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

ALBERTO RAMOS, Plaintiff v. SCOTT ERWIN, JENNIFER GILBREATH, HALLIE SMITH, FREDRICK MORRISON, GINO DAGO, Defendants.	Case No. 4:23-cv-2517 **JURY DEMAND**

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

United States Supreme Court

Court of Appeals for the Fifth Circuit

Southern District of Texas

NATURE AND STAGE OF THE PROCEEDING

On July 10, 2023, Plaintiff Alberto Ramos ("Mr. Ramos") filed a Complaint against Houston Police Department ("HPD") Officers Scott Irwin, Gino Dago, Frederick Morrison, Hallie Smith, and Jennifer Gilbreath (collectively, "Defendants") under 42 U.S.C. § 1983 for violating his Fourth Amendment Rights to be free from unlawful arrest and excessive force. Doc. 1 ("Complaint"). On September 27, Defendants Irwin[1] and Dago field a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Doc. 12. On October 12, Defendants Morrison and Smith filed a nearly identical motion. Doc. 16. Doc. 12 and Doc. 16 are collectively referred to as "Motions to Dismiss." Mr. Ramos is still working to serve the final defendant, Defendant Gilbreath. *See* Doc. 17. Mr. Ramos now files this Opposition to Defendants' Motions to Dismiss and requests an opportunity for oral argument.

STATEMENT OF ISSUES

1. Whether the Complaint, accepting its allegations as true, states a plausible claim that Defendants violated a clearly established federal right. The Court considers this issue *de novo.*
2. Whether the Complaint, accepting its allegations as true, states a plausible claim upon which relief can be granted in light of *Heck v. Humphrey*, 512 U.S. 477 (1994). The Court considers this issue *de novo.*

[1] This is the correct spelling of Defendant Irwin's name, which was spelled incorrectly as "Erwin" in prior submissions.

SUMMARY OF THE ARGUMENT

Plaintiff Alberto Ramos brings this civil rights lawsuit against five HPD officers who arrested him without probable cause, solely because he is Hispanic and male. Despite voicing their belief that Mr. Ramos was medically vulnerable, Defendant officers used excessive force during and after the arrest. First, by tackling Mr. Ramos to the ground without basis, and, later, by gratuitously hogtying Mr. Ramos after he had already been handcuffed and placed in an HPD vehicle. Complaint ¶¶ 16-82. As explained below, Mr. Ramos has plausibly alleged that Defendants' actions violated his constitutional rights and were objectively unreasonable under clearly established law.[2] Defendants spend the bulk of their Motions to Dismiss misstating the facts, mischaracterizing the law, and distracting the court with inapplicable procedural bars. Their arguments fail as a matter of law.

First, Defendants move to dismiss Mr. Ramos's "tackle arrest" excessive force claim (Count III) because they believe his injuries were "de minimis" and that their actions are shielded by qualified immunity. The Complaint establishes that Mr. Ramos's injuries, for which he was hospitalized, were not "de minimis." In any case, Supreme Court and Fifth Circuit precedent make clear that plaintiffs can receive compensatory damages for emotional injuries, and nominal damages for constitutional injuries. As for qualified immunity, it is clearly established in the Fifth Circuit that it is unconstitutional and excessive to use force such as a tackle during an arrest: 1) in the absence of probable cause; *or* 2) when the arrestee displays only "minimal physical resistance." *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000); *Trammell v. Fruge*, 868 F.3d 332, 341 (5th Cir. 2017). Defendants Irwin and Gilbreath did not have probable cause to

[2] Mr. Ramos properly and plausibly pleads that Defendants took the actions alleged in all three counts. He pleads that Defendants Irwin and Gilbreath violated the rights outlined in Counts I and III, and that Defendants Dago, Morrison, and Smith violated the rights outlined in Count II. Complaint ¶¶ 83-105.

tackle and arrest Mr. Ramos, but they did so anyway, despite Mr. Ramos complying with their orders and exhibiting zero resistance. Complaint ¶¶ 16-58, 85-92, 100-105. There was no basis for the force they used, and there is no basis now for qualified immunity to shield their conduct.

Second, Defendants move to dismiss Mr. Ramos's false arrest claim (Count I) because they believe it is barred by the "independent intermediary doctrine" and by qualified immunity. Again, Defendants are wrong on the facts and the law. Mr. Ramos was only charged with offenses arising from his alleged post-arrest conduct. Accordingly, no magistrate judge, grand jury, or other "independent intermediary" has ever determined that Defendants had probable cause to tackle and arrest Mr. Ramos in the first instance. As for qualified immunity, any reasonable officer would have been on notice that arresting a person based solely on their appearance as a Hispanic male violated clearly established law. As set forth in the Complaint, Defendants' sole basis for tackling and arresting Mr. Ramos was a 911 caller's insufficient description of an alleged assailant as "Hispanic" and "male." Fifth Circuit precedent makes clear that the Constitution "require[s] officers to have information more specific than 'a Hispanic male'" to effectuate an arrest. *United States v. Alvarez,* 40 F.4th 339, 348 (5th Cir. 2022). It bears emphasis that Mr. Ramos was never charged with any crime related to the allegations in the 911 call. Complaint ¶¶ 58, 91. Defendants had no lawful basis to tackle and arrest Mr. Ramos, and qualified immunity offers them no shield.

