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

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| KERRY LEE THOMAS,<br><br>Plaintiff,<br><br>v.<br><br>ROBERT JOHNSON,<br>ERIC M. BRUSS,<br>WAYNE SCHULTZ,<br>and THE ESTATE OF ROBERT JOHNSON,<br><br>Defendants. | Case No. 4:23-cv-00662 |

**PLAINTIFF KERRY LEE THOMAS'S SURREPLY IN OPPOSITION TO ERIC BRUSS'S AND WAYNE SCHULTZ'S JOINT MOTION TO DISMISS**

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## NATURE AND STAGE OF THE PROCEEDING

On February 22, 2023, Plaintiff Kerry Lee Thomas filed a Complaint against three officers of the Harris County Constable's Office (Precinct 1) under 42 U.S.C. § 1983: Robert Johnson, Eric M. Bruss, and Wayne Schultz. ECF No. 1 ("Complaint"). The Complaint alleges that Defendants violated Mr. Thomas's Fourth and Fourteenth Amendment right to be free from excessive force when Defendants unleashed an attack dog on Mr. Thomas and then lied to justify their misconduct. On May 26, 2023, Defendants Bruss and Schultz filed a joint Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. ECF No. 11 ("Motion"). In their Motion, Defendants also invoke qualified immunity. On June 9, 2023, Mr. Thomas filed a Response in Opposition to Defendants' Motion to Dismiss. ECF No. 16 ("Opposition"). On June 15, 2023, Defendants filed a Reply in support of their Motion to Dismiss. ECF No. 17 ("Reply"). In their Reply, Defendants Bruss and Schultz raise new legal arguments and factual assertions not raised in their Motion to Dismiss and misstate the governing law. Mr. Thomas submits this Surreply to address those additional arguments and assertions.

## ARGUMENT

### I. The Video Evidence Does Not "Utterly Discredit" Mr. Thomas's Allegations.

In their Reply, Defendants argue for the first time that the video evidence "utterly discredit[s]" a number of Mr. Thomas's allegations, including many that Defendants did not contest at all in their Motion to Dismiss. *See* Reply at 3–4. For those allegations they did challenge in their Motion to Dismiss, Defendants argued only that "the video evidence does not support" or "substantiate[]" them. Mot'n at 8. After Mr. Thomas's Response in Opposition set forth the correct legal standard—whereby the video evidence need not substantiate every allegation in order for Mr. Thomas's Complaint to survive dismissal—Defendants raised new attacks on Mr. Thomas's allegations. In so doing, Defendants put forth factually incorrect statements about both Mr.

Thomas's allegations and the video footage. Mr. Thomas addresses each in the order they appeared in Defendants' numbered list:

1. Defendants dispute Mr. Thomas's allegation that they assisted Defendant Johnson by pointing their guns at, taunting, and threatening Mr. Thomas. Reply at 3. They now argue that these allegations are "utterly discredited" by the video evidence. *Id.* at 3–4. In support of their assertion, Defendants claim that "both deputies can be seen on video with their hands at their side with their guns holstered." *Id.* at 3. The single angle from Johnson's camera does not capture every officer's action or words at every moment during the incident—and so, the limited line of sight of the video cannot, by itself, "discredit" Mr. Thomas's allegations. The events the video does capture affirmatively corroborate Mr. Thomas's allegations. Indeed, while Bruss and Schultz had their guns holstered at certain points, the footage also captures Defendant Bruss standing to the right of Johnson's patrol car, pointing his gun at Mr. Thomas and Mr. Gray as they lay prone on the ground. *E.g.*, Compl. Ex. 1 at approximately 19:25:40 (highlighting added).[1]

[1] The above-cited time stamp also contradicts Defendants' assertion that "[i]t is not until approximately 19:27:29 that you see another officer on the video." *See* Reply at 7; Compl. Ex. 1 at approximately 19:25:40.


