IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VICKIE COOK, Individually and As Natural Mother to DEANNA COOK, N.W., a Minor, By and Through Her Grandparent and Guardian VICKIE COOK, A.W., a Minor, By and Through Her Grandparent and Guardian VICKIE COOK and KARLETHA COOK-GUNDY, Individually and As Representative of the Estate of DEANNA COOK, DECEASED	§	**CIVIL ACTION NO. 3:12-cv-03788-P**
	§	**JURY DEMANDED**
Plaintiffs,	§	
vs.	§	
THE CITY OF DALLAS, TONYITA HOPKINS, KIMBERLEY COLE, JOHNNYE WAKEFIELD, YAMINAH SHANI MITCHELL, JULIA MENCHACA, AMY WILBURN, and ANGELIA HEROD-GRAHAM	§	
Defendants.	§	

PLAINTIFFS' FIRST AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

COMES NOW VICKIE COOK, Individually and as Natural Mother to DEANNA COOK; N'EYCEA WILLIAMS and ANIYA WILLIAMS, minors, By and Through their Grandparent and Guardian, VICKIE COOK; and KARLETHA COOK-GUNDY, Individually and as Representative of the Estate of DEANNA COOK, Deceased, Plaintiffs, complaining of the CITY OF DALLAS, TEXAS (the "CITY OF DALLAS"), TONYITA HOPKINS,

KIMBERLEY COLE, JOHNNYE WAKEFIELD, Officer JULIA MENCHACA, Officer AMY WILBURN, and ANGELIA HEROD-GRAHAM (collectively referred to as "Defendants" or "CITY OF DALLAS Agents") with this Original Complaint allege as follows:

I.
NATURE AND PURPOSE OF THE ACTION

1. On August 17, 2012, DEANNA COOK, a person known to police to have been involved in, and seemingly escaped, a domestically violent relationship, cried out to the DALLAS POLICE DEPARTMENT for assistance and to save her life. Ms. Cook died as police failed to timely respond with assistance, arrived 50 minutes after her 9-1-1 call, and did not provide experienced police officers to fully investigate her life-threatening 9-1-1 call.

2. Plaintiffs allege that the CITY OF DALLAS had a duty, but failed to implement policies, practices and procedures that respected DEANNA COOK's constitutional rights to assistance, protection, medical treatment, and equal treatment under the law. Defendant's failure to implement the necessary policies and the implementation of unconstitutional policies deprived DEANNA COOK of equal protection and due process under the Fourteenth Amendment and caused her unwarranted and excruciating physical and mental anguish and death. For these civil rights' violations, and other causes of action discussed herein, Plaintiffs seek answers and compensation for their damages and the death of DEANNA COOK.

3. Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988; the Fourteenth Amendment to the United States Constitution; Tex. Civ. Prac. & Rem. Code §§ 71.002 and 71.021 and other constitutional provisions and laws of the United States and the State of Texas, to recover damages for the death of DEANNA COOK, while she sought protection, medical treatment and assistance from Defendants, and for the deprivation of her rights under color of law and in violation of federal law.

II.
JURISDICTION AND VENUE

4. This court has original jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343 since Plaintiffs are suing for relief under 42 U.S.C. §1983. This Court has jurisdiction over Plaintiffs' other claims under principles of pendent, ancillary and supplemental jurisdiction under 28 U.S.C § 1367.

5. Venue is appropriate in the United States District Court; Northern District of Texas, Dallas Division, since the city of Dallas was the location of events made the basis of this cause of action.

III.
PARTIES

6. Plaintiff VICKIE COOK resides in Dallas County, Texas.

7. Plaintiffs N'EYCEA WILLIAMS and ANIYA WILLIAMS are minors residing in Dallas and bring this action by and through their Grandmother, Guardian, and Next Friend, VICKIE COOK.

8. Plaintiff KARLETHA COOK-GUNDY resides in Dallas County, Texas.

9. Defendant the CITY OF DALLAS is a municipality of the State of Texas.

10. The CITY OF DALLAS funds and operates the CITY OF DALLAS POLICE DEPARTMENT, which, along with the Dallas City Manager's office, is responsible for the implementation of the police department's budget, policies, procedures, practices, and customs, as well as the acts and omissions, challenged by this suit. The CITY OF DALLAS POLICE DEPARTMENT is also responsible for preventive, investigative, and enforcement services for all citizens of the CITY OF DALLAS.

11. Defendant CITY OF DALLAS is responsible for ensuring that all of its facilities, including the 9-1-1 call center, are in compliance with federal and state law, department or agency policies, rules, and regulations, and related standards of care.

12. Defendant CITY OF DALLAS is the employer of individual Defendants TONYITA HOPKINS, KIMBERLEY COLE, JOHNNYE WAKEFIELD, Officer JULIA MENCHACA, Officer AMY WILBURN, and ANGELIA HEROD-GRAHAM and is responsible for the acts and/or omissions of same that were performed in the course and scope of their employment.

13. Service of Process may be had on the CITY OF DALLAS by serving its City Secretary, Rosa A. Rios, Dallas City Hall, 1500 Marilla Street, Room 5DS, Dallas, TX 75201-6622. The other Defendants may be served in accordance with Rule 5 of the Federal Rules of Civil Procedure.

IV.
STATE ACTION

14. To the extent applicable, Defendants were acting under color of state law when they subjected DEANNA COOK to the wrongs and injuries hereinafter set forth.

V.
FACTS PARTICULAR TO PLAINTIFFS' CLAIMS

DEANNA COOK DIALS 9-1-1 AND PLEADS FOR HELP FROM DEFENDANTS

15. On Friday, August 17, 2012, while an intruder was attacking her inside her home, DEANNA COOK, a 32 year-old mother of two, managed to dial 9-1-1 for assistance. Ms. Cook was screaming at the top of her lungs in fear, begging for assistance from the 9-1-1 Call Center.

16. After Ms. Cook's 9-1-1 call initially went into a holding queue, the call was eventually taken by Defendant TONYITA HOPKINS, who was employed in the 9-1-1 call

center of the CITY OF DALLAS POLICE DEPARTMENT's Communications Section. At the time of the call, TONYITA HOPKINS, upon information and belief, was working overtime.

17. Upon information and belief, the street name and block range for Ms. Cook's residence immediately appeared on the 9-1-1 call center screen. Accordingly, a police officer could have been dispatched immediately to that block, with a specific address to be provided while the officer was en route.

18. At the time of Ms. Cook's call, KIMBERLEY COLE had deserted her post in violation of DALLAS POLICE DEPARTMENT policy. As a result, assistance with handling and classifying Ms. Cook's call had to be provided by JOHNNYE WAKEFIELD.

19. From the tone of Ms. Cook's voice and statements that her life was in jeopardy, it was, or should have been, obvious to TONYITA HOPKINS and JOHNNYE WAKEFIELD that there was a physical disturbance in Ms. Cook's home and that her life was being threatened.

20. Despite that it was apparent that Ms. Cook was being threatened, attacked and was in fear for her life, it took nearly ten (10) minutes to finally initiate a "dispatch" request for officers to go to Ms. Cook's southeast Dallas home. Upon information and belief, Ms. Cook's 9-1-1 call lasts approximately 11 minutes.

21. At some point during Ms. Cook's 9-1-1 call, JOHNNYE WAKEFIELD advised TONYITA HOPKINS to disconnect Ms. Cook's call and call her back. Not surprisingly, after doing so, she received Ms. Cook's voicemail.

22. At no point did JOHNNYE WAKEFIELD or TONYITA HOPKINS notify a police dispatch supervisor or ask that police be dispatched immediately to Ms. Cook's residence.

23. Neither JOHNNYE WAKEFIELD nor TONYITA HOPKINS did any follow-up to ensure that police dispatch had sent officers to Ms. Cook's residence.

THE POLICE DEPARTMENT DEMONSTRATE NO RUSH TO HELP MS. COOK

24. At some point after Ms. Cook's 9-1-1 call, YAMINAH SHANI MITCHELL, a relief police dispatcher, was made aware of Ms. Cook's 9-1-1 call and was aware that police had an exact address for Ms. Cook's residence and that the call had been marked "Urgent! Updated address; disturbance still heard in the background."

25. Instead of prioritizing Ms. Cook's 9-1-1 call, dispatcher MITCHELL allowed officers simply to volunteer for the call.

26. Officers JULIA MENCHACA and AMY WILBURN originally volunteered to check into DEANNA COOK's call.

27. While supposedly en route to Ms. Cook's residence, Officers MENCHACA and WILBURN stopped to investigate a residential burglary alarm call on Earnhardt Way that was a false alarm.

28. Also, while en route to Ms. Cook's residence, Officers MENCHACA and WILBURN stopped at a 7-11 convenience store to make personal purchases. While Officer WILBURN was inside the convenience store, Officer MENCHACA asked dispatcher MITCHELL to take them off Ms. Cook's call. According to the officers, dispatcher MITCHELL misunderstood the request.

29. Prior to arriving at Ms. Cook's residence, Officers MENCHACA and WILBURN also took time out to complete disposition comments for a previous call that had been resolved.

30. Prior to arriving at Ms. Cook's residence, Officers MENCHACA and WILBURN were made aware that Ms. Cook was screaming for help and that a scuffle could be heard in the background of her 9-1-1 call.

31. Officers MENCHACA and WILBURN did not use lights, sirens, or speed to drive to Ms. Cook's residence.

32. At the time of Ms. Cook's 9-1-1 call, as the result of numerous other calls Ms. Cook made to police, THE DALLAS POLICE DEPARTMENT was aware that DEANNA COOK had been a domestic abuse victim and that the alleged suspect had been stalking her at her residence.

THE POLICE FINALLY ARRIVE, BUT CONTINUE TO NOT TAKE MS. COOK'S PLEAS SERIOUSLY

33. Nearly 50 minutes after DEANNA COOK's 11-minute 9-1-1 call was placed, Officers MENCHACA and WILBURN finally arrived at Ms. Cook's southeast Dallas house.

34. While at Ms. Cook's residence, Officers MENCHACA and WILBURN did not go around to the rear of Ms. Cook's residence, did not peek through all of Ms. Cook's windows (where they would have seen signs in her bedroom of a violent physical altercation), and never attempted to forcibly gain entry into the home.

35. Upon information and belief, officers MENCHACA and WILBURN simply knocked on the door and had someone call Ms. Cook's cellular phone. Not surprisingly, the call went to voicemail.

36. While at the residence, Officers MENCHACA and WILBURN were aware that Ms. Cook had previously reported claims of domestic violence and stalking.

37. Nevertheless, shortly after they arrived, officers MENCHACA and WILBURN left, without performing any additional investigation of Ms. Cook's whereabouts, her residence, or her 9-1-1 call.

MS. COOK'S FAMILY FIND HER DEAD IN HER BATHTUB

38. Two days later, on August 19, 2012, after Ms. Cook did not show up for church, her daughters N'EYCEA WILLIAMS and ANIYA WILLIAMS, mother VICKIE COOK, and sister KARLETHA COOK-GUNDY went to Ms. Cook's residence.

39. Once at Ms. Cook's home, her family noticed that two of her dogs (who were normally kept inside the house) were outside barking frantically. Water was leaking from Ms. Cook's garage and other places.

40. Suspecting foul play, Ms. Cook's mother, VICKIE COOK, called 9-1-1 for assistance, after getting no response to knocks on the door or repeated calls to Ms. Cook's cellular phone.

41. During the 9-1-1 call from Ms. Cook's mother, Call Taker ANGELIA HEROD-GRAHAM instructed Ms. Cook's mother that the DALLAS POLICE DEPARTMENT would not send officers out and asked whether Ms. Cook's family had contacted the jails and local hospitals to look for Ms. Cook, although they were reporting that DEANNA COOK was missing.

42. ANGELIA HEROD-GRAHAM has stated that she was trained by the DALLAS POLICE DEPARTMENT that in instances such as this she should ask questions that she asked Ms. Cook's mother, despite that Ms. Cook's mother was pleading for help locating her missing daughter.

43. After being denied any assistance from the DALLAS POLICE DEPARTMENT, Ms. Cook's family began to take matters into their own hands to locate their loved one. Ms. Cook's sister, mother and daughter then went to the rear of her residence, where they kicked the patio door down, and immediately noticed water flowing all throughout the house.

44. After entering the residence, Ms. Cook's family was nearly overcome by the stench coming from Ms. Cook's bedroom. They also noticed that Ms. Cook's bedroom door had been kicked in and her home showed clear signs of foul play.

45. Upon walking into Ms. Cook's bathroom, the family observed Ms. Cook's partially clad body laying side-ways, half-in and half-out of the bathtub, floating atop the cold overflowing water. Her body was severely discolored and skin abnormally wrinkly.

46. Immediately upon Ms. Cook's family seeing her body, ANGELIA HEROD-GRAHAM overhead Ms. Cook's family screaming in shock and agony at finding their loved one in this condition and despite all the pleas for assistance from the police.

47. More than 12 minutes after her initial 9-1-1 call, Ms. Cook's mother spoke to a 9-1-1 operator again and was advised to exit the home. After the police finally arrived, DEANNA COOK's body was taken directly to the morgue.

ADMISSION OF FAULT

48. On or about August 25, 2012, while attending a community meeting in South Dallas, Chief David O. Brown ("Chief Brown") admitted that the police communications center caused Ms. Cook's death when the Police Chief stated "[the 9-1-1 operator] obviously failed at that, and it cost the life of Ms. Cook,"

THE 9-1-1 DEFICIENCIES AT THE TIME OF MS. COOK'S DEATH

49. The Texas Legislature created the Commission on State Emergency Communications (CSEC), which is an agency of the State of Texas charged with oversight of the Statewide 9-1-1 system. The 9-1-1 Program is funded from the fee on each telephone line reflected on an individual's telephone bill (*i.e*. wireline, wireless and VoIP). The CSEC's role is to preserve and enhance public safety and health in Texas through reliable access to emergency

communications services. The CSEC is also charged with developing minimum performance standards for equipment and operation of 9-1-1 service recommend minimum training standards, assist in training, and provide assistance in the establishment and operation of 9-1-1 service.

50. Upon information and belief, the CITY OF DALLAS has been recognized as a municipal emergency communications district pursuant to Health and Safety Code Chapter 772.

51. The city's 9-1-1 call center is located in the basement of Dallas City Hall. The funding for the center is provided in budgets prepare by the City Manager's office.

52. At the time of Ms. Cook's death, there were 90 positions in the 9-1-1 communications section, yet only 64 were filled. Many employees were working overtime to try and do the work required by the unfilled positions.

53. At the 9-1-1 call center, overworked operators struggle to handle massive numbers of calls and it is not uncommon that incorrect and incomplete information is passed from call takers to police officers in the field.

54. Upon information and belief, at the time of Ms. Cook's death, the CITY OF DALLAS' 9-1-1 call center had inadequate operations, inadequate technology, insufficient staffing, inadequate training, improper disciplinary procedures and unsatisfactory procedures to provide proper handling of 9-1-1 calls in accordance with the goals of the CSEC and reasonable expectations.

55. According to Chief Brown, officers respond to critical calls within "six" minutes. However, it took approximately 50 minutes to respond to Ms. Cook's 9-1-1 cries for help and even after the officers arrived, her call was not treated as a serious call.

56. At the time of DEANNA COOK's 9-1-1 call, there was no supervisor on the floor to assist with such a high priority situation. According to Dallas Police Chief Brown, there is "[n]o excuse for leaving the floor when a supervisor is required on the floor at all times."

57. According to KIMBERLEY COLE, however, as a result of "shortages in management and other pressing duties," she requested that JOHNNYE WAKEFIELD cover for her on the day of Ms. Cook's call.

58. Since Ms. Cook's death, the CITY OF DALLAS has attempted to "pass the buck" away from the CITY OF DALLAS on the inadequate 9-1-1 procedures and customs by firing ANGELIA HEROD-GRAHAM and suspending TONYITA HOPKINS for 10 days and re-assigning her to another work group within the DALLAS POLICE DEPARTMENT.

THE DALLAS POLICE DEPARTMENT'S NEW 9-1-1 CLASSIFICATIONS

59. Chief Brown has admitted that "there is a need for technological upgrades in the city's 9-1-1 call center."

60. Since DEANNA COOK's death, the CITY OF DALLAS has implemented new classifications, "6XE-Major Disturbance Emergency," and "6XEA-Major Disturbance Emergency Ambulance, indicating a threat of imminent serious bodily injury or death.

61. There was nothing that prohibited these, or similar, classifications from being put in place prior to August 17, 2012, the date of DEANNA COOK's 9-1-1 call.

VIOLENCE AGAINST WOMEN ACTS AND PROGRAMS

62. In or about 1994, Congress passed the Violence Against Women Act ("VAWA") as part of the federal Violent Crime Control and Law Enforcement Act. VAWA was developed and passed as a result of extensive grassroots efforts by advocates and professionals from the battered women's movement, sexual assault advocates, victim services field, law enforcement

agencies, prosecutors' offices, the courts, and the private bar urging Congress to adopt significant legislation to address domestic and sexual violence.

63. Since its original passage, VAWA's focus has expanded from domestic violence and sexual assault to also include dating violence and stalking. It funds services to protect adult and teen victims of these crimes, and supports training on these issues, to ensure consistent responses across the country.

64. VAWA has a huge emphasis on a coordinated community response to domestic violence, dating violence, sexual assault, and stalking; courts, law enforcement, prosecutors, victim services, and the private bar currently work together in a coordinated effort that had not heretofore existed on the state and local levels.

65. VAWA creates a federal cause of action under certain circumstances. VAWA also discusses the influence on domestic violence victims of the clear lack of support from police.

66. In Texas, the legislature enacted Section 22.01 of the Texas Penal Code, which evidences a clear desire on the part of the Texas legislature to address meaningfully the very serious and troubling issue of domestic violence and to provide increased protection to the victims of domestic violence in Texas, of which the DEANNA COOK was included.