Third, Defendants move to dismiss Mr. Ramos's hogtying excessive force claim (Count II) because they believe that: 1) Mr. Ramos's injuries were "de minimis;" 2) qualified immunity shields them from liability; and 3) the Fifth Circuit cannot make clearly established law. Defendants are wrong on all counts. As with the "tackle arrest" excessive force claim, Mr. Ramos's injuries from hogtying were not "de minimis" and, in any event, could sustain the claim even if his damages were nominal. Qualified immunity does not shield Defendants from consequence for

hogtying Mr. Ramos. As set forth in the Complaint, Defendants acknowledged on the scene and in subsequent reports that they thought Mr. Ramos was medically vulnerable. They hogtied him anyway, choosing to pull him back out of a police car where he had already been handcuffed and detained to do so. The Fifth Circuit law clearly established nearly 30 years ago that it is unconstitutional to hogtie medically vulnerable people. *Gutierrez v. City of San Antonio,* 139 F.3d 441, 446–47 (5th Cir. 1998). In evasion of this dispositive precedent, Defendants incorrectly argue that the law can only be clearly established by the Supreme Court. To the contrary, as evidenced by defendants' own citations, the Supreme Court itself "express[es] no view on that question." *Dist. of Columbia v. Wesby,* 583 U.S. 48, 66 (2018). The Fifth Circuit has repeatedly used non-Supreme Court precedent to clearly establish the law, as has every other circuit. *Aguirre v. City of San Antonio* 995 F.3d 395, 415 (5th Cir. 2021) ("[T]*his court's precedents* demonstrate that . . . Officers had fair warning that [hogtying a plaintiff] was unconstitutional.") (emphasis added) (internal citations omitted); *see also Gutierrez*, 139 F.3d at 446 (stating that a police department's procedures and a Texas statute clearly established the law about hogtying.)

Lastly, Defendants argue that all of Mr. Ramos's claims are barred under *Heck*, 512 U.S. 477, because they imply that his pending criminal charges are invalid. This is, again, false. Defendants are yet again attempting to muddle the timeline and the facts. Defendants tackled and arrested Mr. Ramos while looking for a "Hispanic male" that a 911 caller had seen in a fight. Mr. Ramos has raised an excessive force claim and a false arrest claim related to this initial tackle arrest. Neither of these claims are *Heck*–barred because Mr. Ramos was only charged with offenses arising from his alleged *post-arrest* conduct. In short, there would be no legal or logical contradiction between: 1) a finding here that Defendants violated Mr. Ramos's Fourth Amendment rights with their tackle arrest and; and 2) a finding in Mr. Ramos's criminal case that he,

subsequently, committed a crime. Similarly, Mr. Ramos's remaining excessive force claim is focused on Defendants' decision to hogtie him after he was already arrested, handcuffed, wearing a spit mask, and in the back of a police car. *See* Complaint ¶¶ 59-62, 67-76; Doc. 12-1 at 3. The Fifth Circuit has found that an excessive force claim is not *Heck*-barred if: 1) defendants already restrained and arrested a plaintiff before using excessive force on him; and/or 2) the officers' alleged misconduct occurs *after* the cessation of the plaintiffs' alleged criminal misconduct. *See, e.g., Bush v. Strain*, 513 F.3d 492, 496, 499 (5th Cir. 2008); *Aucoin v. Cupil*, 958 F.3d 379, 381-84 (5th Cir. 2020). Mr. Ramos's hogtying excessive force claim will not invalidate his pending criminal charges because the Defendants' hogtying misconduct occurred *after* the cessation of Mr. Ramos's alleged criminal misconduct.

Defendants' Motion to Dismiss should be denied in its entirety.

FACTUAL BACKGROUND

On July 11, 2021, HPD's dispatch notified Defendant Irwin of a 911 call alleging that a "drunk" "Hispanic" male had committed an assault against a "Hispanic" female. Complaint ¶ 16. Defendant Irwin did not receive any other physical descriptors such as height, weight, clothing, or hair color. *Id.* ¶ 17. He stopped his police vehicle to speak with people on the street who told him that the alleged perpetrator was only verbally arguing and not physically fighting. *Id.* ¶ 21. Defendant Irwin repeated that information to dispatch. *Id.*

Defendant Irwin then saw Mr. Ramos, who is a Hispanic male, peacefully walking on a public sidewalk, by himself, with no Hispanic female nearby. *Id.* ¶¶ 22-28. He pulled alongside Mr. Ramos in his police vehicle and asked Mr. Ramos to tell him his "side of the story," without asking any investigative questions or making any statements related to the 911 call. *Id.* ¶¶ 29-30. Mr. Ramos was unaware of the 911 call and did not understand why Defendant Irwin was talking

to him. *Id.* ¶ 35. However, when Defendant Irwin exited his vehicle and ordered Mr. Ramos to stop moving, Mr. Ramos peacefully complied. *Id.* ¶¶ 31-34. Defendant Irwin communicated Mr. Ramos's compliance to dispatch. *Id.* ¶ 36.