2. In his Complaint, Mr. Thomas alleges that "dispatch specifically stated—more than once—that it was the *reporter*, not the suspects, who was armed" and that "Defendant Johnson even confirmed [this] over the radio while communicating with dispatch before any officers arrived at the location." Compl. ¶ 54. For the first time on Reply, Defendants argue that these allegations are "utterly discredited" by the video evidence. Reply at 3. They contend that dispatch "inform[ed] Johnson that the reportee [was] armed but [said] nothing about Thomas or Gray." Reply at 3. But this contention *supports* Mr. Thomas's allegation that dispatch never told Defendants that the "suspects" were armed. *See* Compl. ¶ 54 & n. 44 (citing Compl. Ex. 1 at approximately 19:20:46). Indeed, the dispatcher had adequate time to provide Defendant Johnson with physical descriptions of Mr. Thomas and Mr. Gray. Compl. Ex. 1 at approximately 19:19:57. If either the dispatcher or Defendant Johnson had reason to believe Mr. Thomas or Mr. Gray were armed, they would have said so. The video does not "utterly discredit" Mr. Thomas's allegations about dispatch communications—it corroborates them.

3. Defendants next contend that Bruss's self-serving statement—"we've been told you had a gun"—"utterly discredits" Mr. Thomas's allegation that Defendants were told no such thing. Reply at 3. But, as explained *supra*, the video evidence *supports*—and at a minimum does not contradict—Mr. Thomas's allegation that Defendants knew he and Mr. Gray were unarmed. Indeed, it captures the dispatcher specifically stating that the 911 *caller* was armed. At no point does it show the dispatcher stating that the "suspects" were armed.

And even if Defendants *were* acting on a reasonable belief that the "suspects" were armed, that would not justify siccing an attack dog on Mr. Thomas, who made no attempt to flee or resist, and who was lying face down on the ground with his arms outstretched and empty, as he had been for the preceding three minutes. Compl. ¶ 54 n. 43; Opp. at 15.

4. Defendants also contend for the first time on Reply that Mr. Thomas's alleged compliance with orders is "utterly discredited" by the video evidence, claiming that "Deputy Johnson order[ed] Thomas to get back in the car several times but he fail[ed] to comply." Reply at 3. On the contrary, Mr. Thomas's allegations do not contradict the video evidence; they accurately describe the events as they unfolded: Upon Defendant Johnson's arrival, "Mr. Thomas immediately exited the car [and] stood with his hands high in the air and empty, facing Defendant Johnson." Compl. ¶ 23.[2] Defendants Bruss and Schultz arrived shortly thereafter and joined Defendant Johnson in giving "a series of conflicting commands that would have been confusing to any reasonable person, let alone one facing a snarling dog and multiple armed officers, ready to shoot." *Id.* ¶¶ 26, 29.

[2] Defendants' Motion to Dismiss asserted that "the *driver* of the vehicle did not initially comply with the demands given by Johnson." Reply at 8 (emphasis added). It further asserted that Deputy Johnson repeatedly asked the *driver* to stay in the car and keep his hands up" and that "[a]fter being given several opportunities to comply, the *driver* [wa]s told to walk towards Bruss." *Id.* (emphases added). Defendants made no analogous assertion about the *passenger* of the vehicle. It is undisputed that Mr. Thomas was the passenger and Mr. Gray was the driver. *See id.*; Compl. ¶ 21.

Nonetheless, "Mr. Thomas . . . did his best to follow their orders," including by seeking clarification when it was unclear whether Defendants were addressing a particular command at Mr. Thomas or Mr. Gray. *Id.* ¶¶ 29, 30. When ordered to the ground, Mr. Thomas asked "Me?" before slowly lowering himself face down on the ground. *Id.* ¶ 30. He was "careful not to make any sudden movements for fear that Defendants would shoot him." *Id.* ¶ 31. Once on the ground, he remained there—in a prone position, with his hands outstretched and empty, until Defendant Schultz ordered him to get back up. *Id.* ¶¶ 35–37. "Given that Mr. Thomas had, until that point, been receiving orders primarily from Defendant Johnson, it took him a few seconds to register that [Defendant Schultz's] command was directed at him." *Id.* ¶ 38. But at no point did Mr. Thomas attempt to flee or do anything that could be construed as threatening or resistance. *Id.* ¶ 31. Indeed, when Johnson unleashed his attack dog, Mr. Thomas had been prone on the ground for nearly three minutes. Opp. at 15 (citing Compl. ¶¶ 23, 30, 35, 38–40). Mr. Thomas's response was compliant.