67. According to the Texas Governor's Commission on Women, for calendar year 2009, 111 women were killed by their former or current husband, intimate partner or boyfriend. This “reported” number represented over one-third of all women killed. This was up from 2000 when 104 women in Texas were killed by their intimate male partners and 177,176 family violence incidents were reported. Additional victims remain uncounted. Research into domestic

homicides typically reveals these to be crimes of accumulation in which men's violence and women's entrapment seem to intensify over time.

68. In 1985, the Texas legislature highlighted the duties of police officers in domestic violence situations in Art. 5.04(a) of the Code of Criminal Procedure, providing that "the responding law enforcement or judicial officers shall protect the victim, without regard to the relationship between the alleged offender and victim." This statute also provides that "[a] peace officer who investigates a family violence allegation or who responds to a disturbance call that may involve family violence shall advise any possible adult victim of all reasonable means to prevent further family violence, including giving written notice of a victim's legal rights and remedies and of the availability of shelter or other community services for family violence victims."

69. Additionally, according to the Dallas City Attorney's website, it "works with police officers to obtain information necessary to effectively prosecute domestic violence cases such as the victim/witness contact information and a report providing explicit details about the violence." The website also indicates that it provides "victim services" and instructs victims to "Dial 9-1-1 if you are in immediate danger."

70. Upon information and belief, the DALLAS POLICE DEPARTMENT has not implemented policies and procedures to aggressively fight domestic violence, to address the influence on domestic violence victims of lack of support from police or to provide prioritized responses and assistance to victims of domestic violence.

VI.
CAUSES OF ACTION

COUNT ONE:
CLAIMS UNDER 42 U.S.C. §1983 AND THE 14TH AMENDMENT TO THE U.S. CONSTITUTION

71. Plaintiffs reallege and incorporate by reference the allegations set forth in all preceding paragraphs as if set forth fully and reiterated here in their entirety.

72. According to its website, the DALLAS POLICE DEPARTMENT, in serving the people of Dallas, "strives to reduce crime and provide a safe city" by, inter alia, "recognizing that its goal is to help people and provide assistance at every opportunity…and to provide preventive, investigative, and enforcement services." The website also indicates that Dallas police officers will "[p]erform their duties with the knowledge that protection of the lives and property of all citizens is their primary duty."

73. The Defendants, acting under color of law and acting pursuant to customs, practices and policies of the CITY OF DALLAS deprived DEANNA COOK of rights and privileges secured to her by the Fourteenth Amendment to the United States Constitution and by other laws of the United States, by failing to provide proper emergency assistance in violation of 42 U.S.C. § 1983 and related provisions of federal law and in violation of the above cited constitutional provisions.

74. With respect to the claims made the basis of this lawsuit, the CITY OF DALLAS failed to adequately train its employees regarding responding to and conducting investigations of domestic violence claims. This failure to train its employees in a relevant respect reflects a deliberate indifference to the rights of the city's inhabitants and is actionable under 42 U.S.C. § 1983.

75. The CITY OF DALLAS failed properly to discipline its employees regarding responding to 9-1-1 calls and conducting an investigation of calls. This failure to discipline its employees in a relevant respect reflects a deliberate indifference to the rights of its inhabitants and is actionable under 42 U.S.C. § 1983.

76. Upon information and belief, the CITY OF DALLAS has a policy, practice, or custom of law enforcement that provides less protection (e.g. by not responding at all or purposefully delaying its response) to female victims of domestic assault than to victims of other assaults. This discrimination against women was a motivating factor in the refusal to prioritize and respond quickly to Ms. Cook's 9-1-1 call and her death was the result of the CITY OF DALLAS' policy, custom, or practice, as well as their inaction in response to the call.

77. Upon information and belief, the CITY OF DALLAS has a policy, practice, or custom of law enforcement that provides less protection to female victims of domestic assault than to victims of other assaults through not providing the information that is required by Art. 5.04(a) of the Texas Code of Criminal Procedure. This discrimination against women was a motivating factor in the refusal to properly investigate Ms. Cook's call and her death was the result of the CITY OF DALLAS' policy, custom, or practice, as well as their inaction in response to the call.

78. Upon information and belief, the CITY OF DALLAS has a policy, practice, or custom of law enforcement that provides less protection or assistance to female victims in high crime and predominantly minority-race neighborhoods than to victims in other neighborhoods. This discrimination was a motivating factor in the refusal to prioritize and respond quickly to Ms. Cook's 9-1-1 call and her death was the result of the CITY OF DALLAS' policy, custom, or practice, as well as their inaction in response to the call.

79. Defendants responded differently to DEANNA COOK's 9-1-1 call arising from her impending murder than if the call had been made by someone similarly situated but of a non-minority race and/or in a more affluent neighborhood. Defendants did not respond to Ms. Cook's 9-1-1 call timely, or seriously, and conducted a shoddy investigation once the officers

finally arrived at DEANNA COOK's residence. This was because Defendants continually believed this domestic situation in a less affluent neighborhood was less deserving of their attention. Such conduct is not at all related to any governmental purpose.

80. On information and belief, Defendant CITY OF DALLAS, acting through official policies, practices, and customs, and with deliberate, callous, and conscious indifference to the constitutional rights of DEANNA COOK failed to implement the policies, procedures; and practices necessary to provide constitutionally adequate protection and assistance to DEANNA COOK during her plea for assistance and implemented policies, procedures, and practices which actually interfered with or prevented with or prevented DEANNA COOK from receiving the protection, assistance and care she deserved.

81. For instance, the following conduct, policies, and customs, *inter alia*, by Defendants violated DEANNA COOK's constitutional rights:

a. The CITY OF DALLAS' failure to adequately train or discipline its employees;

b. Defendants' policy of giving lower priority to 9-1-1 domestic violence calls than to non-domestic violence calls;

c. Defendants' policy of not giving patrol officers the green light to drive fast with their lights and sirens and to make an emergency entry when the investigation involves domestic violence claims;

d. Failing to prioritize DEANNA COOK's call the way Defendants would have had she resided in a more affluent, non-minority, neighborhood;

e. The department's policy of responding earlier to 9-1-1 calls from more affluent, non-minority areas, than they did for DEANNA COOK;

f. Responding to DEANNA COOK's call and arriving at her residence at a time considerably in excess of the time in which Defendants would have responded to a similarly situated person in a more affluent section of the CITY OF DALLAS that did not have a predominantly minority population;

g. Responding to DEANNA COOK's call and arriving at her residence at a time considerably in excess of the time in which Defendants would have responded to a similarly situated non-minority.

h. Refusing to immediately send assistance to DEANNA COOK's residence because of her status as a domestic violence victim, an African-American female and as a result of her residing in a "high crime-rate" area;

i. Defendants' policy of giving less police protection or assistance to women who complain of domestic abuse;

j. Defendants' policy of allowing officers to stop at convenience stores for personal purchases while en route to urgent domestic violence calls;

k. Failure to conduct the type of investigation at DEANNA COOK's residence (e.g. entering the residence to look for foul play) that would have been conducted had she not been a victim of domestic abuse, a minority or a resident in a high crime area;

l. Failure to follow the requirements listed in Art. 5.04(a) of the Code of Criminal Procedure due to Ms. Cook's minority status; and

m. Failure to get more police employees properly trained to professionally handle 9-1-1 emergencies.

82. In addition, Defendant CITY OF DALLAS, as applicable, failed and refused to implement customs, policies, practices or procedures, and failed to train its personnel adequately on the appropriate policies, practices or procedures regarding the handling of 9-1-1 domestic violence and bodily harm calls. In so doing, Defendant CITY OF DALLAS knew that it was acting against the clear dictates of current law, and knew that as a direct consequence of their deliberate decisions, the very situation that occurred -- *i.e.*, death to the 9-1-1 caller -- in all reasonable probability would occur.

83. Defendants' actions demonstrate that before her death DEANNA COOK was the victim of purposeful discrimination, either because of her race and/or gender, or due to an irrational or arbitrary state classification unrelated to a legitimate state objective.

84. Additionally, no rational basis existed for the CITY OF DALLAS' alleged policies of affording female victims of domestic violence less police protection or assistance than other crime victims or giving these victims less investigative attention than other victims.

85. Similarly, no rational basis existed for the CITY OF DALLAS' alleged policies of affording 9-1-1 callers from high-crime areas or predominantly minority areas less police

protection or assistance than other crime victims or giving these female victims less investigative attention than other victims.

86. In addition to the conduct describe above, TONYITA HOPKINS and JOHNNYE WAKEFIELD violated Deanna Cook's rights, *inter alia,* when they failed to prioritize Ms. Cook's call, failed to notify the Manager II or Radio Room sergeant of Ms. Cook's urgent call and refused to alert dispatchers of the grave nature of the call.

87. In addition to the conduct describe above, KIMBERLEY COLE violated Deanna Cook's rights, inter alia, by deserting the call center, leaving it with no supervision to act in emergency matters such as the one presented by Ms. Cook's desperate call.

88. In addition to the conduct describe above, YAMINAH SHANI MITCHELL violated Deanna Cook's rights, *inter alia*, when she failed to prioritize Ms. Cook's call and refused to alert officers of the grave or urgent nature of the call.

89. In addition to the conduct describe above, officers JULIA MENCHACA and AMY WILBURN violated Deanna Cook's rights, *inter alia*, when they failed to prioritize Ms. Cook's call, made various other stops while en route to Ms. Cook's residence, refused to conduct an adequate investigation at Ms. Cook's home, refused to forcibly enter Ms. Cook's home to save her life, and abruptly left the premises while her life lay in the balance.

90. In addition to the conduct describe above, ANGELIA HEROD-GRAHAM violated Deanna Cook's rights, *inter alia*, when she failed to prioritize the call from Ms. Cook's family and refused to alert dispatchers of the grave nature of the call.

91. Upon information and belief, TONYITA HOPKINS, KIMBERLEY COLE, JOHNNYE WAKEFIELD, YAMINAH SHANI MITCHELL, JULIA MENCHACA, AMY WILBURN, and ANGELIA HEROD-GRAHAM acted independently during some of the

conduct or omissions complained of herein and within the general scope of his or her employment during other conduct or inaction.

92. At the time of the conduct complained of, the CITY OF DALLAS' agents were performing ministerial, not discretionary, duties, the breach of which led to Ms. Cook's demise.

93. Additionally, to the extent she was not involved in the decision to delay Ms. Cook's response time, JOHNNYE WAKEFIELD is liable as a bystander since she (a) knew that a fellow officer was violating Ms. Cook's constitutional rights by not providing proper assistance to her, (b) had a reasonable opportunity to prevent the harm by ensuring that Ms. Cook's 9-1-1 call was properly prioritized, and (c) choose not to act.

94. Additionally, to the extent she was not involved in the decision to delay the arrival of the officers to Ms. Cook's residence, YAMINAH SHANI MITCHELL is liable as a bystander since she (a) knew that the assigned officers were violating Ms. Cook's constitutional rights by not providing proper assistance to her, (b) had a reasonable opportunity to prevent the harm by ensuring that Ms. Cook's 9-1-1 call was properly prioritized, and (c) choose not to act.

95. Furthermore, unlike what officers MENCHACA and WILBURN did, no reasonably prudent police officer, under similar circumstances, would have (a) stopped at a 7-11 convenience store to make personal purchases while en route to an urgent call; (b) arrived at the scene of a serious disturbance, where a life was threatened, and refused to survey the entire premises; (c) intentionally refused to look through the windows, where they would have noticed that a physical confrontation had taken place inside; (d) intentionally failed to forcibly gain entry into Ms. Cook's home; (e) intentionally failed to comply with Art. 5.04(a) of the Code of Criminal Procedure; and (f) refused to conduct any follow-up investigation.

96. Moreover, no reasonably competent official would have concluded that the actions of the CITY OF DALLAS, TONYITA HOPKINS, KIMBERLEY COLE, JOHNNYE WAKEFIELD, YAMINAH SHANI MITCHEL, JULIA MENCHACA, AMY WILBURN, and ANGELIA HEROD-GRAHAM described herein would not violate Deanna Cook's rights. In other words, no reasonably prudent call center employee, supervisor or officer, under similar circumstances, could have believed that their conduct was justified.

97. No rational basis existed for the CITY OF DALLAS' alleged policy of affording female victims of domestic violence less police assistance than other crime victims.

98. In addition, DEANNA COOK, individually, was intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment.

COUNT TWO:
VIOLATION OF DUE PROCESS

99. Plaintiffs reallege and incorporate by reference each of the allegations set forth in all preceding paragraphs as if set forth fully and reiterated here in their entirety

100. DEANNA COOK had a protective order against the suspect who police have identified as her suspected killer. Ms. Cook had also contacted the DALLAS POLICE DEPARTMENT on several previous occasions to report that the suspect physically abused and was stalking her.

101. On one such occasion, just a week before her murder, Ms. Cook called 9-1-1 to report that the suspect was across the street from her house stalking her. The police made no arrest and filed no criminal complaint. Instead, the police simply drove the stalking suspect home.

102. The DALLAS POLICE DEPARTMENT clearly had duty to protect DEANNA COOK since the police had knowledge of specific threats of violence to her by the suspected attacker, yet refused to act to protect her.

COUNT THREE:
NEGLIGENCE AND GROSS NEGLIGENCE

103. Plaintiffs reallege and incorporate by reference each of the allegations set forth in all preceding paragraphs as if set forth fully and reiterated here in their entirety.

104. Accordingly, by their actions described herein, all of the Defendants were negligent, grossly negligent and/or acted with malice in at least the following regards:

a. Failing to correctly prioritize DEANNA COOK's August 17, 2012, 9-l-l call;

b. Refusing to escalate DEANNA COOK's call to once requiring lights and sirens blaring;

c. Refusing to respond timely to Deanna Cook's August 17, 2012, 9-1-1 call;

d. Failure to recognize the severity of the crime that DEANNA COOK was reporting;

e. Refusing to correctly prioritize the August 19, 2012, 9-1-1 call from DEANNA COOK's family;

f. Failure to institute a system that would ensure that domestic violence calls receive a high priority of responsiveness;

g. Failure to instruct and supervise Dallas Police Department employees regarding the proper evaluation of 9-1-1 calls;

h. Failure to instruct and supervise Dallas Police Department regarding the importance of having supervisors present at the 9-1-1 call center at all times;

i. Failure to institute adequate policies and procedures to ensure that supervisors would always be present on the floor of the 9-1-1 call center;

j. Failure to abide by the standards of the Texas Commission on Law Enforcement Officer Standards and Education;

k. Failure to correctly prioritize the investigation at DEANNA COOK's residence;

l. Failure to conduct a proper search and investigation while out at DEANNA COOK's residence on August 17, 2012;

m. Failure to follow the requirements listed in Art. 5.04(a) of the Code of Criminal Procedure;

n. Refusing to adequately train, staff or place into practice a procedure to train for police emergency 9-1-1 calls of this sort; which as a result also contributed to the failure of the police to arrive Ms. Cook's home in time to prevent her death;

o. Negligent implementation of existing policies;

p. Negligent hiring, retention and assignments;

q. Negligent supervision, training, and direction;

r. Refusing to get more people properly trained to professionally handle the city's 9-1-1 emergencies and overworking existing call takers;

s. Negligent failure to discipline its 9-1-1 call takers, supervisors and investigating officers;

t. Improper or inadequate operations, technology, staffing, training, and procedures to provide proper handling of 9-1-1 calls; and

u. Failure to properly supervise the daily decisions of DALLAS POLICE DEPARTMENT employees.

105. In addition to the above action or inaction, TONYITA HOPKINS and JOHNNYE WAKEFIELD were negligent when they failed to prioritize Ms. Cook's call, failed to notify the Manager II or Radio Room sergeant of Ms. Cook's urgent call and refused to alert dispatchers of the grave nature of the call.

106. In addition to the above action or inaction, YAMINAH SHANI MITCHELL was negligent when she failed to prioritize Ms. Cook's call and refused to alert the responding officers of the grave nature of the 9-1-1 call.

107. In addition to the above action or inaction, KIMBERLEY COLE was negligent when she left the floor of the 9-1-1 call center, leaving it with no supervision to act in emergency matters such as the one presented by Ms. Cook's desperate call.

108. In addition to the above action or inaction, Officers JULIA MENCHACA and AMY WILBURN did what no reasonably prudent police officer, under similar circumstances, would have done when they (a) stopped at a 7-11 convenience store to make personal purchases

while en route to an urgent call; (b) arrived at the scene of a serious disturbance, where a life was threatened, and refused to survey the entire premises; (c) intentionally refused to look through the windows, where they would have noticed that a physical confrontation had taken place inside; (d) intentionally failed to gain entry into Ms. Cook's home; (e) abruptly left the premises while her life lay in the balance; (f) intentionally failed to comply with Art. 5.04(a) of the Code of Criminal Procedure; and (g) refused to conduct any follow-up investigation.

109. In addition to the above actions and inaction, ANGELIA HEROD-GRAHAM failed to prioritize the call from Ms. Cook's family and refused to alert dispatchers of the grave nature of the call, thus causing Ms. Cook's family to enter a crime scene and observe their loved one dead, murdered in her own bathtub.

110. Upon information and belief, TONYITA HOPKINS, KIMBERLEY COLE, JOHNNYE WAKEFIELD, YAMINAH SHANI MITCHELL, JULIA MENCHACA, AMY WILBURN, and ANGELIA HEROD-GRAHAM acted independently during some of the conduct or omissions complained of herein and within the general scope of his or her employment during other conduct or omissions.

111. No reasonably competent official would have concluded that the actions of TONYITA HOPKINS, KIMBERLEY COLE, JOHNNYE WAKEFIELD, YAMINAH SHANI MITCHELL, JULIA MENCHACA, AMY WILBURN, and ANGELIA HEROD-GRAHAM would not lead to the death of Deanna Cook. In other words, no reasonably prudent call center employee, supervisor or police officer, under similar circumstances, could have believed that their conduct was justified.

112. Defendants' conduct described above constitutes gross negligence, recklessness, and/or intentional misconduct.

COUNT FOUR:
BYSTANDER RECOVERY

113. Plaintiffs reallege and incorporate by reference the allegations set forth in all preceding paragraphs as if set forth fully and reiterated here in their entirety.