Despite Mr. Ramos's full and peaceful cooperation, Defendant Irwin suddenly grabbed Mr. Ramos's arm and tackled him to the ground, placing him under arrest. *Id.* ¶ 37. He did so within mere seconds of getting out of his police vehicle and ordering Mr. Ramos to stop moving. *Id.* ¶ 38. Almost immediately thereafter, Defendant Gilbreath arrived on the scene and helped Defendant Irwin tackle Mr. Ramos. *Id.* ¶¶ 41-47. Defendant Gilbreath sat on top of Mr. Ramos while she and Defendant Irwin handcuffed him. *Id.* ¶¶ 48-49.

After handcuffing Mr. Ramos, Defendants put him in a police car. *Id.* ¶¶ 59-60. There were about 11 officers at the scene at this point, outnumbering a handcuffed Mr. Ramos by 11 to 1. *Id.* ¶ 61. Although Mr. Ramos was physically subdued, he was in a heightened and confused emotional state, breathing irregularly, and crying in pain. *Id.* ¶ 63-64. His medical vulnerabilities were so obvious that Defendants commented on his fragile medical and emotional state on the scene and in subsequent reports. *Id.* ¶ 65-66.

Eventually, even though Mr. Ramos was handcuffed and secured inside a police vehicle, Defendants Dago, Smith, and Morrison pulled Mr. Ramos back out of that police vehicle, laid him prone on the concrete, and put leg restraints on him. *Id.* ¶¶ 70-72. Defendants Dago, Smith, and Morrison attempted to tie Mr. Ramos's handcuffs to his leg restraints and initially failed, causing Mr. Ramos to scream in pain. *Id.* ¶¶ 72-74. Defendants Dago, Smith, and Morrison then succeeded in tying Mr. Ramos's handcuffs to his leg restraints, thereby hogtying him. *Id.* ¶¶ 75-76. Mr. Ramos experienced severe bruising on his ribcage and his arm, and was hospitalized for his injuries. *Id.* ¶¶ 8, 80, 82, 97. He repeatedly complained of pain and displayed symptoms of physical

distress. *Id.* ¶¶ 5-6, 50, 63-64, 81, 106. He also suffered fear, embarrassment, humiliation, reputational damage, inconvenience, and trauma that permeates into his personal and professional life. *Id.* ¶¶ 83-84.

LEGAL STANDARD

When ruling on a motion to dismiss for failure to state a claim, a court must take all well-pleaded factual allegations as true and construe those facts in the light most favorable to the plaintiff. *Great Plains Trust Co. v. Morgan Stanley Dean Witter,* 313 F.3d 305, 312 (5th Cir. 2002). A complaint need only allege sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atl. Corp v. Twombly,* 550 U.S. 544, 570 (2007). "A claim has facial plausibility 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the Defendant is liable for the misconduct alleged.'" *Landry v. Cypress Fairbanks ISD*, 2018 WL 3436971,*3 (S.D. Tex. July 17, 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Thus, "[m]otions to dismiss under Rule 12(b)(6) are viewed with disfavor and are rarely granted." *Lormand v. US Unwired, Inc.,* 565 F.3d 228, 232 (5th Cir. 2009) (citation omitted).

Additionally, a government official who asserts qualified immunity is shielded from liability "unless the plaintiff (1) alleges facts sufficient to 'make out a violation of a constitutional right,' and (2) shows that the constitutional right was clearly established at the time of [the official's] alleged misconduct.'" *Heckford v. City of Pasadena,* 2022 WL209747, at *3 (S.D. Tex. Jan. 21, 2022) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Still, "[t]he law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Easter v. Powell,* 467 F.3d 459, 465 (5th Cir. 2006); *see also Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (reversing grant of qualified immunity even

absent on-point precedent). "Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Hope v. Pelzer,* 536 U.S. 730, 731 (2002). Thus, "[a]n official who commits a patently 'obvious violation of the Constitution is not entitled to qualified immunity." *Villarreal v. City of Laredo, Texas,* 17 F.4th 532, 540 (5th Cir. 2021) (citing *Hope*, 536 U.S. 730, 745).

ARGUMENT

I. MR. RAMOS PLAUSIBLY ALLEGES THAT DEFENDANTS VIOLATED HIS CLEARLY ESTABLISHED RIGHT TO BE FREE FROM UNLAWFUL ARREST.

Defendants erroneously argue that two independent intermediaries determined there was probable cause for Mr. Ramos's arrest, and therefore, his unlawful arrest claim does not overcome qualified immunity. Motions to Dismiss ¶¶ 14–16. This is false. Defendants' purported basis for tackling Mr. Ramos was a 911 call about a "Hispanic male" in a fight. Mr. Ramos was never charged with any offense relating to that 911 call. He was only charged with offenses arising from his alleged post-arrest conduct. The Complaint properly and plausibly pleads that Defendant Irwin lacked probable cause *at the time he arrested Mr. Ramos*, and no "independent intermediary" has ever held otherwise. Because Defendants' independent intermediary argument fails, and they have offered no other challenge to Mr. Ramos's false arrest claim, their motion to dismiss must be denied as to this count (Count I).

A. No "independent intermediary" has ever determined there was probable cause for Defendants to tackle, sit on, and handcuff Mr. Ramos as he walked peacefully on the street, because there was none.