5. Defendants' fifth contention is redundant with their sixth contention, so Mr. Thomas addresses them together.

6. Defendants assert for the first time on Reply that "Deputy Johnson repeatedly asked Thomas and the driver to stay in their vehicle and keep their hands up." Reply at 4. As Defendants acknowledged in their Motion to Dismiss, upon arriving at the scene, Defendant Johnson "asked the *driver* to stay in the car and keep his hands up." Mot'n at 8 (emphasis added). At no point in the video can Johnson be heard ordering Mr. Thomas, the *passenger*, to stay in the car.[3]

Defendants further contend for the first time on Reply that the video evidence "utterly discredits" Mr. Thomas's allegation that he made no attempt to flee or resist and did nothing that

[3] It is undisputed that Mr. Thomas was the passenger and Mr. Gray was the driver. *See* Compl. ¶ 21; Mot'n to Dismiss at 8.

could be construed as threatening. Reply at 4. Defendants' contention is baseless for the same reasons as Defendants' preceding contention about Mr. Thomas's level of compliance. *See supra*, Section I.4. Defendants also argue, for the first time, that Mr. Thomas's pleas of "all lives matter" can "certainly be considered threatening." Reply at 4. Beyond illogical, this argument is conclusory, legally unsupported, devoid of context, meritless, and, if nothing else, a question for the jury.

Throughout the video, Mr. Thomas voices his distress that he might be shot and killed, while taking care to avoid making any sudden movements that might be construed as threatening. *See* Compl. ¶ 31; Compl. Ex. 1. From the moment Defendant Johnson arrived on the scene, Mr. Thomas immediately stood with his hands high in the air and empty. Compl. ¶ 23. Fearing for his life, Mr. Thomas can be heard on the video praying "Please, Father, help me God, in Jesus name." Compl. Ex. 1 at approximately 19:23:18. To Defendant Johnson, Mr. Thomas says, "all lives matter" and "you're my brother!" *Id.* at approximately 19:23:18, 19:23:34. Considered in the light most favorable to Mr. Thomas, these statements are best understood as an invocation of Mr. Thomas's shared humanity with Defendant Johnson, offered in the hopes it would convince Defendant Johnson not to harm him.

To the extent Mr. Thomas can be heard pleading with Defendant Johnson to just "kill me," these statements are best understood in the context of his pleas for mercy and distressed emotional state as he came face to face with a growling attack dog and armed officers ready to shoot. *See id.* at approximately 19:24:13. Mr. Thomas at no point took an aggressive physical posture or threatened Defendants in any way. Compl. ¶ 31. He made no attempt to flee or resist. *Id.* On the contrary, throughout the entire encounter, Mr. Thomas was either standing with his arms raised

high above his head and empty, or laying prone on this ground with his hands outstretched and empty. *Id.* ¶ 23, 33. The video does not discredit his allegations.