114. After the police ignored repeated pleas for assistance, Ms. Cook's family investigated the perimeter of the house, and was able to tell that something was wrong.

115. To make matters worse, instead of offering assistance, the 9-1-1 operator, ANGELIA HEROD-GRAHAM, informed the family that Ms. Cook had made a 9-1-1 call two days earlier. This sent the family into a panic.

116. After hearing this, the family kicked the patio door down to gain entry into the residence. Upon entrance, N'EYCEA WILLIAMS, ANIYA WILLIAMS, VICKIE COOK, and KARLETHA COOK-GUNDY were overcome by the stench coming from Ms. Cook's bedroom.

117. Upon walking into Ms. Cook's bathroom, N'EYCEA WILLIAMS, ANIYA WILLIAMS, VICKIE COOK, and KARLETHA COOK-GUNDY observed Ms. Cook's partially clad body laying side-ways, half-in and half-out of the bathtub, floating atop the cold overflowing water. Her body was severely discolored and skin abnormally wrinkly.

118. After finding Ms. Cook dead, ANGELIA HEROD-GRAHAM overhead Ms. Cook's family screaming in shock and agony at finding their loved one in this condition, despite all the pleas for assistance from the police.

119. N'EYCEA WILLIAMS, ANIYA WILLIAMS, VICKIE COOK, and KARLETHA COOK-GUNDY were all located near the bath tub where DEANNA COOK's body was found; their shock resulted from a direct emotional impact upon them from the sensory and contemporaneous observance of the incident; and each is closely related to DEANNA COOK, as daughters, mom and sister.

120. More than 12 minutes after her initial 9-1-1 call, Ms. Cook's mother spoke to ANGELIA HEROD-GRAHAM again whereupon Ms. Cook stated "my baby is in the tub dead." After the police finally arrived, DEANNA COOK's body was taken directly to the morgue.

121. N'EYCEA WILLIAMS, ANIYA WILLIAMS, VICKIE COOK, and KARLETHA COOK-GUNDY all suffered direct personal injury in form of mental anguish and emotional distress from entering a crime scene (since police wouldn't) and witnessing Ms. Cook's dead body after police failed to intervene to save her life and refused to discover her body, which could have prevented Ms. Cook's family from having to observe the horrific condition of their loved one.

COUNT FIVE:
WRONGFUL DEATH

122. Plaintiffs reallege and incorporate by reference the allegations set forth in all preceding paragraphs as if set forth fully and reiterated here in their entirety.

123. Plaintiffs bring this wrongful death claim against Defendants pursuant to Texas Civil Practice & Remedies Code sections 71.001-71.012.

124. Plaintiff VICKIE COOK is a statutory beneficiary of DEANNA COOK and relied on her for love, affection, comfort, financial assistance, protection, affection and care.

125. Plaintiff VICKIE COOK is also acting as Guardian and Next Friend of minor children Plaintiffs' N'EYCEA WILLIAMS AND ANIYA WILLIAMS, both of whom are statutory beneficiaries of DEANNA COOK and relied on her for love, affection, comfort, financial assistance, protection, affection and care.

126. Plaintiff KARLETHA COOK-GUNDY is the executor/administrator of the Estate of DEANNA COOK.

127. Defendants' wrongful acts caused the death of DEANNA COOK.

128. DEANNA COOK would have been entitled to bring an action for her injuries had she lived.

129. As a proximate result of Defendants' conduct, which caused the untimely death of DEANNA COOK, Plaintiffs are entitled to recover, in excess of the minimum jurisdictional limits of this Court.

COUNT SIX:

SURVIVAL ACTION

130. Plaintiffs reallege and incorporate by reference the allegations set forth in all preceding paragraphs as if set forth fully and reiterated here in their entirety.

131. Plaintiffs bring this survival action claim against Defendants pursuant to Texas Civil Practice & Remedies Code Sections 71.021-71.022.

132. Plaintiff KARLETHA COOK-GUNDY is the legal representative of the estate of DEANNA COOK. Prior to her death, DEANNA COOK had a survival action for herself. KARLETHA COOK-GUNDY is appearing in the survival action as the legal representative of the estate of DEANNA COOK.

133. Plaintiff VICKIE COOK is a statutory beneficiary of DEANNA COOK and relied on her for love, affection, comfort, financial assistance, protection, affection and care.

134. Plaintiff VICKIE COOK is also acting as Guardian and Next Friend of minor children Plaintiffs' N'EYCEA WILLIAMS AND ANIYA WILLIAMS, both of whom are statutory beneficiaries of DEANNA COOK and relied on her for love, affection, comfort, financial assistance, protection, affection and care.

135. Defendants' wrongful acts led to DEANNA COOK's death.

136. As a proximate result of Defendants' conduct, which led to the untimely death of DEANNA COOK, Plaintiffs are entitled to recover, in excess of the minimum jurisdictional limits of this Court.

DAMAGES– ALL DEFENDANTS

137. Defendants' acts and/or omissions were a proximate cause of the following injuries suffered by Plaintiffs and decedent:

a. Actual damages;

b. Loss of affection, consortium, comfort, financial assistance, protection, affection and care;

c. Pain and suffering and mental anguish suffered by DEANNA COOK prior to her death;

d. Mental anguish and emotional distress suffered by Plaintiffs;

e. Loss of quality of life;

f. Funeral and burial expenses;

g. Loss of service;

h. Loss of earnings and contributions to Plaintiffs;

i. Exemplary and punitive damages as well as reasonable attorneys' fees and costs of court;

j. Pursuant to 42 U.S.C. §1988, and other applicable laws, Plaintiffs should be awarded reasonable attorney's fees for the preparation and trial of this cause of action, and for its appeal, if required;

k. Prejudgment interest; and

l. Post judgment interest.

138. Plaintiffs seek unliquidated damages in an amount that is within the jurisdictional limits of the court.

EXEMPLARY DAMAGES

139. Plaintiffs seek exemplary damages for injuries caused by Defendants' gross negligence under Texas Civil Practice & Remedies Code section 41.003(a)(3), as defined by Section 41.001(11). Plaintiffs also seek exemplary damages for the wrongful death of the

decedent caused by Defendants' willful act or omission or gross neglect, as provided in Texas Constitution, article 16, section 26, and Texas Civil Practice & Remedies Code section 71.009. Finally, Plaintiffs seek exemplary damages under any and all other statutes, acts, or law providing for such damages.

CONDITIONS PRECEDENT

140. Defendants have actual notice of DEANNA COOK's death and injuries complained of herein. Any conditions precedent have occurred, been performed, or have been waived.

DEMAND FOR JURY

141. Plaintiffs hereby make demand for a jury trial.

PRAYER

Wherefore, Premises Considered, Plaintiffs pray that Defendants be cited to appear and answer herein and, upon final trial hereof, that Plaintiffs have and recover from Defendants the Plaintiffs' actual damages, exemplary damages, pre and post-judgment interest, costs of court, attorneys' fees, and such other and further relief, both general and special, at law and in equity, to which they may be justly entitled.

Respectfully Submitted,

/s/ Aubrey "Nick" Pittman
AUBREY "NICK" PITTMAN
KRISTIN KAY SCHROEDER

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2012 the foregoing pleading was filed with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this Notice as service of documents by electronic means.

/s/ Aubrey "Nick" Pittman
AUBREY "NICK" PITTMAN

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VICKIE COOK, Individually and As Natural Mother to DEANNA COOK, N.W., a Minor, By and Through Her Grandparent and Guardian VICKIE COOK, A.W., a Minor, By and Through Her Grandparent and Guardian VICKIE COOK and KARLETHA COOK-GUNDY, Individually and As Representative of the Estate of DEANNA COOK, DECEASED	§	**CIVIL ACTION NO. 3:12-cv-03788-P**
	§	**JURY DEMANDED**
Plaintiffs,	§	
vs.	§	
THE CITY OF DALLAS, TONYITA HOPKINS, KIMBERLEY COLE, JOHNNYE WAKEFIELD, YAMINAH SHANI MITCHELL, JULIA MENCHACA, AMY WILBURN, and ANGELIA HEROD-GRAHAM	§	
Defendants.	§	

PLAINTIFFS' RESPONSE TO CITY OF DALLAS'S MOTION TO DISMISS
PLAINTIFFS' TORT CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS

TO THE HONORABLE COURT:

VICKIE COOK, Individually and as Natural Mother to DEANNA COOK; N'EYCEA WILLIAMS and ANIYA WILLIAMS, minors, By and Through their Grandparent and Guardian, VICKIE COOK; and KARLETHA COOK-GUNDY, Individually and as Representative of the Estate of DEANNA COOK, Deceased, Plaintiffs, file their Response to the City of Dallas's

("City of Dallas") Motion to Dismiss Plaintiffs' State Law Claims Against the Individual Defendants, Tonyita Hopkins, Kimberley Cole, Johnnye Wakefield, Yaminah Shani Mitchell, Julia Menchaca, Amy Wilburn, and Angelia Herod-Graham (the "Individual Defendants") and show as follows:

I.
SUMMARY OF RESPONSE

As a result of Deanna Cook's death, Plaintiffs filed suit on September 19, 2012, under 42 U.S.C. §§ 1983 and 1988; the Fourteenth Amendment to the United States Constitution; Tex. Civ. Prac. & Rem. Code §§ 71.002 and 71.021 and other constitutional provisions and laws of the United States and the State of Texas, to recover damages for Ms. Cook's death as she sought protection, medical treatment and assistance from Defendants, and for the deprivation of her rights under color of law and in violation of federal law.

Plaintiffs' Complaint names the City of Dallas, seven individual defendants and alleges certain violations (1) solely against the City of Dallas; (2) against all Defendants, collectively; and (3) against the individual defendants, to the extent the City of Dallas alleges the conduct, if proved, was committed individually by the Individual Defendants outside of the course and scope of their employment with the City of Dallas. Accordingly, the Court should deny the City of Dallas's motion and allow this case to proceed as filed.

II.
ARGUMENT AND AUTHORITIES

A. The City of Dallas Cannot Meet its Burden

It is undisputed that the Texas Tort Claims Act ("TCA") provides a limited waiver of governmental immunity for certain suits against governmental entities. See TEX. CIV. PRAC. & REM.CODE §§ 101.021, 101.023, 101.025 (Vernon 2011). The City of Dallas does not dispute

that section 101.021 generally waives its immunity for negligence claims like those brought by Plaintiffs for damages resulting from Defendants' negligence. Rather, the City of Dallas argues that since Plaintiffs simultaneously pleads claims against both the City of Dallas and its employees regarding the death of Deanna Cook, Plaintiffs are barred from obtaining relief against the City of Dallas and its employees. The City of Dallas's contentions are erroneous. The City of Dallas also argues that the basis for Plaintiffs' claims against the City of Dallas and the Individual Defendants are the same, or are "alternative theories of recovery" for the same conduct. This is also untrue.

It is undisputed that a party moving to dismiss pursuant to any of the election of remedies provisions of section 101.106 bears the burden of proof on his motion to dismiss. *See, e.g. Reedy v. Pompa*, 310 S.W.3d 112, 119 (Tex.App.-Corpus Christi 2010, pet. filed); *Hintz v. Lally*, 305 S.W.3d 761, 767 (Tex.App.-Houston [14th Dist.] 2009, pet. filed); *Lanphier v. Avis*, 244 S.W.3d 596, 605 (Tex.App.-Texarkana 2008, pet. dism'd); *Hall v. Provost*, 232 S.W.3d 926, 928 (Tex.App.-Dallas 2007, no pet.); *Kanlic v. Meyer*, 230 S.W.3d 889, 893 (Tex.App.-El Paso 2007, pet. denied). Thus, here, the City of Dallas bears the burden of proof to establish its right to dismissal under Section 101.106.

B. Plaintiffs' Complaint Alleges Individual Conduct as Well as Conduct Within the Scope of Employment Against Individual Defendants.

The City of Dallas seems to concede that *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 657 (Tex.2008) holds that Section 101.106 applies to tort theories whenever a government employee is alleged to have "acted within the general scope of his or her employment such that the governmental unit is vicariously liable." *Id.* In other words, Section 101.106(e) simply applies an avenue for common-law recovery against the government for tort theories that are alleged "against a government unit," whether it is sued alone or together with its

employees. *Mission Consol. Indep. Sch. Dist*., 253 S.W.3d at 659. To properly invoke the provisions of Section 101.106(e), the City of Dallas must demonstrate that all of the tort theories that are alleged against the Individual Defendants constitute conduct for which the City of Dallas can be held to be vicariously liable. *See Id*.

The City of Dallas also takes the position that the holding in *Mission Consol. Indep. Sch. Dist*., 253 S.W.3d at 655–56, is designed to force a plaintiff to decide at the outset whether an employee acted "independently" **or**, instead, "within the general scope of his or her employment such that the governmental unit is vicariously liable." City of Dallas's Motion, p.3. In other words, the City of Dallas cannot refute that a plaintiff is entitled to bring "independent" claims against an individual employee as well as claims against an "employee acting within his or her scope of employment."

Plaintiffs' Complaint makes clear that certain actions or omission of the Individual Defendants were undertaken with the blessings of the City of Dallas and for which the City of Dallas would be vicariously liable. It is equally clear, and the City of Dallas reluctantly admits in its Motion, that Plaintiffs' Complaint makes sufficient allegations that certain conduct of the Individual Defendants could have been performed independently, outside the scope of employment, by the Individual Defendants. In addition to the §1983 claims alleged against all Defendants, Plaintiffs allege separate acts by the City of Dallas as well as the Individual Defendants, which potentially contributed to Plaintiffs' damages. Plaintiffs also make clear that the Complaint alleges that some of the Defendants conduct, upon information and belief, is considered to be independent conduct, outside the course and scope of employment, for which the Individual Defendants could be held liable. See, e.g. ¶¶91, 110.

For instance, as to Defendant Kimberly Cole ("Cole"), paragraph 18 of Plaintiffs' Complaint alleges that Cole deserted her post at the 9-1-1 call center, leaving it with no supervision to act in emergency matters such as the one presented by Ms. Cook's desperate call. Although Cole apparently contends that her decision to desert her post was the result of "shortages in management and other pressing duties (¶57), Chief of Police David Brown stated that there is "[n]o excuse for leaving the floor when a supervisor is required on the floor at all times." ¶56. Therefore, to the extent Cole was acting individually on this frolic and detour, she could have individual liability to Plaintiffs.

Similarly, paragraph 28 of Plaintiffs' Complaint alleges that Julia Menchaca ("Menchaca") and Amy Wilburn ("Wilburn"), while en route to Ms. Cook's residence, stopped at a 7-11 convenience store to make personal purchases. To the extent Menchaca and Wilburn were acting individually on this personal detour, they could have individual liability to Plaintiffs should a jury determine that it was this personal journey that caused the delay in arriving at Ms. Cook's residence. Additionally, as peace officers, Menchaca and Wilburn were required to abide by Art. 5.04(a) of the Code of Criminal Procedure, which provides:

> [T]he responding law enforcement or judicial officers shall protect the victim, without regard to the relationship between the alleged offender and victim.
>
> A peace officer who investigates a family violence allegation or who responds to a disturbance call that may involve family violence shall advise any possible adult victim of all reasonable means to prevent further family violence, including giving written notice of a victim's legal rights and remedies and of the availability of shelter or other community services for family violence victims.

These allegations are found in paragraph 68, 81 and 95 of Plaintiffs' Complaint. Unless the City of Dallas is prepared to admit that it has instructed its police officers that they can ignore the requirements of Art. 5.04, it is possible for a jury to conclude that Menchaca and Wilburn

were acting individually, outside the course and scope of their employment, and that it was this individual conduct, in whole or in part, that prevented Defendants from saving Ms. Cook's life.

Plaintiffs' Complaint also alleges that the Individual Defendants refused to immediately send assistance to Deanna Cook's residence and refused to conduct a thorough investigation simply because of Ms. Cook's status as a domestic violence victim, an African-American female and as a result of her residing in a "high crime-rate" area. If these decisions were made by the Individual Defendants in their individual capacity, and not within the course and scope of their employment with the City of Dallas, the defendants could have individual liability. In fact, the City of Dallas has already fired and disciplined some of the Individual Defendants (¶58 of Original Complaint) for their individual acts and more discipline has been assessed against one or more of the other Defendants. This certainly suggests that the City of Dallas believes that the Individual Defendants were acting outside of the course and scope of their employment.

Therefore, unless the City of Dallas is willing to concede that all of the conduct and omissions alleged against the Individual Defendants were consistent with City of Dallas's policies and within the course and scope of the Individual Defendants' employment with the City of Dallas; it is axiomatic that Plaintiffs have causes of action against the Individual Defendants. That is because it is undisputed that the Tort Claims Act did not intend to leave a plaintiff without any remedy merely as the result of a simultaneous filing. In other words, the Tort Claims Act was not enacted to allow the City of Dallas to move for dismissal of the Individual Defendants then later allege that the City of Dallas is not vicariously liable since the Individual Defendants' actions were not within the general course and scope of their employment with the City of Dallas. If that were done under the scenario being proposed by the City of Dallas's Motion to Dismiss, Plaintiffs would be left without a remedy for the individual acts.

C. The Law Allows Claims Against Individual Defendants and Municipalities to Proceed Simultaneously Within the Same Lawsuit.

Moreover, Section 101.106(e) does not foreclose "suits within a suit" that allege independent claims against individuals in the same suit that alleges claims against the government unit. *Kelemen v. Elliott*, 260 S.W.3d 518 (Tex.App.-Houston [1st Dist.] 2008, no pet.) is an example of the principle allowing suits to proceed simultaneously against individual defendants and a municipality. In *Kelemen*, a city police officer was terminated after reporting that she was sexually assaulted by another police officer. Id. at 520. She then brought suit against the officer asserting various common law assault-based claims and against the city for statutory claims of retaliation and discrimination. *Id*. The city moved to dismiss the officer from the lawsuit based on immunity under section 101.106(f) of the Tort Claims Act. *Id*. The Houston Court of Appeals refused to dismiss the individual officer because he failed to meet the first prong of his burden of proof, that is, he failed to show that kissing a fellow officer was within the general scope of his employment with the city. *Id*. at 524. That court held that Kelemen sued the city and the individual for "distinct conduct." *Id*. at 522. Thus, the *Kelemen* court treated the claims asserted against each of the defendants as segregable and, effectively, as separate "suits."