Defendants attack Mr. Ramos's unlawful arrest claim with the "independent intermediary" doctrine, arguing that "the magistrate's probable cause findings" in Mr. Ramos's pending criminal case have "br[oken] the chain of causation" and, therefore, that he is barred from relief here. Motions to Dismiss ¶ 5. They also note, in passing, that "the act of resisting can supply probable

cause for the arrest itself," and that "probable cause as to just one [offense] necessarily undermines any assertion of unlawful arrest." *Id.* ¶ 15. Defendants' "independent intermediary" argument fails because it is founded on mischaracterizations of Mr. Ramos's pleadings and the law. Defendants' references to basic probable cause precepts are accurate, but ineffectual here.

As set forth in the Complaint, Defendants' purported basis for tackling and arresting Mr. Ramos was an allegation made in a 911 call about a "Hispanic male" fighting with a "Hispanic" woman on the street. Complaint ¶ 16. Mr. Ramos pleads that Defendants Irwin and Gilbreath did not conduct any investigation related to the underlying 911 call before arresting him. *Id.* ¶¶ 4, 30, 39–40, 45, 51–52, 54–57, 88. All of the offenses that Mr. Ramos was ultimately charged with—one count of harassing a public servant for allegedly spitting at Defendant Gilbreath, and two counts of assaulting a public servant for allegedly kicking Defendants Morrison and Smith, *see* Doc. 12-2—were based on behaviors that he allegedly engaged in *after* he was already tackled, cuffed, and arrested. HPD's own probable cause narratives make this clear: Mr. Ramos is accused of spitting, kicking, and resisting *after* "Ofc apprehend," meaning *after* Defendants had already arrested him. *See* Doc. 12-1 at 3. In short, Mr. Ramos's pending criminal proceedings concern *only* his post-arrest conduct. Accordingly, no magistrate or other independent intermediary has ever made any finding that Defendants Irwin and Gilbreath had probable cause to tackle and arrest Mr. Ramos in the first instance. *Id.*

Defendants muddle the timeline of events by suggesting that they arrested Mr. Ramos because he was "kicking and spitting on them." Motions to Dismiss ¶ 5. As set forth in Mr. Ramos's pleadings, he did not engage in kicking, spitting, or any resistant behaviors that could have provided probable cause for arrest before being tackled. *Id.* ¶¶ 33–36, 102. In fact, he pleads that he complied with Defendant Irwin's command to stop walking and that Defendant Irwin

radioed Mr. Ramos's compliance to dispatch. *Id*. Mr. Ramos pleads that, despite his full cooperation with Defendant Irwin, Defendant Irwin grabbed him, tackled him to the ground, and arrested him anyway. *Id.* ¶¶ 33–39, 41–47, 90, 103. Defendants' motion to dismiss does not state what probable cause Defendants Irwin and Gilbreath had to arrest Mr. Ramos *at the time they tackled him*; their arguments against his unlawful arrest claim therefore fail.

B. It is clearly established that stopping or arresting someone solely based on their race and/or sex violates the Fourth Amendment.

The Fifth Circuit has clearly established that a suspect's race and/or sex is not enough information to create reasonable suspicion for a stop. Defendants' motions do not contest this fact. *See generally* Doc. 12, 16. In the Fifth Circuit, "[r]easonable suspicion to stop someone suspected of criminal activity is a low threshold," but it "require[s] officers to have information more specific than 'a Hispanic male who once rode away from police on a bicycle with large handlebars in a particular area' . . . . That open-ended description would effectively authorize random police stops, something the Fourth Amendment abhors." *Alvarez*, 40 F.4th at 343 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)); *see also Goodson*, 202 F.3d at 737 (description of potential suspect as "tall, heavy-set, white man" would be "too vague, and fit too many people," to create reasonable suspicion); *United States v. Jones*, 619 F.2d 494, 497 (5th Cir. 1980) (no reasonable suspicion or probable cause where suspect matched general description: "black male, 5 feet 6 inches to 5 feet 9 inches tall and weighing between 150 and 180 pounds, with a medium afro hair style, who was wearing jeans and a long denim jacket"); *United States v. Rias*, 524 F.2d 118, 121 (5th Cir. 1975) (no reasonable suspicion or probable cause where suspects matched description: "two black males in a black or blue Chevrolet"). The right to be free from an arrest—or even a mere stop—based on race or sex alone was therefore clearly established at the time of Mr. Ramos's arrest.

Here, Mr. Ramos pleads that Defendant Irwin received a 911 call describing an alleged assailant as "Hispanic," "male," and "drunk," and that Defendant Irwin did not receive any other physical descriptors such as height, weight, clothing, or hair color. Complaint ¶¶ 2–3, 16–18. Afterward, Defendant Irwin observed Mr. Ramos merely walking on a public sidewalk; he was not committing any crimes or engaging in any suspicious activity. *Id.* ¶¶ 2, 22–27, 31, 88–89, 101. Thus, Mr. Ramos's race and sex were the only bases Defendant Irwin had to tie Mr. Ramos to the underlying 911 call. *Id.* ¶¶ 3–4, 16–19, 28, 40, 42–45, 55, 86–87. As set forth in the Complaint, Houston has a large Hispanic population of over 1 million people. *Id.* ¶ 3. The description was therefore "too vague, and fit too many people," to create reasonable suspicion for a stop or probable cause for arrest. *Goodson*, 202 F.3d at 737.