7. Finally, Defendants take issue with Mr. Thomas's allegations that Bruss and Schultz stood steps away from Defendant Johnson, encouraging and assisting him in the attack. Reply at 4. They argue for the first time on Reply that these allegations are "utterly discredited" by the video evidence. *Id.* On the contrary, the video evidence supports these allegations. For example, Defendant Bruss can be heard on the video commanding Mr. Thomas to "stop moving around" as he writhed in pain with Johnson's attack dog tearing at his arm and Johnson perched on top of him. Compl. Ex. 1 at approximately 19:27:58. *See also Malone v. City of Fort Worth*, No. 4:09-CV-634-Y, 2014 WL 5781001, at *10 n.5 (N.D. Tex. Nov. 6, 2014) ("The Court wonders how a man, who is prone on the ground and being attacked by a dog, can reasonably be expected to expose his hands and unflinchingly hold them behind his back."). Moreover, both Bruss and Schultz can be seen standing by and watching the attack—without doing anything to stop it or preventing Defendant Johnson from unleashing his dog in the first place. Compl. Ex. 1 at approximately 19:27:43; 19:28:13. *See Baxter v. Harris*, No. 15-6412, 2016 WL 11517046, at *2 (6th Cir. Aug. 30, 2016) (holding that plaintiff plausibly alleged bystander officer "had the opportunity to intervene, given his proximity to [the plaintiff], and the means to prevent the harm from occurring either by instructing [the dog handler] not to release the animal or by restraining the animal himself until [the dog handler] could command it to stop"). Instead, as Johnson riled up his panting dog, Bruss and Schultz joined in the show of force by aiming a gun at Mr. Thomas, taunting him, and levying threats of their own. Compl. ¶¶ 2, 32–33, 51.

## II. Defendants' Additional Cases Do Not Rebut Binding Precedent that Defendants Violated Clearly Established Law.

For the first time on Reply, Defendants cite *Deshotels v. Marshall* in support of their qualified immunity arguments. Reply at 6. But *Deshotels* bears no factual similarity to the case at hand. Unlike Mr. Thomas, the decedent in *Deshotels* was suspected of burglary, fled from the police and, once caught, "actively resisted" the bystander officers' attempts to handcuff him. *Deshotels v. Marshall*, 454 F. App'x 262, 267 (5th Cir. 2011). Here, by contrast, Defendants were responding not to a burglary but to a dispatch report of two men making noise outside of a home. Compl. ¶ 18. Mr. Thomas made no attempt to flee or resist. *Id.* ¶ 1. Indeed, he had his hands high in the air and empty from the moment Defendants arrived on the scene. *Id.* ¶¶ 1, 23. And, at the time that Defendant Johnson unleashed his attack dog, Mr. Thomas had been laying prone on the ground, as ordered, with his hands outstretched and empty for nearly three minutes. Compl. ¶¶ 30–40. Unlike the officers who were granted qualified immunity in *Deshotels*—who were "actively engaged in restraining a large, potentially dangerous suspect," 454 F. App'x at 269—Defendants Bruss and Schultz had their hands free to prevent Johnson's attack but instead chose to assist Johnson by *inter alia*, aiming a gun at and threatening Mr. Thomas. Compl. ¶ 51.

Defendants' newfound analogy to *Joseph v. Bartlett*, 981 F.3d 319 (5th Cir. 2020), is also inapposite. *See* Reply at 4. As Defendants acknowledge, the *Joseph* court reversed the district court's denial of qualified immunity to a bystander officer because the plaintiffs "d[id] not identify a single case" establishing the duty to intervene or even make "any arguments as to the clearly established law" at all. *See* Reply at 4; *Joseph*, 981 F.3d at 345. In contrast, Mr. Thomas's Opposition pointed to three binding cases from the Fifth Circuit clearly establishing that "an officer's continued use of force on a restrained and subdued subject is objectively unreasonable." *See* Opp. at 13–15 (citing *Cooper v. Brown*, 844 F.3d 517, 524–25 (5th Cir. 2016); *Bush v. Strain*,

513 F.3d 492, 502 (5th Cir. 2008); *Timpa v. Dillard*, 20 F.4th 1020 (5th Cir. 2021), cert. denied, 142 S. Ct. 2755 (2022)). Mr. Thomas also cited several binding cases clearly establishing a bystander officer's duty to intervene to prevent harm caused by a fellow officer's unconstitutional conduct. *See* Opp. at 10 (citing *Timpa*, *supra*; *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995)). Further, although the qualified immunity doctrine does not require Mr. Thomas to identify a case that applies bystander liability specifically in the context of an unconstitutional dog attack,[4] Mr. Thomas nonetheless pointed the Court to two decisions by the Eleventh Circuit, a decision by the Sixth Circuit, and five district court decisions (including one by the Northern District of Texas), all of which hold bystander officers liable in precisely this context. *See* Opp. at 16–18 (discussing cases).