In *Green v. Nueces County*, 2010 WL 918972 (S.D. Tex. 2010), the court cited *Kelemen* to find § 101.106(e) inapplicable to the claims brought against a county and several individual employees where the plaintiff alleged a Section 1983 claim against both defendant County and the individual defendants and state law tort claims of assault and battery against the individual Defendants. Other federal court decisions have followed *Kelemen* and *Green*. *Rodriguez v. Christus Spohn Health Sys. Corp*., 2010 WL 376267 (S.D. Tex. January 26, 2010) (Jack, J.) (denying motion to dismiss claims against individuals); *Garcia v. City of Harlingen*, 2009 WL 159583 (S.D. Tex. 2009) (Hanen, J.) (treating defamation claim asserted only against individual

defendant as a separate "suit" under § 101.106(e), and thus denied motion to dismiss defamation claim against individual because § 101.106(e) does not apply). *See also, Villasan v. O'Rourke*, 166 S.W.3d 752, 761 (Tex.App.-Beaumont 2005, pet. filed) ("Injured claimants may still opt to proceed on viable common law claims against individual governmental employees, as common law claims are not proscribed by the amended statutory provisions of section 101.106.").

These opinions are all consistent with *Mission Consol. Indep. Sch. Dist.* wherein that court explained that claims that fell outside 101.106 were still actionable against the defendants since those valid claims did not constitute a "suit filed under this chapter" and "would not come within subsection (e)'s purview because the Tort Claims Act expressly provides that the remedies it authorizes 'are in addition to any other legal remedies.'" *Id*. (citing Tex. Civ. Prac. & Rem. Code Ann. § 101.003). 253 S.W.3d at 659. Therefore, contrary to the City of Dallas's contentions in its Motion, this is not a case where identical state law claims are being brought against both the City of Dallas and the Individual Defendants. Discovery will reveal which of those specifics acts of negligence, for instance, were committed by the Individual Defendants within their course and scope of employment at the City of Dallas and which ones were committed individually by the Defendants without regard to the City of Dallas's policies.

III.
CONCLUSION

For the reasons discussed herein, Plaintiffs ask that the Court deny the City of Dallas's Motion to Dismiss Plaintiffs' State Law Claims Against the Individual Defendants. Arguing in the alternative, should the Court determine that more specificity is required with regard to the claims currently being asserted in Plaintiffs' live complaint, Plaintiffs would hereby request leave to amend their complaint.

Respectfully Submitted,

/s/ Aubrey "Nick" Pittman
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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2012 the foregoing pleading was filed with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this Notice as service of documents by electronic means.

/s/ Aubrey "Nick" Pittman
AUBREY "NICK" PITTMAN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VICKIE COOK, Individually and as Natural Mother to DEANNA COOK, et al.,	§	
Plaintiffs,	§	**CIVIL ACTION NO. 3:12-CV-3788-P**
v.	§	
	§	**JURY DEMANDED**
THE CITY OF DALLAS, et al.,	§	
***Defendants*.**	§	

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSES TO PLAINTIFFS' EMERGENCY MOTION TO PRESERVE EVIDENCE AND FOR EXPEDITED DISCOVERY AND BRIEF IN SUPPORT

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ATTORNEYS FOR PLAINTIFFS

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TABLE OF AUTHORITIES

CASES

RULES

CONSTITUTIONAL PROVISIONS

Plaintiffs file this Reply in support of Plaintiffs' Motion to Preserve Evidence and for Expedited Discovery (the "Motion to Preserve and Expedite") and show as follows:

I. SUMMARY OF REPLY

Noticeably absent in the Defendants' Responses[1] to the Motion to Preserve and Expedite is any affirmation that Defendants' records retention policy guarantees that the electronic and audio information sought is being archived and preserved. Nor is there any representation that no one has ever been instructed to purge information from their email or computers. Also absent from the responses is any assurance that Defendants have maintained the information sought by Plaintiffs. Indeed, Defendants do not even aver that each of them has preserved the formats of evidence that Plaintiffs fear has a likelihood of being deleted. Instead, Defendants' Responses make *ad hominem* attacks on Plaintiffs' counsel that are based on untruths and misrepresentations. Defendants' personal attacks are simply a subterfuge with which Defendants attempt to distract attention from the need for immediate discovery in this action, which will cause no actual prejudice to Defendants – it only advances the timing of disclosure. Despite Defendants' insinuations, Plaintiffs have no nefarious reason for requesting preservation of evidence or expediting discovery. And, Defendants fail to reveal how expediting discovery (as opposed to routine discovery) would work to Plaintiffs' advantage. Indeed, the real benefit to expediting discovery is that it increases the likelihood that relevant information is not destroyed and will be available to resolve issues before the Court. Defendants' supposed "concerns," legitimate or otherwise, would exist in any discovery request, whether expedited or not. Thus, Defendants cannot demonstrate any tangible prejudice unique to this motion to expedite that would outweigh the prejudice to Plaintiffs if any discoverable evidence is destroyed by the passage of time, before it can be collected and preserved by Plaintiffs.

[1] Responses to the Motion to Preserve and Expedite were filed by (1) Tonyita Hopkins and Angelia Herod-Graham; (2) Kimberly Coles; and (3) City of Dallas, Julia Menchaca, Amy Wilburn, Johnnye Wakefield, and Yaminah Shani Mitchell (referred to collectively as "Defendants' Responses").

II. ARGUMENT AND AUTHORITIES

A. Plaintiffs' Counsel Held Substantive Conferences with Defendants' Counsels Regarding Conducting Immediate Discovery.

Inexplicably, the City of Dallas (and to a lesser extent Kimberley Cole in her response) first alleges that Plaintiffs' counsel failed to conduct a "sufficient" conference before filing the Motion to Preserve and Expedite. This is either a misguided argument or a complete prevarication of the facts. A few days after Plaintiffs submitted information requests to the City of Dallas, Plaintiffs' counsel received an October 8, 2012, call from Patricia Shake with the City of Dallas, for what Plaintiffs assumed was a Rule 26(f) call to confer about discovery. Pursuant to Ms. Shake's request, Plaintiffs submitted word versions of discovery to the City Attorney so that it could expeditiously respond to interrogatories and requests for documents. *See*, Exhibit 1, attached hereto, of an email from the City Attorney's office acknowledging receipt of Word versions of discovery requests. During the October 8, 2012, call, there was never a mention from Ms. Shake that Mr. Schuette instructed her to inform Plaintiffs that the City of Dallas felt that any discovery was unacceptable. Indeed, it makes no sense that the City Attorney would ask for Word versions of the requests if it never intended to participate in discovery. However, the City Attorney waited nineteen (19) days after the submission of the written discovery, and fourteen (14) days after the presumed FED.R.CIV.P. 26(f) conference, to notify Plaintiffs that the October 8, 2012, call was not in conjunction with a Rule 26(f) conference and that the City of Dallas objected to proceeding with any discovery.

After receiving the October 22, 2012, letter from the City Attorney that it would not respond to "any" discovery, Plaintiffs' counsel sent an October 26, 2012, email to the three (3) Defendant groups asking whether Defendants would agree to respond to discovery "immediately." *See*, City Defendants' Appendix—000004. This same email asked for Defendants' position on Plaintiffs' motion to commence discovery, which was triggered by the City of Dallas's abrupt October 22, 2012, letter that the City of Dallas was refusing to participate in discovery at this stage. In

conjunction with this email, Plaintiffs' counsel made three (3) telephone calls: to Kevin Wiggins, Mark Goldstucker, and Jason Schuette, [2]respectively. The October 26, 2012, email makes clear that Plaintiffs were seeking "immediate" discovery. Also, during the three telephone calls on October 26, 2012, Defendants' counsels made it clear that each was opposed to "any" discovery going forward before the Court rules on the motions to dismiss. In other words, Plaintiffs were informed as to "why" Defendants opposed immediate discovery – defendants wanted to wait until resolution of the motions to dismiss. In fact, the responses filed to the immediate motion reiterate Defendants' position that they object to any immediate discovery. Therefore, it is baffling why the City Attorney would misrepresent that the conferences were not "substantive" or that Plaintiffs' counsel did not know the reasons for Defendants' opposition to immediate discovery. Not surprisingly, the City Attorney fails to point out what would have been different had another type of conference been held or whether he would have agreed to immediate discovery if another type (or a longer) conference had been held. This evinces the disingenuousness of Defendants' argument that an insufficient pre-motion conference was held. Lastly, the City Attorney, oddly, denies that it "has made no attempt to confer with Plaintiffs' counsel to provide discovery." Yet, the City Attorney can produce no correspondence stating that it has ever offered to "provide" immediate discovery, contrasted with opposing discovery. Without a doubt, every overture from the City Attorney has been that it opposes any form of discovery at this stage. Thus, the City of Dallas's protestations about an alleged lack of a substantive conference ring hollow. Indeed, if the City of Dallas had made "an offer" to provide the immediate discovery being sought, the Motion to Preserve and Expedite could likely have been rendered moot.

[2] It was represented by Jason Schuette that an attorney by the name of James Butt was also present in Mr. Schuette's office during this telephone conference.

B. Defendants' Responses do not Refute Plaintiffs' Need for Preservation of Evidence or Expedited Discovery.

Once again, instead of addressing Plaintiffs' concerns why a preservation of evidence order and expedited discovery is needed, Defendants resort to personal accusations against Plaintiffs' counsel. Having served as a member of this bar for over twenty (20) years, and having served, under three different Chief Judges, on the Court Advisory Committee and other committees of the Northern District of Texas for over ten years, Plaintiffs' counsel is well aware of the obligations under FED.R.CIV.P. 11. All representations made satisfy all requirements imposed on those who practice before this Court. Indeed, it is worth noting that Defendants' Responses do not specifically deny Plaintiffs' justifiable beliefs that (i) some of the discoverable materials may already have been deleted by one or more of the Defendants' supervisors or employees; (ii) the laptop computers, desk computers, and other mediums of storage frequently purge and/or delete materials; and (iii) directives were given by one or more officials within the Dallas Police Department to delete relevant materials or to ignore preserving the materials. The Responses also do not represent that the transient electronic format, or audio and video format evidence on computers and portable disks, is not being frequently purged. Indeed, only depositions from the appropriate officials and lack of information will determine whether directives to purge evidence were given. Discovery will also reveal whether email or other information is being expunged in the ordinary course of operations.

For example, a sampling of material requested show that these items are uniquely susceptible to being lost or purged: (i) audio recordings, transcripts and enhanced 9-1-1 call detail reports for the Cook 9-1-1 calls; (ii) on-board computer recordings; (iii) complete 'unit availability report' from the CAD system showing all the Police Department units signed on to the CAD system; (iv) Computer Aided Dispatch incident reports for the police responses; (v) all computer to computer messages from within the 9-1-1 center that day; (vi) communication logs, audiotapes and electronic reports; (vii) electronically stored information of various City of Dallas policies and customs; (viii) video

recordings taken and recorded by security or surveillance cameras of: the 9-1-1 call center and Ms. Cook's residence; and (ix) email, electronically stored information, audiotapes, telephone messages, notes, and other communications by and between Defendants and select police department officials.

Notably, the only mention of an alleged attempt to ensure preservation of evidence is the vague assertion by the Assistant City Attorney that "I had [sic] personally discussed with various City of Dallas employees who are charged with maintaining electronically stored information ("ESI") the importance of maintaining that data, and I believe that those obligations are understood." *See*, City Defendants' Appendix—000002. However, nowhere in this craftily-worded statement does the Assistant City Attorney indicate that he specifically spoke with any of the identifiable City of Dallas officials, supervisors, or other individuals whose information is being sought. Also absent from this representation is any indication that the City Attorney has taken steps itself to preserve crucial evidence. It has been over ten (10) weeks since Ms. Cook's call to the 9-1-1 call center was basically ignored. By now, the Chief of Police or City Attorney presumably should have undertaken steps to obtain and preserve much of the information being sought, as well as the evidence supporting Defendants' defenses, if any. Yet, the City Attorney cannot provide any assurances to this Court that the discoverable material sought has been preserved by all City of Dallas personnel and is not subject to electronic deletion or destruction with the passage of time.

Moreover, the City of Dallas contends that authorities cited in Plaintiffs' Motion to Preserve and Expedite are allegedly inapposite the facts in this case. While it may be true that specific "facts" in each case are different, it is the principle of law in those cases that is pertinent. That is, courts allow expedited discovery where evidence may be lost with the passage of time; where a case's resolution will be expedited; and to uncover the identities of potential litigants. Undeniably, these principles of evidence preservation apply regardless of whether the lawsuit involves infringement, seed crops, or Section 1983 claims. Defendants will not be harmed by a preservation of evidence order directed to each person in possession of discoverable information and an expedited discovery

schedule before evidence is purged or destroyed. The prejudice from a potential loss of evidence outweighs any prejudice to Defendants from providing discovery "earlier than the normal schedule."

C. Defendants' Unfounded Objections to the Appropriateness of the Discovery Requested do Not Justify Denial of the Relief Requested.

Having failed to refute the clear need for expedited discovery, Defendants concoct various theories why discovery should not proceed as requested.

1. The City of Dallas's objections to the scope of discovery are without merit.

In its response, the City of Dallas cherry picks through a few of the discovery requests and argues that it would have "objections" to the breadth of certain of the discovery requests. However, these concerns, if valid, would be dealt with by FED.R.CIV.P. 33(b)(1), (4) and 34(b)(2)(A), (C), which would allow Defendants to make "valid" objections to the discovery requests. The City of Dallas chose proposed interrogatories 1-4 in an attempt to show alleged overbreadth. These interrogatories ask for the policies regarding the operations of the 9-1-1 call operations and policies or customs regarding the manner in which the City of Dallas responds to domestic violence victims. Peculiarly, the City of Dallas contends that interrogatories 1-4 are overbroad while simultaneously contending in its motion to dismiss that Plaintiffs fail to allege the City of Dallas's policies with more particularity. The City of Dallas also misrepresents that the discovery is not limited to a time frame. The time frame for the responses is clearly indicated in the instructions. The City Attorney also claims that fourteen (14) days is an insufficient response time, but fails to acknowledge that it has had the specific discovery requests for 30 days already. Unmistakably, the full extent of this information is relevant and narrowly tailored to lead to the discovery of admissible evidence. Furthermore, as to the contention that these interrogatories are overly broad, Rule 26(c) requires the City of Dallas to demonstrate good cause in order to protect it from an alleged burden. *See* FED.R.CIV.P. 26(c); *In re Terra Intern., Inc*., 134 F.3d 302 (5th Cir.1998)). The City of Dallas can

make no such showing. Nevertheless, the expedited nature of the discovery would not deprive Defendants of the ability to make valid objections, if any.

Defendants also take issue with Plaintiffs' request to take discovery to ascertain the identities of other possible defendants. First, defendants Hopkins, Wakefield and Cole are the ones who first raised the "issue" that the 9-1-1 call takers may have had difficulty locating Ms. Cook's residence "because she was calling from a cell phone." Yet, Defendants now contend that Plaintiffs are not entitled to "track down" the City of Dallas's possible defense to determine if the cellular telephone provider is a proper defendant and, more importantly, to quickly ensure that the cellular provider preserves the relevant evidence, once Defendants identify the relevant evidence related to the cellular provider. Defendants' objection here defies commonsense.[3] Second, the City of Dallas contends that Plaintiffs' Complaint does not allege the identities of each of the City of Dallas policy makers who implemented many of the rules and customs that caused the violations of Ms. Cook's constitutional rights, yet argues in its Response that Plaintiffs should be prohibited from determining the identities of the other potential defendants and quickly ensuring that they also preserve the evidence on their laptops and recorders. Contrary to the City of Dallas's representation, although the identity of a policymaker may be an issue of law, it can turn on specific facts uncovered in discovery.[4] Therefore, any prohibition against Plaintiffs discovering the identities of other culpable defendants is illogical.

Finally, Defendants contend that a request for employment history, personnel files, training files and disciplinary records is somehow overly broad. However, the Complaint clearly alleges that

[3] Defendants Hopkins and Herod-Graham erroneously suggests that Plaintiffs should have subpoenaed the cellular provider's records but fail to understand that "all" discovery is precluded before the Rule 26(f) conference. More importantly, Hopkins ignores that the evidence regarding "whether" the cellular provider is a potential defendant lies in Defendants' hands. That is why discovery is sought to explain what Hopkins and Wakefield's reasons were for allegedly having trouble locating Ms. Cook's residence and dispatching help.

[4] *Crowder v. Sinyard*, 884 F.2d 804, 829 (5th Cir.1989) (notwithstanding "formal subservice of the Chief of Police to city officials," chief could be considered final policymaker where his uncontradicted testimony "indicate[d] that the city manager delegated all power regarding the city's law enforcement activities to [him]" and, "except as to the department's budget, city officials exercise no control over the department's activities, policies, or procedures"), overruled in part on other grounds by *Horton v. California*, 496 U.S. 128 (1990).

the "training and disciplinary polices" were inadequate, contributing to the constitutional violations. It is likely that this information will be found in the files. Additionally, it is undisputed that at least three of the Defendants (i.e. Cole, Hopkins, and Herod-Graham) were disciplined or fired for their involvement in these events. Accordingly, their personnel records and employment history will help establish whether the City of Dallas was aware of the lack of experience by these defendants or the predispositions, if any, of these defendants to violate the rules.

2. Future qualified immunity claims do not prevent immediate discovery from the City of Dallas and the Individual Defendants.