Mr. Ramos further pleads that he complied with Defendant Irwin's commands to stop moving after Defendant Irwin approached him on a public sidewalk. Complaint ¶¶ 33–36, 102. Despite his compliance, Defendants Irwin and Gilbreath grabbed, tackled, and handcuffed Mr. Ramos within seconds of approaching him. *Id.* ¶¶ 38–39, 41–47, 90, 103. Mr. Ramos did not consent to being tackled and handcuffed, and he repeatedly yelled "stop" and "let me go." *Id.* ¶ 50. Mr. Ramos therefore plausibly pleads that he was stopped and arrested solely based on his race and sex, amounting to an unlawful arrest in violation of his Fourth Amendment rights.

Because the Complaint plausibly alleges that Defendants violated Mr. Ramos's clearly established right to be free from false arrest under the Fourth Amendment, the Motion to Dismiss should be denied as to Count I.

II. MR. RAMOS PLAUSIBLY ALLEGES THAT DEFENDANTS VIOLATED HIS CLEARLY ESTABLISHED RIGHT TO BE FREE FROM EXCESSIVE FORCE, PARTICULARLY DURING AN ARREST WITHOUT PROBABLE CAUSE.

Defendants argue that qualified immunity bars Mr. Ramos's excessive force claims because he cannot cite any "authority prohibiting officers from using some degree of force to bring a suspect into custody when a suspect is kicking and spitting on them." Motions to Dismiss ¶ 5. Again, Defendants are muddling the timeline of events and mischaracterizing the facts. Mr. Ramos pleads that he was fully compliant before Defendants Irwin and Gilbreath arrested him, and Defendants' own probable cause narratives allege that the kicking and spitting happened *after* they had already arrested Mr. Ramos. Complaint ¶¶ 33–39, 41–47, 102–03; Doc. 12-1 at 3. It is clearly established that it is unconstitutional to immediately resort to overwhelming force when arresting someone, particularly when arresting someone without probable cause. Defendants also claim that because Mr. Ramos's injuries are de minimis, they did not subject Mr. Ramos to excessive force when tackling him upon arrest. Mr. Ramos's properly and plausibly pleads injuries that are more than de minimis. Regardless, he is still entitled to compensatory damages for his emotional injuries and nominal damages for his constitutional injuries. Because the Complaint plausibly alleges that Defendants violated Mr. Ramos's clearly established right to be free from excessive force under the Fourth Amendment, the Motions to Dismiss should be denied as to Count II.

A. It is clearly established that immediately resorting to overwhelming force to execute an arrest in the face of peaceful behavior and compliance violates the Constitution.

As set forth in the Complaint, Mr. Ramos was doing nothing but walking peacefully along the street when Defendants ordered him to stop—an order he immediately complied with. Complaint ¶¶ 33–36, 102. Nonetheless, Defendants immediately tackled Mr. Ramos to the ground, sat on him, handcuffed him, and placed him in a police car. *Id.* ¶¶ 33–39, 41–47, 102–03; Doc. 12-1 at 3. Instead of grappling with the facts as they are, Defendants attempt to justify this baseless arrest by pointing to irrelevant, post-arrest conduct. *See* pages 11–12, *supra.*

The Fifth Circuit has prohibited the immediate use of overwhelming force to initiate an

arrest of an individual who is compliant. "[C]learly established law demonstrate[s] that an officer violates the Fourth Amendment if he abruptly resorts to overwhelming physical force rather than continuing verbal negotiations with an individual who poses no immediate threat or flight risk, who engages in, at most, passive resistance, and whom the officer stopped for a minor [offense]." *Hanks v. Rogers,* 853 F.3d 738, 747 (5th Cir. 2017). "[W]here an individual's conduct amounts to mere 'passive resistance,' use of force is not justified." *Trammell*, 868 F.3d at 341 (citing *Goodson*, 202 F.3d at 734, 740). The Fifth Circuit stated, "the law is clear that once the plaintiff stops resisting or is in the deputy's control, the permissible degree of force lessens . . . Joining these allegations [of a tackle arrest] with [the plaintiff's] insistence that he was stopped, not ignoring commands, and was not resisting arrest, we conclude [the defendant officer] violated [the plaintiff's] constitutional rights." *Aguilar v. Robertson,* 512 Fed. App'x 444, 450 (5th Cir. 2013) (unpublished). Moreover, "whether [a plaintiff] was lawfully arrested depends on whether [the defendant officer] had probable cause to conduct an arrest at all. If not, then any resistance by [the plaintiff] was lawful and did not constitute 'resisting arrest.'" *Deville v. Marcantel*, 567 F.3d 156, 165 (5th Cir. 2009); *see also Trammell*, 868 F.3d at 341 (finding no justification for use of force where "officers lacked reasonable suspicion to detain or frisk the plaintiff," who "was not fleeing").