Defendants' other legal arguments about the clearly established law are equally unavailing. For the first time on Reply, Defendants attempt to distinguish the Fifth Circuit's decision in *Timpa v. Dillard* based on the duration of the excessive force. Reply at 8 (citing *Timpa* at 1020). However, in finding that the bystander officer's duty to intervene was clearly established, the *Timpa* court expressly relied on cases where the use of force was only "momentary" (*Bush*) or where the force lasted for between one and two minutes (*Cooper*, *Darden*). *Timpa*, 20 F.4th at 1036 (citing *Cooper*, 844 F.3d at 521; *Bush*, 513 F.3d at 496; *Darden v. City of Fort Worth*, No. 4:15-CV-221-A, 2016 WL 4257469, at *5 (N.D. Tex. Aug. 10, 2016)). *See also Timpa*, 20 F.4th at 1039 (denying

[4] *See, e.g.*, *Timpa v. Dillard*, 20 F.4th 1020, 1036–39 (5th Cir. 2021), cert. denied, 142 S. Ct. 2755 1034–39, 1039 (2022) (citing *Hale v. Townley*, 45 F.3d 914 (5th Cir. 1995); *Bush v. Strain*, 513 F.3d 492 (5th Cir. 2008); *Cooper v. Brown*, 844 F.3d 517 (5th Cir. 2016); *Darden v. City of Fort Worth*, 880 F.3d 722 (5th Cir. 2018)). The *Timpa* court analyzed the plaintiff's bystander claims from the lens of *Hale v. Townley*, which stands for the general rule of bystander liability under Section 1983, read in conjunction with *Cooper*, *Bush*, and *Darden*, which stand for the general proposition "that an officer's continued use of force on a restrained and subdued subject is objectively unreasonable." *Id.*

qualified immunity to defendant-officer who stood by for 34 seconds while the plaintiff was unconscious).

Defendants' efforts to distinguish the Eleventh Circuit's decision in *Edwards v. Shanley* fails for similar reasons. *See* Reply at 8. While the dog attack in *Edwards* lasted for some five to seven minutes, the *Edwards* court relied on its own prior decision in *Priester*, which found both principal and bystander liability for a similar dog attack lasting for approximately two minutes. *Edwards v. Shanley*, 666 F.3d 1289, 1297 (11th Cir. 2012) (discussing *Priester v. City of Riviera Beach*, 208 F.3d 919 (11th Cir. 2000)). Indeed, the court characterized those two minutes of agony as an "eternity." *Id.* And while Defendants make note of the fact that the plaintiff in *Edwards* surrendered as though it were a point of distinction, this is actually a point of similarity. *See* Reply at 8; Compl. ¶ 23.

Defendants' shallow attempt to distinguish *Fidler v. City Indianapolis* also fails. *See* Reply at 8–9 (citing 428 F. Supp. 2d 857 (S.D. Ind. 2006)) ("In the Indiana case cited by Plaintiff, one officer kicked the plaintiff while the other officer allowed his dog to bite him for two minutes even though he was not resisting or fleeing."). The *Fidler* court's denial of qualified immunity to the bystander officers for their failure to intervene was not contingent on the plaintiff being subjected to other forms of violence. *See* 428 F. Supp. at 863 ("Not surprisingly, the defendants have not cited any cases from the Seventh Circuit or any other court holding that officers in such a situation could act reasonably in kicking and stomping the subject for more than a minute ***or*** in releasing a dog trained to bite the subject.") (emphasis added). Indeed, these are precisely the sort of factual distinctions that the Fifth Circuit has held do not entitle an officer to qualified immunity. *See Easter v. Powell*, 467 F.3d 459, 465 (5th Cir. 2006) ("The 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.") (citation omitted).