The City of Dallas alludes to alleged claims of qualified immunity in an attempt to advance its argument against allowing the expedited discovery in this matter. However, it is undisputed that since municipalities are not entitled to qualified immunity, Plaintiffs should be allowed to engage in discovery in order to pursue their claims against the City of Dallas. *See Gilbert v. City of Dallas*, 2000 WL 748153, at ----1-3 (N.D.Tex. June 8, 2000) (citing *Sorrells v. City of Dallas*, 192 F.R.D. 203, 210 (N.D.Tex.2000)); *Buffin v. Bowles*, 2000 WL 575216, at *5 (N.D.Tex. May 11, 2000).

As to the individual defendants, Plaintiffs are not prohibited from taking their discovery. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), instead of closing the door on all discovery when an official claims qualified immunity, the court allowed discovery that was designed to go to the question of whether the official is entitled to qualified immunity. The *Britton* court stated:

> Discovery involving public officials is indeed one of the evils that *Harlow* aimed to address, but neither that opinion nor subsequent decisions create an immunity from all discovery. *Harlow* sought to protect officials from the costs of "broad-reaching" discovery, 457 U.S., at 818, 102 S.Ct., at 2738, and [the Supreme Court] has since recognized that limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity. *Anderson v. Creighton*, 438 U.S. 635, 646, n.6 (1987); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Id. at 593, n 14. The Fifth Circuit in *Lion Boulus v. Wilson*, 834 F.2d 504 (5th Cir.1987) carefully addressed the issue of discovery in light of a claim to qualified immunity. In *Lion Boulos*, the Court dismissed the defendant's appeal and held that "qualified immunity does not shield

government officials from all discovery but only from discovery which is either avoidable or overly broad." *Id* at 507. "Discovery orders entered when the defendant's immunity claim turns at least partially on a factual question; when the district court is unable to rule on the immunity defense without further clarification of the facts; and which are narrowly tailored to uncover only those facts needed to rule on the immunity claim are neither avoidable nor overly broad." *Id*. at 507-08.

Generally, a court should allow discovery if it finds that the officer's conduct violated a clearly established right." *Izen v. Catalina*, 256 F.3d 324, 330 (5th Cir.2001) (citation omitted); *see also Moore v. Louisiana*, 210 F.3d 369, 2000 WL 294462, at *2 (5th Cir. Feb. 25, 2000) (discovery allowed where the complaint asserts facts which, if true, would defeat the defense). Here, Plaintiffs should be allowed to proceed with discovery against the individual defendants. First, the allegations in Plaintiffs' complaint are sufficient to negate the "future" assertions of the defense immunity.[5] A complaint is sufficient when (i) it alleges a violation of a clearly established constitutional right and (ii) the defendant's conduct was objectively unreasonable. *Harper v. Harris County, Tex*., 21 F.3d 597, 600 (5th Cir.1994); *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir.1993). Plaintiffs' Complaint clearly alleges through factual statements that as a result of the City of Dallas and the other defendants' racial and gender discrimination against Deanna Cook, she was deprived of her rights under the Equal Protection Clause of the 14th amendment. See, e.g. Complaint at PageID 73-81 ¶¶ 71- 102. Accordingly, Plaintiffs meet their burden under the first element. As to the second prong of this inquiry, an objectively reasonable official knows that intentional discrimination based on race is illegal. *Moini v. Univ. of Tex*., 2011 WL 90472 at *11 (W.D.Tex. Jan. 10, 2011) (citing *Mustafa v. Clark Cnty. Sch. Dist*., 157 F.3d 1169, 1181 (9th Cir.1998)). Accordingly, the Complaint defeats

[5] At this stage, none of the individual defendants has filed any motion asserting qualified immunity as a defense. However, Defendants' Responses suggest that individual defendants plan to raise this plea in the future.

future qualified immunity claims, if any. Nevertheless, the planned qualified immunity assertions do not warrant an outright denial[6] of the Motion to Preserve and Expedite.

In the alternative, should the Court conclude that Plaintiffs' Complaint is not currently sufficient to defeat Defendants' prospective qualified immunity claims, and although the Defendants have not properly pled the defense of qualified immunity, Plaintiffs assert that an additional grounds for leave to take discovery and amend Plaintiffs' complaint is FED.R.CIV.P. 7 and *Schultea v. Wood*, 47 F.3d 1427 (5th Cir.1995). "When a public official pleads the affirmative defense of qualified immunity in his answer, the district court may, on the official's motion or on its own, require the plaintiff to reply to that defense in detail." *Id*. at 1433. A *Schultea* reply, pursuant to FED.R.CIV.P. 7(a), is appropriate when a court finds that a plaintiff has failed to plead sufficient detail in his complaint to address the affirmative defense of qualified immunity. *Id*.

Second, irrespective of Defendants' planned assertions of qualified immunity, since the individual defendants are witnesses to the actions against the City of Dallas, Plaintiffs are entitled to discovery from the individual defendants. *Gilbert* 2000 WL 748153 at *1 (parties who may be entitled to qualified immunity are not necessarily exempt from discovery when called as a witness to claims against a non-immune defendant); *see also, Estate of Sorrells* 192 F.R.D. at 210. There, the Court allowed discovery of the municipality and its officers, although the officers involved claimed that discovery would circumvent the protections of qualified immunity. The court still found that the defendant parties could be called as witnesses for non-immune defendants. *Id*. at n.8.

III. CONCLUSION

Defendants have been unable to demonstrate how they would be prejudiced by an order that would allow an earlier start to discovery that is otherwise reasonably calculated to lead to admissible

[6] Kimberley Cole's intent to indefinitely deprive Plaintiffs of discovery is evident from her response at PageID 638 that "discovery should therefore wait until the motions to dismiss are decided, AND, if Cole's Motion to Dismiss is denied, MUST BE STAYED as to her pending resolution of the [future] assertion of Cole's qualified immunity. " [emphasis supplied]. In other words, Cole argues against any discovery before or after the Rule 26(f) conference.

evidence. Therefore, considering the potential prejudice to Plaintiffs from loss of evidence due to any further delay in conducting discovery to preserve evidence, Plaintiffs respectfully ask that the Court grant Plaintiffs' Emergency Motion to Preserve Evidence and for Leave to take Expedited Discovery.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2012 the foregoing pleading was filed with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this Notice as service of documents by electronic means.

/s/ Aubrey "Nick" Pittman
AUBREY "NICK" PITTMAN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VICKIE COOK, Individually and as Natural Mother to DEANNA COOK, et al., Plaintiffs,	§	CIVIL ACTION NO.
v.	§	3:12-CV-3788-P ECF
THE CITY OF DALLAS, et al., Defendants.	§	

DEFENDANT CITY OF DALLAS'S MOTION TO DISMISS PLAINTIFFS' STATE LAW CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS, AND BRIEF IN SUPPORT

TO THE HONORABLE COURT:

Defendant City of Dallas (the "City") files its motion to dismiss Plaintiffs' state law claims against the individual defendants, Tonyita Hopkins, Kimberley Cole, Johnnye Wakefield, Yaminah Shani Mitchell, Julia Menchaca, Amy Wilburn, and Angelia Herod-Graham (referred to collectively as the "Individual Defendants").

I. SUMMARY OF MOTION

Plaintiffs plead federal and state claims against the Individual Defendants. In addition to Plaintiffs' federal claims brought pursuant to 42 U.S.C. § 1983 for alleged deprivations of rights secured by the Fourteenth Amendment, Plaintiffs sue the City and the Individual Defendants under this Court's supplemental jurisdiction for tort claims arising from the death of Deanna Cook ("Cook"), as follows: a wrongful death claim, a survival claim, infliction of emotional distress claim, and for damages resulting from negligence, gross negligence, recklessness, and/or intentional misconduct. Pursuant to the Texas Election of Remedies Statute, Texas Civil Practice and Remedies Code section 101.106(e), the City moves the Court immediately to dismiss Plaintiffs' state law claims against the Individual Defendants.

II. RELEVANT PROCEDURAL HISTORY

2.1 Plaintiffs filed this suit on 19 September 2012, seeking monetary damages against the City and the Individual Defendants. In an apparent response to a rule 12(b)(6) motion by the City of Dallas Police Department filed on 20 September 2012 (ECF #6), that same day Plaintiffs filed their live complaint, Plaintiffs' First Amended Complaint (ECF #8) (the "Complaint"), which omits the Dallas Police Department as a defendant.[1] (*See* Court's Docket.)

2.2 Plaintiffs caused the City to be served with a summons and a copy of the Complaint on 20 September 2012. (*See* ECF #4; Court's Docket.) The City has not yet filed an answer or rule 12 motion in response to the Complaint. (*See* Court's Docket.)

2.3 The Court has not entered a scheduling order. (*See* Court's Docket.)

III. ARGUMENT AND AUTHORITIES IN SUPPORT OF MOTION

A. The Texas Tort Claims Act and Texas' Election of Remedies Statute

Like many states, Texas has enacted a limited statutory waiver of its sovereign immunity. *See* Texas Civil Practice and Remedies Code, chapter 101, the Texas Tort Claims Act ("TTCA"). Because plaintiffs frequently sought to avoid the restrictions imposed by the TTCA by suing government employees, in 1985 the Texas Legislature enacted an election of remedies provision that barred any action by a claimant against a government employee whose act or omission gave rise to the claim where there is a judgment or a settlement of a claim involving the same subject matter.[2] However, as the Texas Supreme Court noted in *Mission Consolidated Independent*

[1] Plaintiffs caused to be served to the Dallas city secretary a summons directed to "the City of Dallas Police Department." (*See* ECF #4 at PageID 47.) The Dallas Police Department's rule 12(b)(6) motion was premised upon the fact that, as a matter of law, the Dallas Police Department is not a jural entity that is capable of being sued. (*See* ECF #6.) In light of the omission of the Dallas Police Department from the live Complaint, on 21 September 2012 the Dallas Police Department filed a notice that it withdraws its rule 12(b)(6) motion (ECF #9).

[2] *See* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3305, which provided that "[a] judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of a governmental unit whose act or omission gave rise to the claim."

School District v. Garcia, 253 S.W.3d 653 (Tex. 2008), the 1985 amendment still did not prevent plaintiffs from pursuing alternative theories against both the governmental unit and its employees prior to obtaining a judgment or reaching a settlement. *Mission*, 253 S.W.3d at 655-56. Consequently, governmental units and their employees were required to expend considerable resources defending redundant claims brought under alternative theories of recovery.

As part of Texas' comprehensive effort in 2003 to reform its tort system, the Legislature amended section 101.106 of the TTCA, entitled "Election of Remedies." Section 101.106(e) now provides:

> If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.[3]

For the Court's convenience, the City attaches a copy of section 101.106 to this motion.

"Section 101.106 . . . is designed to force a plaintiff to decide at the outset whether an employee acted independently, and is thus solely liable, or whether she acted within the general scope of her employment so that the governmental unit is vicariously liable." *City of Arlington v. Randall*, 301 S.W.3d 896, 903 (Tex. App.—Fort Worth 2009, pet. denied) (citing *Mission*, 253 S.W.3d at 657). By requiring a plaintiff to make an irrevocable election at the time suit is filed between suing the governmental unit under the TTCA or proceeding against the employee alone, section 101.106 narrows the issues for trial and reduces delay and duplicative litigation costs.[4] *Texas Bay Cherry Hill, L.P. v. City of Fort Worth*, 257 S.W.3d 379, 398 (Tex. App.—Fort Worth

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[3] Per section 101.106(e), the City is the proper movant because it is the governmental unit that is/was the employer of the Individual Defendants.

[4] *All* tort theories alleged against a governmental entity, including intentional torts, and without regard to whether the governmental entity is sued alone or together with its employees, are assumed to be "under" the TTCA for purposes of section 101.106. *See Mission*, 253 S.W.3d at 656-57 (citing *Newman v. Obersteller*, 960 S.W.2d 621, 622 (Tex. 1997)).

2008, no pet.) (citing *Mission*, at 656-57).

Here, Plaintiffs attempt to straddle those choices in precisely the manner that the statute seeks to prevent. Paragraph 12 of the Complaint asserts that the City "is the employer of [the Individual Defendants] and is responsible for the acts and/or omissions of same that were performed in the course and scope of their employment." (Complaint at PageID 64.) However, in paragraph 91, Plaintiffs plead that the Individual Defendants "acted independently during some of the conduct or omissions complained of herein and within the general scope of his or her employment during other conduct or inaction." (Complaint at PageID 78-79.) Plaintiffs repeat that allegation within their "Negligence and Gross Negligence" claim (paragraph 110 (Complaint at PageID 83)). As discussed below, Plaintiffs incorporate those allegations by reference in each of their four tort claims arising under Texas law.

Section 101.106(e) of the TTCA is unconditional and mandatory. So long as a plaintiff files suit against both the governmental entity and its employee(s), a court *must immediately dismiss* the employee(s) upon the filing of a motion such as this. A governmental entity perfects the statutory right to dismissal of its employees upon the filing of a motion to dismiss. *Randall*, 301 S.W.3d at 903. A plaintiff cannot alter his election of remedies by amending his complaint. Once a plaintiff pleads her tort claims against a governmental entity, its employee, or both, her election is irrevocable and cannot be altered by an amended complaint. *See, e.g.*, *Randall*, 301 S.W.3d at 903 ("Even if the plaintiff amends his petition after the government files a motion to dismiss, the amended petition does not moot the right created by the filing of a motion under section 101.106."); *Brown v. Ke-Ping Xie*, 260 S.W.3d 118, 121-22 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (holding that the plaintiff's original petition, not his amended petition, controls whether dismissal of the employees under section 101.106(e) is appropriate); *Villasan v.*

O'Rourke, 166 S.W.3d 752, 762 (Tex.App.—Beaumont 2005, pet. denied) (concluding that if dismissal of a government employee is appropriate based on the original petition, the filing of an amended petition does not avoid the mandatory language of section 101.106(e), and stating that "the trial judge's duty to dismiss the government's employee [is] mandatory when the government files a motion requesting that the claims against its employee be dismissed").

B. Section 101.106(e) Applies to Plaintiffs' Texas Common Law and Statutory Claims Against the Individual Defendants.

Here, Plaintiffs filed their Texas state law negligence, "bystander," wrongful death, and survival claims against both the City and the Individual Defendants. Plaintiffs named the City and the Individual Defendants in their original complaint. (*See* Plaintiffs' Original Complaint at 1-2, 3-4 (ECF #1 at PageID 1-2, 3-4) ¶¶ 2, 11-13.) Plaintiffs' live Complaint continues to name both the City and the Individual Defendants. (*See* Complaint at 1-2, 3-4 (ECF #8 at PageID 61-62, 63-64) ¶¶ 11-13.) Because the live Complaint with respect to the state law tort claims is a verbatim copy of Plaintiffs' original complaint in every respect other than pagination and the certificate of service, the remainder of this motion will refer to the live Complaint.

Plaintiffs plead four claims arising under Texas common law or Texas statutory law: a "negligence and gross negligence" claim (Complaint at PageID 81-83 ¶¶ 103-12); an apparent claim for negligent infliction of emotional distress, labeled as a claim for "Bystander Recovery" (Complaint at PageID 84-85 ¶¶ 113-121); a wrongful death claim, pursuant to Texas Civil Practice and Remedies Code sections 71.001-71.012 (Complaint at PageID 85-86 ¶¶ 114-29); and a survival action, pursuant to Texas Civil Practice and Remedies Code sections 71.021-71.022 (Complaint at PageID 86-87 ¶¶ 130-36).

1. Plaintiffs' claims for "Negligence and Gross Negligence"

Paragraph 103 of the Complaint "reallege[s] and incorporate[s] by reference each of the

allegations set forth in all preceding paragraphs" of the Complaint. (Complaint at PageID 81.) Paragraph 104 pleads that "all of the Defendants were negligent, grossly negligent and/or acted with malice." (*Id.*) Paragraph 104 contains subparagraphs "a" through "u", which enumerate the means by which Plaintiffs assert that the City and its employees were negligent. (*Id*. at PageID 81-82.) The negligence alleged in those subparagraphs plainly embraces actions by both the City and the Individual Defendants.

2. Plaintiffs' claims for "Bystander Recovery"

Paragraph 113 of the Complaint similarly reincorporates all of the preceding paragraphs of the Complaint. (Complaint at PageID 84.) Although cast as a claim for "bystander recovery," Plaintiffs' claim is actually for negligent infliction of emotional distress.[5] Nonetheless, however this claim is classified, Plaintiffs bring it against both the City and the Individual Defendants.

3. Plaintiffs' claim for "Wrongful Death"

This claim is brought by Cook's children and parents, who are among the class of persons who may bring a wrongful death action, per Texas Civil Practice and Remedies Code section 71.004. Paragraph 122 of the Complaint again reincorporates all of the preceding paragraphs of the Complaint. (Complaint at PageID 85.) As before, Plaintiffs' allege that both the City and the Individual Defendants are liable for Cook's death. (*See* Complaint at PageID 85-86 ¶¶ 123-29.)

4. Plaintiffs' "Survival Action" claim

Plaintiffs' survival action is brought by Cook's heirs, legal representatives, and/or estate, who are among the class of persons who may bring a claim for personal injuries suffered by a deceased person pursuant to Texas Civil Practice and Remedies Code section 71.021. Paragraph

[5] To the extent that Plaintiffs assert a right to recover for negligent infliction of emotional distress, that claim must fail regardless of the identity of the defendant(s). The Texas Supreme Court held in *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993), that there is no general duty not to negligently inflict emotional distress. *Boyles*, 855 S.W.2d at 597. Plaintiffs plead no facts to support intentional infliction of emotional distress. (*See generally* Complaint.)

130 of the Complaint once again reincorporates all of the preceding paragraphs of the Complaint. (Complaint at PageID 86.) And, as before, Plaintiffs allege that both the City and the Individual Defendants are liable for Cook's death. (*See* Complaint at PageID 86-87 ¶¶ 131-36.)

5. The Court must dismiss Plaintiffs' Texas tort claims as to the Individual Defendants without delay.

Clearly, Plaintiffs' Texas tort claims are alleged against both the City and the Individual Defendants; that is, against both the governmental unit and its employees. Therefore, section TTCA 101.106(e) applies, and the Individual Defendants must be dismissed immediately upon the filing of this motion. As explained above, amendment of the Complaint would be futile. For these reasons, the Court must grant without delay the City's motion to dismiss Plaintiffs' Texas common-law and statutory tort claims as to the Individual Defendants.