Here, Mr. Ramos presented no threat or risk of flight and did not resist Defendants' unlawful stop in any way. Mr. Ramos pleads that after Defendant Irwin received a 911 call, Defendant Irwin observed Mr. Ramos walking on a public sidewalk without committing any crimes or engaging in any suspicious activity. Complaint ¶¶ 2, 22–27, 31, 88–89, 101. Mr. Ramos complied with Defendant Irwin's command to stop moving, and Defendant Irwin radioed Mr. Ramos's compliance to dispatch. *Id.* ¶¶ 33–36, 102. Despite his compliance, Defendants Irwin and

Gilbreath grabbed, tackled, and handcuffed Mr. Ramos within mere seconds of approaching him. *Id.* ¶¶ 38–39, 41–47, 90, 103. Mr. Ramos pleads that Defendants arrested him solely based on his Hispanic race and male sex, which is insufficient to meet the probable cause standard. *Id.* ¶¶ 3–4, 16–19, 28, 40, 42-45, 55, 86-87; *see also, e.g.*, *Alvarez*, 40 F.4th at 348. Mr. Ramos therefore plausibly pleads that Defendants Irwin and Gilbreath violated his clearly established right to be free from overwhelming and immediate force when he was already stopped, compliant, and posing no threat, especially where Defendants lacked probable cause to arrest him at the time of the tackle.

B. Mr. Ramos properly and plausibly pleads that his injuries were more than "de minimis."

Defendants claim that because Mr. Ramos's physical injuries are "de minimis," they did not subject Mr. Ramos to excessive force when tackling him upon arrest. The cases that Defendants cite to paint Mr. Ramos' injuries as de minimis are completely distinguishable from Mr. Ramos' case. They all find that the defendants' use of force was "objectively reasonable so as to render de minimis any injury incurred by the plaintiff." *Arthur v. Officer Mohammed Bellahna*, 2020 WL 6292453, at *3 (S.D. Tex. Oct. 27, 2020); *Smith v. Heap*, 31 F.4th 905, 912 (5th Cir. 2022) (same); *Tarver v. City of Edna*, 410 F.3d 745, 752 (5th Cir. 2005) (same). Additionally, in *Tarver* and *Heap*, the plaintiffs did not plead major physical injuries or any psychological injuries at all. *Heap*, 31 F.4th at 912 (plaintiff alleging no physical or psychological injuries whatsoever); *Tarver*, 410 F.3d at 751 (plaintiff alleging contusions from handcuffs).

Unlike in those cases, Mr. Ramos pleads that the use of force in his tackle arrest was unreasonable because there was no probable cause to arrest him, and he complied with all of Defendants' commands. *See* Section II.A, *supra*. Mr. Ramos also pleads significant injuries. He pleads that he repeatedly complained of pain and displayed symptoms of physical distress after Defendants Irwin and Gilbreath arrested him but before Defendants Dago, Smith, and Morrison

hogtied him. *Id.* ¶¶ 5-6, 50, 63-64, 81, 83, 106. Mr. Ramos further pleads that Defendant Gilbreath sat on top of him and threatened to tase his bare chest (*id.* ¶¶ 5, 48), and that he "alternated between hyperventilating and slow, labored, coarse-sounding breaths," *id.* ¶ 64. Mr. Ramos also pled Fourth Amendment constitutional injuries related to the tackle arrest. Complaint ¶¶ 85-92, 100-105. In the Fifth Circuit, "[a] violation of constitutional rights is never de minimis . . . In *Carey v. Piphus*, the Supreme Court explained the reason for this rule: 'By making deprivation of such [constitutional] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed.'" *Lewis v. Woods*, 848 F.2d 649, 651 (5th Cir. 1988). Lastly, Mr. Ramos pled emotional and psychological injuries related to his tackle arrest. Complaint ¶¶ 83-84. "[C]ompensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation . . . personal humiliation, and mental anguish and suffering.'" *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (citing *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974)). Mr. Ramos therefore plausibly pleaded injuries that were more than de minimis.

III. MR. RAMOS PLAUSIBLY ALLEGES THAT DEFENDANTS VIOLATED HIS CLEARLY ESTABLISHED RIGHT TO BE FREE FROM EXCESSIVE FORCE VIA HOGTYING.

Defendants argue that the injuries Mr. Ramos suffered from being hogtied are "de minimis." This is false. Mr. Ramos properly and plausibly pled injuries from hogtying that were more than de minimis. Additionally, in evasion of dispositive precedent, Defendants claim that the law can only be clearly established by the Supreme Court. To the contrary, as evidenced by Defendants' own citations, the Supreme Court itself "express[es] no view on that question." *Wesby,* 583 U.S. at 66. Further, the Fifth Circuit itself has repeatedly used non-Supreme Court precedent to clearly establish the law. In *Aguirre,* the Fifth Circuit concluded that "it is not

necessary that a previous case presenting identical facts exist in order for a right to be clearly established. . . [t]he central concept [of clearly establishing the law] is that of fair warning," and that "*this court's precedents* demonstrate that . . . Officers had 'fair warning' that their conduct was unconstitutional.'" 995 F.3d at 415 (citing *Trammell*, 868 F.3d at 343) (emphasis added). *See also Easter,* 467 F.3d 465 (same); *Austin v. Johnson*, 328 F.3d 204, 210 (5th Cir. 2003) (same). It is therefore clearly established that it was unconstitutional to hogtie Mr. Ramos.

