction to Hear Plaintiffs' State-law Claims

Finally, Plaintiffs state-law claims are within this Court's jurisdiction and survive Defendant's Motion to Dismiss.

While, "[a]s a general rule, [Texas] criminal statutes do not create civil liability," *Gann v. Keith*, 151 Tex. 626, 634 (Tex. 1952), some statutory provisions do. Articles 14.06 and 15.17 of the Texas Code of Criminal Procedure are among them. In *Sanders v. City of Houston*, 543 F. Supp. 694, 704 (S.D. Tex. 1982), *aff'd*, 741 F.2d 1379 (5th Cir. 1984), a class of plaintiffs, defined as "all persons who are or will be held at Municipal Detention Centers without access to bond for periods of time beyond that necessary to effect the appropriate administrative steps incident to arrest," sued the City of Houston for violations of their constitutional rights and their rights under Articles 14.06 and 15.17 of the Texas Code of Criminal Procedure. *Id.* at 696. The case went to a bench trial on the merits of the federal and state law claims, and the Court found for the Plaintiffs on both, "conclud[ing] that Articles 14.06 and 15.17 are to be construed in harmony with Gerstein." *Id.* at 705.

> Supported by the same findings of fact which compelled the conclusion . . . that the contested hold policy violates the Fourth Amendment, the Court determines that the policy of investigative hold as is presently employed by the Houston Police Department is violative of Articles 14.06 and 15.17. *Similarly, the statutory rights of the three named plaintiffs were violated by the significant restraint of liberty to which they were subjected.*

Id. (emphasis added).

Plaintiffs' rights under Articles 14.06 and 15.17 are coextensive with their constitutional rights under *Gerstein*, and this Court has jurisdiction—and has previously exercised that jurisdiction—to entertain claims made pursuant to Articles 14.06 and 15.17. This Court also has jurisdiction over their claims made in Article 17.033, which was enacted in 2001, after *Sanders*

was decided, because it is substantively similar to Articles 14.06 and 15.17 and should similarly be construed in harmony with *Gerstein.*

Defendant cites two cases to support its argument that there is no private civil claim under the statutory provisions at issue; neither deals with Articles 14.06, 15.17, or 17.033 of the Texas Code of Criminal Procedure. First, Defendant cites a Report and Recommendation issued by a Magistrate Judge in the Eastern District of Texas, in which a plaintiff filed, *pro se*, petitions for habeas corpus seeking to reverse his conviction and seeking damages for his confinement. *See Lang v. Texas*, 2010 WL 5600204, at *2 (E.D. Tex. Nov. 12, 2010), *report and recommendation adopted in part*, 2011 WL 166977 (E.D. Tex. Jan. 19, 2011). Second, Defendant cites a case in the Southern District of Texas involving a negligent-hiring claim, *Houston-Hines v. Houston Indep. Sch. Dist.*, 2006 WL 870459 (S.D. Tex. Apr. 5, 2006), in which the court held only that "[i]t is clear that there is no private right of action for monetary damages based on a violation of *the Texas Constitution*." *Id.* at *5 n.6 (emphasis added) (citing *City of Beaumont v. Bouillion*, 896 S.W.2cd 143, 147 (Tex. 1995). The court left open the possibility that there may be a private right of action based on a violation of the Texas Code of Criminal Procedure. *Id.* Neither of the Defendant's cases deals directly with the statutory provisions at issue here; neither weighs against this Court's precedent in *Sanders*.

Accordingly, this Court has jurisdiction to hear Plaintiffs' state-law claims.

VI. CONCLUSION

For the foregoing reasons, Defendant's motion should be denied.

Dated: April 5, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2017, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States District Court for the Southern District of Texas.

/s/ Charles Gerstein
Charles Gerstein