Rather than grapple with the remaining cases Mr. Thomas cites clearly establishing Defendants' duty to intervene, Defendants simply conclude that they are "equally distinguishable." Reply at 9. Defendants go further, asserting that "there is no constitutional amendment that should or would have put Bruss and Schultz on notice that their actions were unconstitutional."[5] Reply at 6. These arguments pretend that the Fourth Amendment and the ample case law applying its protections in these circumstances do not exist. *See id.*

## III. This Court Must Rule on an Important Issue of First Impression Based on the Record Before It.

In his Opposition, Mr. Thomas urges this Court to consider recently unearthed, compelling evidence that the still-controlling Civil Rights Act of 1871 expressly eliminated common law immunities, including qualified immunity. Opp. at 18–25. Rather than address this revelation head-on, Defendants urge this Court to ignore it. Reply at 10–11. Defendants ask this Court instead to apply rulings from cases in which the groundbreaking evidence and argument before this Court was not presented. *Id.*

Neither the Fifth Circuit nor the United States Supreme Court has ever grappled with the qualified immunity implications of the newly resurfaced statutory text. Indeed, some of the cases Defendants cite ground their holdings in the reasoning that "had it wished to abolish [qualified

[5] Defendants marry this contention with a repeat of the factual misstatements catalogued *supra*, Section I, in an effort to escape the Supreme Court's decision in *Taylor v. Riojas*. *See* 141 S. Ct. 52 (2020); Reply at 6. But Defendants' legal arguments collapse under the weight of their falsehoods.

immunity]," Congress "would have specifically so provided." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (citing *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967)). As we now know, Congress did exactly that.[6]

A finding that the Civil Rights Act of 1871 abrogated qualified immunity does not require any break with precedent. Moreover, "[f]ederal courts . . . have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (citing *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821)). "Jurisdiction existing, [the Supreme] Court has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Id.* (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). This Court must rule on the evidence and arguments now before it.

[6] Moreover, Justice Thomas did not address this question in his concurrence in *Ziglar v. Abbasi*, which Defendants' reference in support of their arguments that this Court should simply ignore the existence of the Notwithstanding Clause. *See* Reply at 10–11 (citing *Morrow v. Meachum*, 917 F. 3d 870, 874 n. 4 (5th Cir. 2019), which in turn cites *Ziglar v. Abbasi*, 582 U.S. 120, 156–60 (2017) (Thomas, J., concurring)). That reference fails to address Mr. Thomas's Notwithstanding Clause arguments. Justice Thomas's critiques of qualified immunity in *Ziglar* were directed at his position that modern qualified immunity doctrine has strayed too far from the common law as it stood at the time the Civil Rights Act was enacted in 1871. *Ziglar v. Abbasi*, 582 U.S. 120, 156–60 (2017) (Thomas, J., concurring). It said nothing of the proposition that Congress never intended to incorporate common law immunities at all. *See id.*; Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201, 235 & n.13 (2023) (explaining that Justice Thomas and other critics of qualified immunity "accept *Pierson*'s logic—that Congress meant to adopt the good-faith immunity that existed at common law") (citing *Ziglar*, 582 U.S. at 157). The *Pierson* logic Professor Reinert refers to is based on the Supreme Court's application of what he calls the "Derogation Canon" in *Pierson v. Ray*. 111 Calif. L. Rev. at 204–05. But this logic was flawed, in part, because it presumed the absence of what we now know to have been present—"a clause clear[ly] indicat[ing] that Congress meant to abolish wholesale all common-law immunities." *See Pierson v. Ray*, 386 U.S. 547, 554–55 (1967). *See also* Reinert, 111 Calif. L. Rev. at 204–06 (arguing that even in the absence of the Notwithstanding Clause, the Derogation Canon should never have been applied to Section 1983, because the canon was traditionally applied only to common law claims or rights—not common law defenses like qualified immunity).

## CONCLUSION

For the foregoing reasons, as well as those detailed in Mr. Thomas's Response in Opposition, this Court should deny Defendants' Motion to Dismiss in its entirety.

Respectfully submitted this 28th day of June, 2023,

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**CERTIFICATE OF SERVICE**

I certify that on June 28, 2023, a true and correct copy of this document was properly served on counsel of record via electronic filing in accordance with the United States District Court for the Southern District of Texas Procedures for Electronic Filing.

*/s/ Jeffrey D. Stein*
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