A. It is clearly established that it is unconstitutional to hogtie a medically vulnerable person.

Fifth Circuit precedent clearly establishes that it is unconstitutional to hogtie a medically vulnerable person. Twenty-five years ago, the Fifth Circuit stated that the "combination of (1) drug use, (2) positional asphyxia, (3) cocaine psychosis, and (4) hogtying or carotid choke holds" would have "violated law clearly established prior to November 1994." *Gutierrez v. City of San Antonio,* 139 F.3d 441, 446–47 (5th Cir. 1998). The Fifth Circuit reaffirmed that decision in 2020, finding that "hogtying a nonviolent, drug-affected person in a state of drug-induced psychosis and placing him in a prone position for an extended period is objectively unreasonable." *Goode v. Baggett,* 811 Fed. Appx. 227, 237 (5th Cir. 2020); *see also id.* at 236 ("*Gutierrez* clearly established the unlawfulness of hogtying in certain circumstances… Our holding in *Gutierrez* addressed the lawfulness of hogtying a person who is 'drug-affected'"); *id.* (finding hogtying objectively unreasonable when the plaintiff "was running around in circles, sweating profusely, yelling incoherently, and 'acting really strange,' similar to how *Gutierrez* was acting"). In 2021, months before the incident at issue here, the Fifth Circuit reaffirmed that the "right to be free from" a "maximal prone restraint position" that was "tantamount to and as dangerous as a hog-tie"—where plaintiff "was presenting reasons to believe he was on drugs and in a drug-induced psychosis—was clearly established at the time of the incident." *Aguirre,* 995 F.3d at 419–20.

Here, the Complaints sets forth that Defendants thought Mr. Ramos might be on drugs before they hogtied him. Specifically, Defendant Irwin stated out loud during the arrest that he thought Mr. Ramos's mental state was deteriorating, and that he thought Mr. Ramos might be experiencing an overdose. Complaint ¶ 65. Mr. Ramos displayed symptoms of positional asphyxia—which is known to be deadly— – while hogtied. *Id.* ¶¶ 64, 77-79. Further, he "was crying loudly for help, asking questions in confusion, and making nonsensical statements in both Spanish and English"—his "emotional delirium was so heightened that it appeared to have physical effects on his body." *Id.* ¶¶ 63-64. While no evidence is required at this stage, these allegations are confirmed by the probable cause determinations for Defendants Morrison, Gilbreath, and Smith, all of which state that Mr. Ramos "appeared to be under the influence of some unknown drug," and that Mr. Ramos was "swe[a]ting profusely." *Id.* ¶ 66; Doc. 12-1. Therefore, Defendants' decision to hogtie Mr. Ramos when they believed him to be under the influence of drugs and in distress violated his clearly established right to be free from excessive force.

B. It is clearly established that it is unconstitutional to hogtie a person who presents no threat to safety.

The Fifth Circuit has found "hogtying [] objectively unreasonable" where "[a]t no point was [the plaintiff] thought to be armed, and he was already handcuffed and subdued." *Goode,* 811 Fed. Appx. at 232 (citing *Trammell,* 868 F.3d at 340); *see also Aguirre*, 995 F.3d at 419–20 (finding a clearly established right to be free from restraint positions where the plaintiff "was not resisting [and] posed no immediate safety threat.").

Here, Mr. Ramos pleads that, before Defendants Dago, Morrison, and Smith decided to hogtie him, they had already subdued him by handcuffing him, putting him in an HPD vehicle, and putting a spit mask on him. Complaint ¶¶ 59-62, 67-76. Moreover, there were at least 11

officers on the scene to maintain control. *Id.* ¶¶ 61-62, 69, 94. Mr. Ramos did not pose a threat to anyone or a risk of flight when the officers decided to hogtie him. Defendants assert that they hogtied Mr. Ramos because he spit at and kicked them, but that contradicts the pleadings, which must be taken as true: Mr. Ramos pleads that Defendants hogtied him while he was wearing a spit mask and after he had been secured in the back of a police vehicle, where he could not have been spitting at or kicking anyone. *Id.* ¶¶ 67-70. There was no legitimate justification for removing Mr. Ramos from the vehicle to apply further restraints. *See id.* Therefore, because Defendants hogtied Mr. Ramos after they had already subdued him with handcuffs, a police vehicle, and a spit mask, they violated his clearly established right to be free from excessive force.

C. Mr. Ramos's injuries from being hogtied were more than "de minimis."

The injuries that Mr. Ramos suffered from being hogtied were more than de minimis. As noted above, the cases that Defendants cite to paint Mr. Ramos' injuries as de minimis are completely distinguishable from Mr. Ramos's case. They all find that the Defendants' use of force was "objectively reasonable so as to render de minimis any injury incurred by the plaintiff." *Arthur*, 2020 WL 6292453, at *3; *Heap*, 31 F.4th at 912 (same); *Tarver*, 410 F.3d at 752 (same). Additionally, in *Tarver* and *Heap*, the plaintiffs did not plead major physical injuries or any psychological injuries at all. *Heap*, 31 F.4th 905, 912. *Tarver*, 410 F.3d 745, 751.