WHEREFORE, the City of Dallas requests that the Court enter without delay an order dismissing Plaintiffs' Texas common law and statutory tort claims pleaded against the Individual Defendants, and for all such other relief that is consistent with this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 25 September 2012 I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VICKIE COOK, Individually and as Natural Mother to DEANNA COOK, et al.,	§	
	§	**CIVIL ACTION NO.**
Plaintiffs,	§	
v.	§	**3:12-CV-3788-P**
	§	**ECF**
THE CITY OF DALLAS, et al.,	§	
Defendants.	§	

DEFENDANTS TONYITA HOPKINS' AND ANGELIA HEROD-GRAHAM'S MOTION TO DISMISS PLAINTIFFS' CLAIMS PURSUANT TO FED. R. CIV. P. 12(b)(6) AND BRIEF IN SUPPORT

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TO THE HONORABLE COURT:

Defendant Tonyita Hopkins and Angelia Herod-Graham (hereinafter referred to as "Hopkins" and "Herod-Graham" respectively), pursuant to Fed. R. Civ. P. Rule 12(b)(6), file this Motion to Dismiss Plaintiffs'[1] claims alleged against them in Plaintiffs' First Amended Original Complaint (the "Complaint", ECF No. 8).

I. SUMMARY OF MOTION

On September 20, 2012, Plaintiffs filed their First Amended Complaint alleging that Hopkins and Herod-Graham deprived them and/or Deanna Cook of her 14th Amendment rights to due process and equal protection under the law. Plaintiffs also bring claims for failure to comply with Article 5.04 (a) of the Texas Code of Criminal Procedure, wrongful death, and negligence, among others, in the death of Deanna Cook.

First, Hopkins and Herod-Graham are entitled to dismissal of Plaintiffs' due process claim because the due process clause does not require a state to provide its citizens with protective services, including 911 services. Moreover, Plaintiffs have not pled facts sufficient to satisfy the narrow exception of a "special relationship" wherein Hopkins or Herod-Graham, respectively, restrained Deanna Cook and/or her mother, so as to expose them to harm.

Second, Hopkins and Herod-Graham are entitled to dismissal of Plaintiffs equal protection claims because Plaintiffs have only made vague and conclusory allegations of discrimination and have not pled allegations sufficient to plausibly suggest a discriminatory state

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[1] Vickie Cook, Individually and as Natural Mother to Deanna Cook, N.W., a Minor, by and through her Grandparent and Guardian Vickie Cook, A.W., a Minor, by and through her Grandparent and Guardian Vickie Cook and Karletha Cook-Gundy, Individually and as Representative of the Estate of Deanna Cook, the deceased, are collectively referred to herein as "Plaintiffs".

of mind, including facts to show that Hopkins or Herod-Graham treated similarly-situated, non-African-American females, in non-domestic violence situations, in more affluent lower crime neighborhoods differently than Deanna Cook or her mother were treated, at the time of their respective 911 calls. In fact, Plaintiffs' Complaint establishes that Herod-Graham was not involved in the Deanna Cook 911 call on August 17, 2012 and, therefore, Herod-Graham could not have possibly been involved in the alleged violation of Deanna Cook's equal protection rights on that occasion. Moreover, Plaintiffs Complaint is devoid of any allegation that Hopkins spoke or interacted with Deanna Cook at the time of the August 17, 2012 call, or ascertained Deanna Cook's race or gender, at the time of the call.

Third, Hopkins and Herod-Graham are entitled to dismissal of Plaintiffs claims for violations of article 5.04 (a) of the Texas Code of Criminal Procedure because violations of state law cannot form the basis for a claim under Section 1983.

Finally, this Court should grant the City of Dallas' Motion to Dismiss Plaintiffs' tort claims against Hopkins and Herod-Graham based on Plaintiffs election under TEX. CIV. PRAC. & REM. CODE § 101.106(e), requiring the dismissal of the government unit's employees when the government unit is also sued. Alternatively, if the tort claims are not dismissed, this Court should dismiss the tort claims of wrongful death and negligence in the death of Deanna Cook, against Herod-Graham, since, as a matter of law, Plaintiffs' pleadings establish that Herod-Graham was not contacted until two days after Deanna Cook's 911 initial call and minutes before Plaintiffs discovered Deanna Cook's body.

II. FACTUAL BACKGROUND

Plaintiffs filed suit against Hopkins and Herod-Graham respectively seeking monetary

damages in connection with the death of Deanna Cook ("Deanna Cook" or "decedent"). In their Complaint, Plaintiffs allege the following:

A. Hopkins 911 Call

On August 17, 2012, Deanna Cook called the City of Dallas 911 Call Center ("Center") to report a domestic dispute. Complaint ¶ 15. Initially, the call was placed into a holding queue and was eventually answered by Hopkins. *Id.* ¶16. Hopkins was an employee in the City of Dallas Police Department's Communications Section *Id.* ¶ 16.

When Hopkins retrieved the call, the street name and block range of Cook's residence appeared on the 911 center screen. *Id.* ¶ 17. It was clear based upon noise heard during the call by Hopkins that some type of physical disturbance was taking place at Deanna Cook's home.[2] *Id.* ¶ 19. Approximately ten (10) minutes later, a final "dispatch" request for police officers to go to Deanna Cook's home was submitted by the Center. *Id.* ¶ 20.

At some point during the call Johnnye Wakefield[3] ("Wakefield") advised Hopkins to disconnect the call with Cook and call her back. When Hopkins called Deanna Cook she received her voicemail box. *Id.* ¶ 21. During the 911 call, neither Wakefield nor Hopkins notified a police dispatcher supervisor about the call, asked that police be dispatched immediately to Cook's residence, or conducted any follow-up to insure the police had sent officers to Deanna Cook's residence *Id.* ¶ 22.

B. Herod-Graham's 911 Call

Two days after the initial call to 911 Deanna Cook's mother Vicki Cook ("Ms. Cook")

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[2] Plaintiffs never alleged that Cook ever spoke with Hopkins during the entire 911 call. See Complaint.

[3] Wakefield was serving as the "acting supervisor" on the day of the incident. Complaint 11 ¶ 57.

contacted the 911 Center when her daughter did not come to church on August 19, 2012. Complaint ¶ 38. After church, Ms. Cook, Deanna Cook's sister and daughters went to look for decedent at her residence. *Id.* ¶ 38. Upon arrival, the ladies saw water leaking from the Deanna Cook's garage and other places. *Id.* ¶ 39.

Ms. Cook called 911 for assistance when Deanna Cook failed to respond to their knocks on the door and repeated calls to Deanna Cook's phone. *Id.* ¶ 40. Herod-Graham was the 911 operator who received the call. *Id.* ¶ 41. After being told that Deanna Cook was missing, Herod-Graham asked Ms. Cook if she had contacted the jails and local hospitals regarding the whereabouts of Deanna Cook prior to sending police officers to the residence. *Id.* ¶ 41. Herod-Graham also told Deanna Cook's family that Deanna Cook placed a call to the 911 Center two (2) days earlier. *Id.* ¶ 115.

While on the phone with Herod-Graham, Ms. Cook and her family members "took matters into their own hands. They went to the rear of Deanna Cook's residence, kicked the patio door down and entered the residence where they noticed water flowing throughout the home and a stench coming from Deanna Cook's bedroom" *Id.* ¶¶ 43-44. Ultimately the family members found Deanna Cook's dead body in the bathroom. Upon hearing this information, Herod-Graham advised Ms. Cook to exit the home and the police arrived shortly thereafter. *Id.* ¶¶ 45-47.

III. ARGUMENT AND AUTHORITIES REQUIRING DISMISSAL

A. Applicable Legal Standard

The standard for determining a motion to dismiss for failure to state a claim is well established. A complaint must have sufficient facts, accepted as true, to state a claim for relief

that is plausible on its face *Ashcroft vs. Iqbal*, 556 U.S. 662,678,129 S. Ct. 1937,1949 (2009). Facial plausibility is found when a Plaintiff pleads facts that allow the court to draw the reasonable inference that the Defendant is liable for the alleged misconduct. *Id.* The plausibility standard is not a probability requirement but it demands more than a sheer possibility that a defendant has acted unlawfully. *Id.*

Fed. R. Civ. P. 8 "demands more than an unadorned, the – defendant – unlawfully – harmed – me accusation". *Iqbal*, 550 U.S. 678; *Bell Atlantic Corp. vs. Twombly*, 550 U.S. 544,555,127 Supreme Court S. Ct. 1955,_ (2007). Similarly, a complaint that merely contains "labels and conclusions" or makes "naked assertions" without "further factual enhancements" will not survive a motion to dismiss. *Id.* Instead, a Plaintiff must include well- pleaded facts that permit the court to infer more than the mere possibility of misconduct. *Id.* at 678. Furthermore, a legal conclusion found in a complaint is not entitled to an assumption of truth. *Id.* at 680. A Plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions. *Bell Atlantic* at 555. (See also *Kaiser Aluminum and Chem Sales, Inc. v. Avondale Shipyards, Inc.* 677 F.2d 1045, 1050 (5th Cir. 1982) and *Fernandez-Montes v. Allied Pilots Ass'n,* 987 F.2nd 278, 284 (5th Cir. 1993).

B. Plaintiffs Complaint Fails to Assert any Cognizable Constitutional Due Process or Equal Protection Claim Against Hopkins or Herod-Graham.

Plaintiffs allege that all defendants acting under color of law deprived Deanna Cook of rights and privileges secured to her by the 14th Amendment to the U.S. Constitution and by other laws of the United States, by failing to provide proper emergency assistance in violation of 42 U.S.C. § 1983 and related provisions of federal law and in violation of the above-cited constitutional provisions. See Complaint ¶¶ 73, 86 and 90. Plaintiffs further claim that all

defendants deprived Cook of equal protection of the law. *Id.* ¶¶ 74-78, 85, 86 and 90.

1. *Plaintiffs' Due Process Claims Must Fail as a Matter of Law Because There is no Constitutional Right to 911 services.*

Plaintiffs seek to recover damages for the death of Deanna Cook, "while she sought protection, medical treatment and assistance from defendants and for the deprivation of her rights under color of law and in violation of federal law. Regarding Hopkins, Plaintiffs allege that Hopkins violated Cook's rights when she failed to prioritize Cook's call, failed to notify a manager II or radio room sergeant of Cook's urgent call and refused to alert dispatchers of the grave nature of the call. *Id.* ¶ 86. In regard to Herod-Graham, Plaintiffs contend that she violated Cook's rights when she failed to prioritize the call from Ms. Cook's family and refused to alert dispatchers of the grave nature of the call, two days after the initial 911 call. *Id.* ¶ 90.

To prevail on their Due Process claim, Plaintiffs must state a claim against Hopkins and Herod-Graham for the violation of a constitutional right to 911 services. There is no constitutional right to 911 services. The United States Supreme Court has held that "the Due Process Clause does not require a State to provide its citizens with particular protective services". *DeShaney v. Winnebago Cty. Dept. of Soc. Servs.,* 489 U.S. 189, 197 (1989). [4]

In *DeShaney*, the Supreme Court addressed a claim brought by a mother and her child, Joshua DeShaney, under 42 U.S.C. §1983 against a county department of social services alleging that Joshua DeShaney had been denied due process of law when the department failed to intervene and protect him from the injuries he suffered at the hands of his physically abusive father. Specifically, at the age of four, Joshua's father severely beat Joshua causing him to go

[4] Moreover, in *Brown v. Commonwealth of Pa.*, 318 F.3d 473, 478 (3rd Cir. 2003), the Third Circuit held that substantive due process does not require "the state to provide competent rescue services if it [so] chooses to provide them."

into a coma and inflicting permanent brain injury. In *DeShaney*, the Supreme Court reaffirmed that it has "...recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 196. 109 S. Ct. 998. The Supreme Court instructed:

> If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause. *Id.* at 196-197, 109 S. Ct. 998.

The Supreme Court also stated that "the Clause was intended to protect the people from the State, not to ensure that the State protected them from each other." *Id.* Since the State is not constitutionally required by the Due Process Clause to provide protective services, the Court found that there can be no liability when the State fails to provide such services, even if it would have prevented the private injury from occurring. *Id.* at 196-97, 109 S. Ct. 998.

The Supreme Court, however, did provide an exception to its general non-liability rule. It held that there was an affirmative duty to protect "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs," thereby creating a special relationship. 489 U.S. at 200, 109 S. Ct. 998. The "special relationship" exception is implicated when the state restrains an individual so as to expose the individual to harm. *Sargi v. Kent City Bd. Of Educ.*, 70 F. 3d 907, 910-11 (6th Cir. 1995) ("A special relationship can only arise when the *state* restrains an individual.") (emphasis in original).

Similarly, the 5th Circuit, in *Beltran v. The City of El Paso* 367 F.3rd 299 (2004) followed

DeShaney when it reversed a district court's denial of a 911 operator's summary judgment motion, finding no constitutional violation. As in this case, *Beltran* involved claims of constitutional violations based on the handling of a 911 call. In *Beltran* a wife and daughter were violently attacked by the husband/father. During the altercation, the daughter hid in the bathroom and called 911. While talking with the 911 operator, the operator encouraged the daughter to stay in the bathroom and told her that the police were on the way. Ultimately the father found the daughter and killed her as well as the mother.

The plaintiffs in the *Beltran* case alleged that the operator's actions of encouraging the caller to stay in the bathroom and telling the caller that police were on their way established a "special relationship" sufficient to invoke the Due Process Clause of the 14th Amendment. Specifically, the plaintiffs alleged that the daughter relied to her detriment on the promises of the 911 operator that police were on their way. The 5th Circuit, following *DeShaney*, noted that the "Due Process Clause" does not require a state to provide its citizens with particular protective services. *DeShaney*, 489 U.S. at 197, 109 S. Ct. 998; *Beltran,* 367 at 308. Therefore, "a state's failure to protect an individual against private violence does not violate the due process clause." *Id.*[5] In ruling that the handling of a 911 call did not invoke constitutional violations, the 5th Circuit dismissed Beltran's argument that a special relationship theory applied due to the 911 operator encouraging the daughter to stay in the bathroom and telling her that police were on the way. *Beltran,* 367 at 308.[6]

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[5] The 5th Circuit also recognized "special relationship" cases arise when the state, "through the affirmative exercise of its power, acts to restrain an individual's freedom to act on his own behalf.

[6] See also *Hale v. Bexar County, Texas*, 2008 WL 2967513 (W.D. Tex. 2008); *Badway v. City of Philadelphia*, 2009 WL 2569260 (E.D. Pa., August 19, 2009).

In this instance, Plaintiffs' do not have a clearly-established constitutional right or federal statutory right for protective services, which would give rise to a due process claim against Hopkins, or Herod-Graham as 911 operators. Additionally, Plaintiffs have not pled nor can Plaintiffs meet the narrow exception of a "special relationship."

First, Plaintiffs fail to allege that Deanna Cook had a "special relationship" with Hopkins. There is no allegation that Hopkins committed any acts to restrain Deanna Cook's freedom to act on her behalf. In fact, Plaintiffs' complaint does not even allege that Hopkins spoke directly with Deanna Cook, much less attempted to restrain her freedom. Plaintiffs make no allegations that Hopkins was present at the scene or provided any advice or counsel to Cook which led to any constitutional deprivations.

Second, Plaintiffs fail to allege that Deanna Cook had a "special relationship" with Herod-Graham. In fact, Herod-Graham was never involved in any interaction with Deanna Cook, including Deanna Cook's 911 call. Complaint, ¶ 39-44. Herod-Graham was not contacted until two days after the initial 911 call from Deanna Cook, when Deanna Cook's family contacted 911 and spoke to Herod-Graham. *Id.* This communication took place contemporaneously with Deanna Cook's family's discovery of Deanna Cook's body. *Id.* Likewise, Plaintiffs' complaint is devoid of any allegations that Herod-Graham had a "special relationship" with Deanna Cook's mother or family members, or that she restrained Ms. Cook or other family members' freedom in any way. See Complaint generally. In fact, per Plaintiffs own allegations, once Deanna Cook's family allegedly learned that the police were not being dispatched immediately, Deanna Cook's family took matters into their own hands", knocked down the patio door, entered the residence and found Deanna Cook's dead body in the bathtub. Complaint ¶¶ 43-44. The Complaint

contains no allegations that Herod-Graham restrained the liberty or rendered Deanna Cook or her family members unable to care for themselves in any way. The only allegation against Herod-Graham, by Plaintiffs, was that Herod-Graham asked if Deanna Cook's family had contacted the jail and hospital to look for Cook and that Herod-Graham failed to send the police immediately. *Id.* ¶¶ 42-43. These allegations do not rise to a level of the "special relationship" envisioned by the Supreme Court in *DeShaney*.

Here, under *DeShaney* and *Beltran*, no constitutional violation could have occurred in the handling of the two 911 calls by Hopkins and Herod-Graham because (1) there is no clearly-established right to rescue services, including 911 services and; (2) neither Hopkins nor Herod-Graham had a special relationship with Deanna Cook, or any member of the Cook family. Accordingly, Hopkins and Herod-Graham cannot be held liable for any constitutional or federal Due Process Clause violation and such claims must be dismissed against them, respectively, as a matter of law.

2. *Plaintiffs' Equal Protection Claims Fail to Establish a Constitutional or Federal Right.*

Plaintiffs also allege that all Defendants responded differently to Cook's 911 call arising from her impending murder than if the call had been made by someone similarly-situated but of a non-minority race and/or in a more affluent neighborhood. Specifically Plaintiffs allege "that the Defendants did not respond to Cook's 911 call timely, or seriously and conducted a shoddy investigation once the officers finally arrived at Cook's residence. This was because Defendants continually believed that this domestic situation in a less affluent neighborhood was less deserving of their attention. Such conduct is not related to any governmental purpose." Complaint ¶ 79.

In paragraph 81 of Plaintiffs' First Amended Complaint, Plaintiffs allege that the following conduct, polices, and customs, *inter alia*, by Defendants violated Cook's constitutional rights:

> (b) Defendants policy of giving lower priority to 911 domestic violence calls than to non-domestic violence calls;
> (d) Failing to prioritize Cook's call the way Defendants would have had she resided in a more affluent, non-minority neighborhood;
> (f) Responding to Cook's call and arriving at her residence at a time considerably in excess of the time in which Defendants would have responded to a similarly situated person in a more affluent section of the City of Dallas that did not have a predominately minority population;
> (h) Refusing to immediately send assistance to Cook's residence because of her status as a domestic violence victim, an African-American female and as a result of her residing in a "high crime-rate" area:
> (i) Defendant's policy of giving less police protection or assistance to women who complain of domestic abuse.... Complaint ¶ 81, b, d, f, h and i.

Further, Plaintiffs' contend that "Defendants actions demonstrate that before her death Cook was the victim of purposeful discrimination, either because of her race and/or gender, or due to an irrational or arbitrary state classification unrelated to a legitimate state objective." Complaint ¶¶ 83. In essence, Plaintiffs allege that assistance was not provided because Deanna Cook was a domestic violence victim, lived in a less affluent, high crime area and minority neighborhood, and was an African-American and/or female. Since Plaintiffs refer to all Defendants in the above stated allegations, Hopkins and Herod-Graham hereby respond to Plaintiffs' allegations of a violation of the Equal Protection Clause.

First, to state a claim of racial or gender discrimination under the Equal Protection Clause, a plaintiff must allege that he or she was treated differently than other similarly-situated individuals and that the unequal treatment stemmed from a discriminatory purpose. *Priester v. Lowndes County*, 354 F.3d 414, 424 (5th Cir. 2004). A discriminatory purpose "implies that the

decision maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effect on an identifiable group." *Taylor v. Johnson*, 257 F.3d 470, 473 (5th Cir. 2001). Plaintiffs do not allege sufficient facts to show that Hopkins treated similarly-situated, non-African American females, in more affluent lower crime neighborhoods differently than Deanna Cook was treated. Further, Plaintiffs do not allege any facts to suggest that Hopkins had a discriminatory state of mind during the 911 call. Vague and conclusory allegations that one's equal protection rights have been violated are insufficient to raise an equal protection claim. See *Pedraza v. Meyer*, 919 F.2d 317, 318 n. 1 (5th Cir. 1990). Plaintiffs general allegations of racial discrimination in their Complaint appear to focus on Plaintiffs belief that Hopkins and Herod-Graham failed to take the respective 911 calls seriously. This, however, is not sufficient to plead adequately Hopkins' and Herod-Graham's discriminatory state of mind because Plaintiffs do not allege any plausible facts showing that Hopkins or Herod-Graham handled Deanna Cook's or Deanna Cook's mother's 911 call differently because of gender or race. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1952 (2009) (dismissal appropriate where "...complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind"). Here, notably, Plaintiffs have failed to plead any facts evidencing knowledge of the race or gender of Deanna Cook by Hopkins at the time of Deanna Cook's 911 call on August 17, 2012. See Complaint. In fact, there is no indication in the pleadings that Hopkins was even able to speak to Deanna Cook at the time of her 911 call on August 17, 2012. Rather, *ex post facto,* Plaintiffs make various conclusory allegations asserting that Deanna Cook's race and/or gender impacted the level of assistance provided to her at the time of the 911 call. Further, Plaintiffs Complaint is devoid of any involvement of Herod-

Graham with Deanna Cook and the 911 call made by Deanna Cook on August 17, 2012. As such, Herod-Graham could not have violated Deanna Cook's Equal Protection rights.

Second, in *Shipp v. McMahon,* 234 F. 3d 907 (5th Cir. 2000), the 5th Circuit adopted the standard articulated by the 10th Circuit in *Watson v. City of Kansas City,* 857 F. 2d 690 (10th cir. 1988) for reviewing Equal Protection claims brought by victims of domestic assault. In *Shipp,* the Court held that to sustain a gender-based constitutional equal protection claim based upon law enforcement policies, practices and customs toward domestic assault and abuse cases, a plaintiff must show: 1) the existence of a policy, practice or custom of law enforcement to provide less protection to victims of domestic assault than to victims of other assaults; 2) that discrimination against women was a motivating factor; and 3) that the plaintiff was injured by the policy, custom or practice. *Id.* at 914, (overruled on other grounds, *McClendon v. City of Columbia,* 305 F. 3d 314 (5th Cir. 2002).

The *Watson* court explained that "law enforcement officials will be liable only for those policies practices, customs and conduct that are the product of invidious discrimination. While statistical evidence showing disproportional impact is probative on the issue of gender-based motivation, such evidence without a showing of **intent** is insufficient to sustain an Equal Protection claim. *Watson,* 857 F. 2d at 690 (Emphasis added); *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047, 48 L. Ed.2d 597 (1976). Finally, the causation requirement will hold law enforcement officials accountable only for injuries that result from inaction or conduct pursuant to invidious policies, customs and practices. As such, law enforcement would not be held liable for generalized harms that are not traceable to their conduct, policies or customs. Furthermore, law enforcement would not be called to answer for those injuries that are solely

attributable to the perpetrators of the underlying domestic assault. *Shipp,* at 914.

In this case, Plaintiffs have not pled any facts against Hopkins or Herod-Graham to satisfy any of the above prongs of the Equal Protection standard. See Complaint. Plaintiffs provide nothing more than conclusory remarks and innuendo in an attempt to assert an Equal Protection claim. Specifically, Plaintiffs have pled no facts against Hopkins and/or Herod-Graham which contend that either 911 operator failed to prioritize Cook's call because she did not reside in a more affluent, non-minority neighborhood. There are no specific allegations or claims that Hopkins and Herod-Graham responded differently in the past to other similar calls that were not from predominately minority populations. Further, Plaintiffs have pled no specific facts that statements made by Herod-Graham during her discussion with Deanna Cook's mother, i.e. asking whether she had checked the hospitals and jails, were handled differently from non-minority callers or callers from more affluent neighborhoods. No facts have been pled which illustrate actions taken by Hopkins or Herod-Graham constitute discrimination against Cook because she was a female. Plaintiffs have pled no facts which purport to implicate that Hopkins or Herod-Graham responded to the respective 911 calls in the manner that they did based upon any personal animosity towards Cook or any member of her family. The complaint is completely devoid of any such allegations. As previously stated, a Plaintiff's obligation to provide the grounds of her entitlement to relief requires more than labels and conclusions. *Bell Atlantic* at 555. Plaintiffs' allegations regarding the Equal Protection claims are nothing more than mere legal and conclusions which cannot withstand the scrutiny of a 12 (b) (6) motion to dismiss as a matter of law.

3. *Hopkins and Herod-Graham cannot be Held Liable Under 42 U.S.C. § 1983 for Alleged Non Compliance with Article 5.04 (a) of the Texas Code of Criminal Procedure.*

In paragraphs 62 through 70 of the First Amended Complaint, Plaintiffs set forth allegations pertaining to the federal Violence Against Women Act (the "VAWA")[7,8]. Complaint ¶¶ 62-70. Paragraph 68 of the First Amended Complaint contains an allegation regarding Article 5.04 (a) of the Code of Criminal Procedure, which purports to address duties of police officers in domestic violence situations. *Id.* ¶ 68. In paragraph 81 (l) of Plaintiffs' First Amended Complaint, Plaintiffs contend that "all Defendants failed to follow the requirements listed in Article 5.04 (a) of the Code of Criminal Procedure due to Cook's minority status". *Id.* ¶ 81 (l).

To the extent that Plaintiffs allege a deprivation of Cook's constitutional rights actionable under 42 U.S.C. § 1983 by reason of Hopkins or Herod-Graham's alleged failure to comply with Article 5.04 (a), such a claim must fail as a matter of law. It is settled law in this circuit that violations of state law cannot form the basis for a claim under 42 U.S.C. § 1983. See, e.g., *Stegemiller v. Wilson,* 15 F. 3d 180, 2 (5th Cir. 1994) (unpublished)[9]

Thus, if Plaintiffs meant to include Hopkins and Herod-Graham as alleged violators of this act, their claim cannot be maintained as a matter of law.

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[7] The VAWA is a piece of federal legislation which was created to urge Congress to adopt significant legislation to address domestic and sexual violence. Funds generated as a result of the legislation are used to help combat domestic violence and similar type crimes. Complaint pages 11-12 ¶ 62-64.

[8] Hopkins and Herod- Graham are not sure whether Plaintiffs are alleging that their actions violated the provisions of the VAWA for which they seek monetary relief. If Plaintiffs are seeking such relief, any such claim must fail as a matter of law since there is no private right to bring a civil action for damages under the VAWA. See *United States v. Morrison*, 529 U. S. 598 (2000) (invalidating a private right of action under the VAWA). Even if there was a private right of action, Plaintiffs have failed to plead any facts against Hopkins or Herod-Graham which would support such a theory. (See Complaint).

[9] "Although the Whistleblowers Act might provide Stegemiller with a claim for the violation of state law, only a violation of federal law can serve as the basis for a § 1983 cause of action."); see also *Nesmith v. Taylor*, 715 F. 2d 194 (5th Cir. 1983) ("It is fundamental to our federal jurisprudence that state tort claims are not actionable under federal law; a plaintiff under § 1983 must show deprivation of a federal right.").

4. *Hopkins and Herod-Graham re-urge, and incorporate by reference, the City of Dallas' Motion to Dismiss Plaintiffs State Tort Law Claims.*

Plaintiffs also assert pendent state law tort claims against Hopkins and Herod-Graham, including negligence, wrongful deathand a bystander action. However, TEX. CIV. PRAC. & REM. CODE § 101.106(e) bars the claims against Hopkins and Herod-Graham, because suit was also filed against the City of Dallas[10]. The statute provides:

> If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

Because the City of Dallas filed its Motion to Dismiss on September 25, 2012, the claims against Hopkins and Herod-Graham must be dismissed.

In the alternative, Herod-Graham seeks dismissal of Plaintiffs' tort claims against her for wrongful death and negligence resulting in the death of Ms. Deanna Cook. Specifically, in their Complaint, Plaintiffs pled that two days after the initial 911 call by Deanna Cook, on August 19, 2012, that N'Eycea Williams, Aniya Williams, Vickie Cook, and Karletha Cook-Gundy went to Ms. Deanna Cook's residence. Complaint ¶ 38. Plaintiff's further pled that at that time, a 911 call for assistance was placed since, *inter alia*, water was leaking from Ms. Deanna Cook's apartment. Complaint ¶¶ 39-40. Plaintiffs identify the 911 operator on August 19, 2012, as Herod-Graham. Complaint ¶ 41. Plaintiffs allege that during the August 19, 2012, 911 call, they were denied assistance from Herod-Graham and they broke down the door to Ms. Cook's

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[10] On September 25, 2012 the City of Dallas filed a Motion to dismiss Plaintiff's State Law Claims against the Individual Defendants and Brief in Support (ECF # 10). On October 2, 2012, the City of Dallas filed its reply Brief in support of Its Motion to Dismiss Plaintiffs' State Law Claims Against the Individual Defendants (ECF #13). Hopkins and Herod-Graham incorporate by reference the above described pleadings into this Motion to Dismiss. Based upon the arguments presented by the City of Dallas in the above described pleadings and the provisions contained in §101.106(e) of the TEX. CIV. PRAC. & REM. Code all Texas tort claims must be dismissed against Defendants Hopkins and Herod-Graham.

apartment and found her body. Complaint ¶¶ 41, 43-46.

Plaintiffs have filed suit against Herod-Graham for negligence resulting in the death of Deanna Cook and wrongful death. Complaint ¶ 111, 127. The elements of a cause of action for wrongful death are: (1) the plaintiff is the surviving spouse, parent or child of the decedent; (2) the defendant is a person or corporation; (3) **the defendant's wrongful act caused injury to the decedent;** (4) **the injury resulted in the death of the decedent**; (5) the decedent would have been entitled to bring an action for the injury if he or she had lived; and (6) the plaintiff suffered actual injuries. See TEX. CIV. PRAC. & REM. CODE §§71.001-71.004; *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 345-46 (Tex. 1992). The elements of negligence are: (1) the existence of a legal duty owed by one person to another to protect the latter against injury; (2) a breach of that duty; and (3) **damages proximately resulting from the breach.** *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608, 613 (Tex. 1996).

Here, Plaintiffs cannot plead any facts evidencing any involvement of Herod-Graham in the death of Ms. Deanna Cook. In fact, Plaintiffs' pleading shows that Herod-Graham was not contacted until shortly before the discovery of Deanna Cook's body two days later. Complaint ¶ 40-46. As such, Plaintiffs have failed to plead facts in support of a wrongful death claim and/or a claim for negligence resulting in the death of Ms. Deanna Cook. Therefore, Plaintiffs wrongful death claim and claim of negligence resulting in the death of Ms. Deanna Cook, against Herod-Graham should be dismissed.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs have failed to state plausible claims under 42 U.S.C. § 1983 for relief against Hopkins and Herod-Graham. Hopkins and Herod-Graham are entitled

to dismissal of Plaintiffs' Due Process and Equal Protection claims as a matter of law. Further, Hopkins and Herod-Graham are entitled to dismissal of claims brought by Plaintiffs pursuant to Article 5.04 (a) of the Texas Code of Criminal Procedure because violations of state law do not give rise to claims under 42 U.S.C. 1983. This Court should also grant the City of Dallas' Motion to Dismiss Plaintiffs' tort claims against Hopkins and Herod-Graham based on Plaintiffs' election under TEX.CIV. PRAC. & REM. CODE § 101.106 (e). Alternatively as it relates to Herod-Graham, Plaintiffs' claims regarding wrongful death and negligence arising in the death of Ms. Deanna Cook should be dismissed since Plaintiffs have pled no facts which support these causes of action against Herod-Graham.

WHEREFORE, Defendants Hopkins and Herod-Graham pray that this Court dismiss Plaintiffs' claims against them for alleged violations of 42 U.S.C. §1983, the 14th Amendment of the U. S. Constitution, Texas tort claims, Article 5. 04 (a) of the Texas Code of Criminal Procedure and for any other relief to which Plaintiffs contend they are entitled which are consistent with this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2012 the foregoing document was filed with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this Notice as service of documents by electronic means.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VICKIE COOK, Individually and as Natural Mother to DEANNA COOK, *et al.*,	§	
Plaintiffs,	§	**CIVIL ACTION: 3:12-CV-3788-P**
v.	§	
	§	**ECF**
THE CITY OF DALLAS; *et al.*,	§	
Defendants.	§	**JURY DEMANDED**

PLAINTIFFS' RESPONSE TO DEFENDANTS TONYITA HOPKINS AND ANGELIA HEROD-GRAHAM'S MOTION PURSUANT TO FED.R.CIV.P 12(b)(6) TO DISMISS PLAINTIFFS' CLAIMS AND BRIEF IN SUPPORT

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I. SUMMARY OF RESPONSE

Although the Defendants' employer, the City of Dallas, refuses to produce, even under freedom of information requests,[1] the corroborating evidence of Plaintiffs' claims, Tonyita Hopkins ("Hopkins") and Angelia Herod-Graham's ("Herod-Graham") and their employer have filed motions to dismiss, hoping the Court will dismiss the claims and deprive Plaintiffs of a trial. Rather than accept that Plaintiffs' First Amended Complaint (the "Complaint") satisfies the requirements of FED. R. CIV. P. 8(a), since it provides notice of Plaintiffs' plausible claims and the grounds upon which they rest, Defendants' Motion to Dismiss (the "Motion to Dismiss") argues for a heightened pleading standard and ignores long-standing Rule 8(a) precedent.

Deanna Cook was a taxpaying citizen of the City of Dallas, where her taxes were used (like all citizens) to help fund the Dallas Police Department. Accordingly, she should have been afforded the same police assistance, rights and protection provided to all citizens, regardless of the nature of the 9-1-1 telephone calls, her residential location, her gender, or her race. The Complaint clearly provides Defendants with notice of the claims under 42 U.S.C. § 1983 and 42 U.S.C. § 1988; the Fourteenth Amendment to the United States Constitution; TEX. CIV. PRAC. & REM. CODE §§ 71.002 and 71.021 and other constitutional provisions and laws of the United States and the State of Texas.

II. ARGUMENT & AUTHORITIES

A. Defendants Cannot Meet their Burden on the Motion to Dismiss.

In deciding a FED.R.CIV.P. 12(b)(6) motion, the district court accepts as true those well-pleaded factual allegations in the complaint and views the facts in the light most favorable to the plaintiff. *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir.2004). As part of its evaluation of a motion to dismiss, this Court does not determine whether the Plaintiffs will ultimately prevail,

[1] The Public Information Act mandates disclosure of public information upon request to a governmental body. See TEX. GOV'T CODE § 552.021.

but whether they may present evidence in support of their claim. *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir.1999). The Supreme Court has explained that in the Rule 12(b)(6) context, a complaint survives a motion to dismiss if the complaint states a "plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *see also, Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007). Factual allegations are assumed to be true, even if doubtful in fact. *Id.* Furthermore, although the Motion to Dismiss makes reference to the phrase "labels and conclusions," the Motion to Dismiss does not specify any such conclusions, and certainly none that would affect the sufficiency of the Complaint's factual allegations. Therefore, the Court's current review is limited to whether Plaintiffs have plausibly alleged causes of action against Defendants. Even a cursory review of the Complaint shows that the facts alleged, if proven, entitle Plaintiffs to the relief requested in the Complaint.