Again, unlike those cases, Mr. Ramos pleads that the use of force in his hogtying was objectively unreasonable under clearly established law and that he suffered significant physical, constitutional, emotional, and psychological injuries. *See* pages 18-19, *supra*. Specific to his hogtying claim, Mr. Ramos asserts that the Fifth Circuit has clearly established that it is unconstitutional to hogtie someone who is already physically restrained and believed to be under the influence of drugs. *See* Section III, *supra*. Mr. Ramos also pleads significant injuries. He pleads

that he experienced severe bruising on his ribcage and his arm, and was hospitalized for his injuries. Complaint ¶¶ 8, 80, 82, 97. Mr. Ramos had trouble breathing and screamed in pain while being hogtied. *Id.* ¶¶ 63, 74, 81. He displayed symptoms of positional asphyxia, which is known to be deadly. *Id.* ¶¶ 64, 77-79, 81. He was in such an obviously unhealthy state that several Defendants stated, both on the scene and in subsequent reports, that Mr. Ramos was medically fragile *Id.* ¶¶ 63, 65. Mr. Ramos also pled a Fourth Amendment constitutional injury related to his hogtying Complaint ¶¶ 93-99. *Lewis*, 848 F.2d 649, 651 ("A violation of constitutional rights is never *de minimis*.") Lastly, Mr. Ramos pleads emotional and psychological injuries related to Defendants' behavior. Complaint ¶¶ 83-84. *Stachura*, 477 U.S. 299, 307 (allowing compensatory damages for psychological injuries). Mr. Ramos therefore plausibly pleaded injuries that were more than de minimis.

III. MR. RAMOS'S CLAIMS ARE NOT BARRED BY *HECK v. HUMPHREY*.

Defendants erroneously argue that Mr. Ramos's claims are all barred by *Heck*, 512 U.S. 477, because a judgment in his favor "would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487. This is false. Mr. Ramos's claims are not barred by *Heck* because his pending criminal case concerns alleged conduct that is not at issue or in dispute here. Mr. Ramos is entitled to redress for the specific constitutional violations he alleges regardless of the outcome of his pending criminal case.

A. *Heck* does not bar Mr. Ramos's claims related to his tackle arrest because he has no criminal charges related to those claims

Two of Mr. Ramos's § 1983 claims are completely unrelated to his criminal charges, and therefore cannot invalidate any criminal conviction he receives. The Court in *Heck* stated that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would *necessarily* imply the invalidity of his conviction or

sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487 (emphasis added). The Court reasoned that civil damages actions "are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Id.* at 486.

Mr. Ramos has two claims stemming from Defendants Irwin and Gilbreath tackling and arresting him within seconds of seeing him: a false arrest claim and an excessive force claim. The Defendants' actions during the tackle arrest were solely based on allegations from a 911 call, and Mr. Ramos never received criminal charges related to the underlying 911 call. *See* Section I, *supra*; Complaint ¶¶ 58, 91 (stating that Mr. Ramos received no charges related to the underlying 911 call); *id.* ¶¶ 3-4, 16-19, 28, 40, 42-45, 55, 86-87 (describing Mr. Ramos's arrest without probable cause). Instead, Mr. Ramos's charges relate solely to alleged conduct that occurred *after* his arrest was complete. Accordingly, the excessive force and false arrest claims related to Mr. Ramos's tackle arrest are not barred by *Heck.*

B. Heck does not bar Mr. Ramos's excessive force claim for hogtying because the Defendants' alleged misconduct occurred after Mr. Ramos was already restrained and had ceased his alleged criminal conduct.

Mr. Ramos's remaining excessive force claim is focused on Defendants' decision to hogtie him after he was already arrested, handcuffed, wearing a spit mask, and in the back of a police car. *See* Complaint ¶¶ 59-62, 67-76; at 3. The Fifth Circuit has found that an excessive force claim is not *Heck* barred if defendants already restrained and arrested a plaintiff before using excessive force on him. *See, e.g. Bush*, 513 F.3d 492, 496, 499 ("Following Bush's resisting arrest conviction, the defendants moved for summary judgment, principally arguing that Bush's claims are barred under *Heck v. Humphrey*. . . we conclude that Bush has adequately pleaded a claim for excessive force occurring *after* she was restrained.") (emphasis added). Mr. Ramos's excessive force claim

related to hogtying should not be *Heck* barred because Defendants had already arrested and restrained him before they hogtied him. *See* Complaint ¶¶ 59-62, 67-76; Doc. 12.-1 at 3. Additionally, the Fifth Circuit has found that a plaintiff's Fourth Amendment § 1983 claims do not necessarily imply the invalidity of a conviction or sentence if the officers' alleged misconduct occurs *after* the cessation of the plaintiffs' alleged criminal misconduct. *See Aucoin*, 958 F.3d at 382 ("Put simply, there is no *Heck* bar if the alleged violation occurs 'after' the cessation of the plaintiff's misconduct that gave rise to his prior conviction."); *Poole v. City of Shreveport*, 13 F.4th 420, 426-27 (5th Cir. 2021) ("[I]t would not be inconsistent with the state court's finding that Poole fled the police for a jury to conclude that an officer used excessive force after that flight ended.") Mr. Ramos's Fourth Amendment claim related to hogtying therefore will not invalidate his pending criminal charges because the Defendants' misconduct of hogtying Mr. Ramos occurred *after* the cessation of the plaintiffs' alleged criminal misconduct.

CONCLUSION

For the reasons stated above, Plaintiff Alberto Ramos respectfully requests that the Court deny Defendants' Motions to Dismiss (Doc. 12 and Doc. 16) in their entirety.

Respectfully submitted,

/s/ Kiah Duggins
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CERTIFICATE OF SERVICE

I certify that on November 2, 2023, a true and correct copy of this document was served on counsel of record via the CM/ECF System in accordance with the local rules of the United States District Court for the Southern District of Texas.

/s/ Kiah Duggins