B. The Complaint Does Not Have to Meet a Heightened Pleading Standard.

At this stage there is no requirement that a plaintiff must prove evidentiary facts or even set forth a complete and convincing picture of the alleged wrongdoing in its pleading. Indeed, the Supreme Court has stated that "[s]pecific facts are not necessary; the statement need only 'give the defendants fair notice of what the… claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)(quoting *Twombly*, 550 U.S. at 555). Throughout the Motion to Dismiss, defendants ignore substantial factual allegations in Plaintiffs' 141-paragraph Complaint and argue that Plaintiffs must satisfy some type of rigorously heightened pleading standard. However, in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), the Supreme Court held that "a federal court may [not] apply a 'heightened pleading standard'-more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure-in civil rights cases alleging municipal liability under 42

U.S.C. § 1983." *Id*. at 164; *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). This Circuit has also held that in section 1983 suits against municipalities and individual defendants in their official capacities, the generic pleading requirements of Rule 8(a) govern. *Anderson v. Pasadena Indep. Sch. Dist*, 184 F.3d 439, 443 (5th Cir.1999) (citing *Leatherman*, 507 U.S. at 166-67; *Baker v. Ritnal*, 75 F.3d 190, 195 (5th Cir.1996).

Indeed, only minimal factual allegations are required at the motion to dismiss stage, and courts have concluded, for instance, that the allegations in the complaint need not specifically state what the municipality's policy is that has been violated, as the plaintiff will generally not have access to it, but may be more general. *See Hobart v. City of Stafford*, 2010 WL 3894112, at *5 (S.D.Tex. Sept. 29, 2010) (*Hobart I*). Nevertheless, the Complaint meets the pleading requirements established by the Supreme Court, Rule 8(a), and includes the "extra" pleading requirements discussed in *Schultea v. Wood*, 47 F.3d 1427, 1430 (5th Cir.1995)(en banc) for suits against officials in their personal-capacities.

C. It is Undisputed that the Law Provides for Individual Liability Against Defendants on Plaintiffs' Claims.

The Civil Rights Act provides a cause of action against any "person who, under color of [state law] ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States.]" 42 U.S.C. § 1983. State officials sued in their personal capacity are persons for purposes of § 1983. *See Hafer v. Melo*, 502 U.S. 21, 31 (1991). "Personal-capacity suits seek to impose personal liability upon a government official for actions [the official] takes under color of state law." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Liability in a personal-capacity suit can be demonstrated by showing that the official

caused the alleged constitutional injury. See *id*. at 166. A complaint alleging a personal capacity claim need only allege that the defendant:

> (1) deprived plaintiff of rights secured by the constitution or laws of the United States;
>
> (2) while acting under color of state law; and
>
> (3) caused injury by the deprivation.

West v. Atkins, 487 U.S. 42, 48 (1988); *Piotrowski v. City of Houston*, 51 F.3d 512, 515 (5th Cir.1995)*; see also, Parratt v. Taylor*, 451 U.S. 527, 535 (1981), rev'd on other grounds, *Daniels v. Williams*, 474 U.S. 327, 330–31 (1986); *Augustine v. Doe*, 740 F.2d 322, 324–25 (5th Cir.1984); *see also Doe v. Rains County Indep. Sch. Dist.*, 66 F.3d 1402, 1409 (5th Cir.1995). "A person deprives another of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which [the plaintiff complains]." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir.1993) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.1978)).

The Complaint makes specific factual allegations that these defendants acted in their personal capacity in violating Ms. Cook's rights, by defendants' affirmative acts, by participating in acts of the city and by omitting to perform acts defendants were legally required to perform:

> ¶91. Upon information and belief, TONYITA HOPKINS, KIMBERLEY COLE, JOHNNYE WAKEFIELD, YAMINAH SHANI MITCHELL, JULIA MENCHACA, AMY WILBURN, and ANGELIA HEROD-GRAHAM acted independently during some of the conduct or omissions complained of herein and within the general scope of his or her employment during other conduct or inaction. Complaint at PageID 78.
>
> ¶16. After Ms. Cook's 9-1-1 call initially went into a holding queue, the call was eventually taken by Defendant TONYITA HOPKINS, who was employed in the 9-1-1 call center of the CITY OF DALLAS POLICE DEPARTMENT's Communications Section. At the time of the call, TONYITA HOPKINS, upon information and belief, was working overtime. Complaint at PageID 64

¶17. Upon information and belief, the street name and block range for Ms. Cook's residence immediately appeared on the 9-1-1 call center screen. Accordingly, a police officer could have been dispatched immediately to that block, with a specific address to be provided while the officer was en route. Complaint at PageID 65

¶19. From the tone of Ms. Cook's voice and statements that her life was in jeopardy, it was, or should have been, obvious to TONYITA HOPKINS and JOHNNYE WAKEFIELD that there was a physical disturbance in Ms. Cook's home and that her life was being threatened. Complaint at PageID 65

¶20. Despite that it was apparent that Ms. Cook was being threatened, attacked and was in fear for her life, it took nearly ten (10) minutes to finally initiate a "dispatch" request for officers to go to Ms. Cook's southeast Dallas home. Upon information and belief, Ms. Cook's 9-1-1 call lasts approximately 11 minutes. Complaint at PageID 65

¶21. At some point during Ms. Cook's 9-1-1 call, JOHNNYE WAKEFIELD advised TONYITA HOPKINS to disconnect Ms. Cook's call and call her back. Not surprisingly, after doing so, she received Ms. Cook's voicemail. Complaint at PageID 65.

¶40. Suspecting foul play, Ms. Cook's mother, VICKIE COOK, called 9-1-1 for assistance, after getting no response to knocks on the door or repeated calls to Ms. Cook's cellular phone. Complaint at PageID 68

¶41. During the 9-1-1 call from Ms. Cook's mother, Call Taker ANGELIA HEROD-GRAHAM instructed Ms. Cook's mother that the DALLAS POLICE DEPARTMENT would not send officers out and asked whether Ms. Cook's family had contacted the jails and local hospitals to look for Ms. Cook, although they were reporting that DEANNA COOK was missing. Complaint at PageID 68

¶42. ANGELIA HEROD-GRAHAM has stated that she was trained by the DALLAS POLICE DEPARTMENT that in instances such as this she should ask questions that she asked Ms. Cook's mother, despite that Ms. Cook's mother was pleading for help locating her missing daughter. Complaint at PageID 68

¶48. On or about August 25, 2012, while attending a community meeting in South Dallas, Chief David O. Brown ("Chief Brown") admitted that the police communications center caused Ms. Cook's death when the Police Chief stated "[the 9-1-1 operator] obviously failed at that, and it cost the life of Ms. Cook," [sic]. Complaint at PageID 69.

Accordingly, defendants are liable since they were either personally involved in the constitutional violations against Deanna Cook and/or their acts were causally connected to the constitutional violations. *See, e.g. Anderson* 184 F.3d at 443. As explained below, the

Complaint alleges specific facts showing that each defendant violated clearly established statutory or constitutional rights of which a reasonable person should have known.

D. The Complaint Alleges Facts Supporting the Legal Contention that Defendants Violated Deanna Cook's Equal Protection and Due Process Rights.

Defendants rely on *DeShaney v. Winnebago County Dept. of Soc. Servs*., 489 U.S. 189 (1989). However, *DeShaney* seeks to define a bright line limit to the substantive component of the Due Process Clause. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that substantive component of Due Process Clause does not protect the right to engage in homosexual sodomy). *DeShaney* specifically does not disallow claims based upon illegitimate distribution of public services in contravention of the Equal Protection Clause. "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886). But no such argument has been made here." *DeShaney*, 489 U.S. 197 n. 3.

"A claim has facial plausibility when the plaintiff[s] plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. A defendant has acted under color of state law where he or she has "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Atkins*, 487 at 49 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)); *see also Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981). "Actions taken pursuant to a municipal ordinance are made 'under color of state law.'" *See Coral Constr. Co. v. King County*, 941 F.2d 910, 926 (9th Cir. 1991). Even if the deprivation represents an abuse of authority or lies outside the authority of the official, if the official is acting within the scope of his or her employment, the person is still acting under color of state law. *See Anderson v. Warner*, 451 F.3d 1063, 1068 (9th Cir. 2006).

The Complaint alleges that Hopkins took Deanna Cook's 9-1-1 call and acted by virtue of her authority as a City of Dallas 9-1-1 call taker. Complaint at PageID 64-65 ¶¶ 16-23; PageID 74 ¶73. Herod-Graham was also a 9-1-1 call taker who acted by virtue of her authority with the City of Dallas. Complaint at PageID 68 ¶¶ 40-43; PageID 74 ¶73. These facts satisfy the requirement to allege conduct under color of state law. The Complaint also alleges that defendants caused injury to Plaintiffs (Complaint at PageID85-87 ¶¶ 127, 135, 137), thereby satisfying the requirement to show that the defendants' conduct caused injury to Plaintiffs. Thus, the only question remaining is whether the Complaint alleges that these defendants acted in such a way as to deprive Ms. Cook of federally-protected rights. The answer to that question is YES - the Complaint alleges facts that support the legal contentions in the Complaint.

1. The Complaint provides allegations of specific violations, by both defendants, of Deanna Cook's equal protection rights.

The Complaint alleges how each defendant is involved, states how Defendants permitted or possibly encouraged a violation of Deanna Cook's constitutional rights and meets all pleading requirements. First, the Complaint makes clear that Plaintiffs' equal protection claims are based, *inter alia*, on facts that the defendants treated domestic assaults differently than other types of assaults, and practiced gender and racial discrimination in the response time and assistance provided to domestic violence victims. See, e.g. Complaint at PageID 67, 74, 75-77 ¶¶32, 36, 70, 73, 76-79, 81, and 83. These claims all give rise to a constitutional deprivation. Second, the Complaint alleges (at PageID 77, 80 ¶¶84, 85, 97, and 98) that Defendants had no rational basis for unequal treatment aimed at victims of domestic violence even if the treatment were not based solely on the victim's status as a woman. *See Navarro v. Block*, 72 F.3d 712, 716–17 (9th Cir.1995) (noting that a domestic violence/non-domestic violence classification in how a police department categorized 911 emergency calls failed a rationality test).

In the Motion to Dismiss, defendants cite (e.g. at page 11, PageID 315), several factual allegations from the Complaint that detail the particular course of action in which defendant engaged that demonstrates how the defendants violated Ms. Cook's equal protection rights. Yet strangely defendant alleges later in the Motion to Dismiss that "Plaintiffs have not pled any facts against Hopkins or Herod-Graham." This is factually and facially untrue. Indeed, the Complaint contains specific factual allegations, *inter alia*, against both Hopkins and Herod Graham:

The Hopkins Related Allegations

¶16. After Ms. Cook's 9-1-1 call initially went into a holding queue, the call was eventually taken by Defendant TONYITA HOPKINS, who was employed in the 9-1-1 call center of the CITY OF DALLAS POLICE DEPARTMENT's Communications Section. At the time of the call, TONYITA HOPKINS, upon information and belief, was working overtime. Complaint at PageID 64

¶17. Upon information and belief, the street name and block range for Ms. Cook's residence immediately appeared on the 9-1-1 call center screen. Accordingly, a police officer could have been dispatched immediately to that block, with a specific address to be provided while the officer was en route. Complaint at PageID 65

¶19. From the tone of Ms. Cook's voice and statements that her life was in jeopardy, it was, or should have been, obvious to TONYITA HOPKINS and JOHNNYE WAKEFIELD that there was a physical disturbance in Ms. Cook's home and that her life was being threatened. Complaint at PageID 65

¶20. Despite that it was apparent that Ms. Cook was being threatened, attacked and was in fear for her life, it took nearly ten (10) minutes to finally initiate a "dispatch" request for officers to go to Ms. Cook's southeast Dallas home. Upon information and belief, Ms. Cook's 9-1-1 call lasts approximately 11 minutes. Complaint at PageID 65

¶21. At some point during Ms. Cook's 9-1-1 call, JOHNNYE WAKEFIELD advised TONYITA HOPKINS to disconnect Ms. Cook's call and call her back. Not surprisingly, after doing so, she received Ms. Cook's voicemail. Complaint at PageID 65.

¶22. At no point did JOHNNYE WAKEFIELD or TONYITA HOPKINS notify a police dispatch supervisor or ask that police be dispatched immediately to Ms. Cook's residence. Complaint at PageID 65.

¶23. Neither JOHNNYE WAKEFIELD nor TONYITA HOPKINS did any follow-up to ensure that police dispatch had sent officers to Ms. Cook's residence. Complaint at PageID 65.

¶55. According to Chief Brown, officers respond to critical calls within "six" minutes. However, it took approximately 50 minutes to respond to Ms. Cook's 9-1-1 cries for help and even after the officers arrived, her call was not treated as a serious call. Complaint at PageID 70

¶76. Upon information and belief, the CITY OF DALLAS has a policy, practice, or custom of law enforcement that provides less protection (e.g. by not responding at all or purposefully delaying its response) to female victims of domestic assault than to victims of other assaults. This discrimination against women was a motivating factor in the refusal to prioritize and respond quickly to Ms. Cook's 9-1-1 call and her death was the result of the CITY OF DALLAS' policy, custom, or practice, as well as their inaction in response to the call. Complaint at PageID 75.

¶77. Upon information and belief, the CITY OF DALLAS has a policy, practice, or custom of law enforcement that provides less protection to female victims of domestic assault than to victims of other assaults through not providing the information that is required by Art. 5.04(a) of the Texas Code of Criminal Procedure. This discrimination against women was a motivating factor in the refusal to properly investigate Ms. Cook's call and her death was the result of the CITY OF DALLAS' policy, custom, or practice, as well as their inaction in response to the call. Complaint at PageID 75.

¶78. Upon information and belief, the CITY OF DALLAS has a policy, practice, or custom of law enforcement that provides less protection or assistance to female victims in high crime and predominantly minority-race neighborhoods than to victims in other neighborhoods. This discrimination was a motivating factor in the refusal to prioritize and respond quickly to Ms. Cook's 9-1-1 call and her death was the result of the CITY OF DALLAS' policy, custom, or practice, as well as their inaction in response to the call. Complaint at PageID 76.

¶79. Defendants responded differently to DEANNA COOK's 9-1-1 call arising from her impending murder than if the call had been made by someone similarly situated but of a non-minority race and/or in a more affluent neighborhood. Defendants did not respond to Ms. Cook's 9-1-1 call timely, or seriously, and conducted a shoddy investigation once the officers finally arrived at DEANNA COOK's residence. This was because Defendants continually believed this domestic situation in a less affluent neighborhood was less deserving of their attention. Such conduct is not at all related to any governmental purpose. Complaint at PageID 75.

¶81. For instance, the following conduct, policies, and customs, inter alia, by Defendants violated DEANNA COOK's constitutional rights:

b. Defendants' policy of giving lower priority to 9-1-1 domestic violence calls than to non-domestic violence calls;

c. Defendants' policy of not giving patrol officers the green light to drive fast with their lights and sirens and to make an emergency entry when the investigation involves domestic violence claims;

d. Failing to prioritize DEANNA COOK's call the way Defendants would have had she resided in a more affluent, non-minority, neighborhood;

e. The department's policy of responding earlier to 9-1-1 calls from more affluent, non-minority areas, than they did for DEANNA COOK;

f. Responding to DEANNA COOK's call and arriving at her residence at a time considerably in excess of the time in which Defendants would have responded to a similarly situated person in a more affluent section of the CITY OF DALLAS that did not have a predominantly minority population;

g. Responding to DEANNA COOK's call and arriving at her residence at a time considerably in excess of the time in which Defendants would have responded to a similarly situated non-minority.

h. Refusing to immediately send assistance to DEANNA COOK's residence because of her status as a domestic violence victim, an African-American female and as a result of her residing in a "high crime-rate" area;

i. Defendants' policy of giving less police protection or assistance to women who complain of domestic abuse;

j. Defendants' policy of allowing officers to stop at convenience stores for personal purchases while en route to urgent domestic violence calls;

k. Failure to conduct the type of investigation at DEANNA COOK's residence (e.g. entering the residence to look for foul play) that would have been conducted had she not been a victim of domestic abuse, a minority or a resident in a high crime area;

l. Failure to follow the requirements listed in Art. 5.04(a) of the Code of Criminal Procedure due to Ms. Cook's minority status. Complaint at PageID 76.

¶83. Defendants' actions demonstrate that before her death DEANNA COOK was the victim of purposeful discrimination, either because of her race and/or gender, or due to an irrational or arbitrary state classification unrelated to a legitimate state objective. Complaint at PageID 77.

¶84. Additionally, no rational basis existed for the CITY OF DALLAS' alleged policies of affording female victims of domestic violence less police protection or assistance than other crime victims or giving these victims less investigative attention than other victims. Complaint at PageID 77.

¶85. Similarly, no rational basis existed for the CITY OF DALLAS' alleged policies of affording 9-1-1 callers from high-crime areas or predominantly minority areas less police protection or assistance than other crime victims or giving these female victims less investigative attention than other victims. Complaint at PageID 77.

¶86. In addition to the conduct describe above, TONYITA HOPKINS and JOHNNYE WAKEFIELD violated Deanna Cook's rights, *inter alia*, when they failed to prioritize Ms. Cook's call, failed to notify the Manager II or Radio Room sergeant of Ms. Cook's urgent call and refused to alert dispatchers of the grave nature of the call. Complaint at PageID 78.

¶96. Moreover, no reasonably competent official would have concluded that the actions of the CITY OF DALLAS, TONYITA HOPKINS, KIMBERLEY COLE, JOHNNYE WAKEFIELD, YAMINAH SHANI MITCHEL, JULIA MENCHACA, AMY WILBURN, and ANGELIA HEROD-GRAHAM described herein would not violate Deanna Cook's rights. In other words, no reasonably prudent call center employee, supervisor or officer, under similar circumstances, could have believed that their conduct was justified. Complaint at PageID 80.

¶48. On or about August 25, 2012, while attending a community meeting in South Dallas, Chief David O. Brown ("Chief Brown") admitted that the police communications center caused Ms. Cook's death when the Police Chief stated "[the 9-1-1 operator] obviously failed at that, and it cost the life of Ms. Cook," [sic]. Complaint at PageID 69

The Herod-Graham Related "Additional" Allegations

¶40. Suspecting foul play, Ms. Cook's mother, VICKIE COOK, called 9-1-1 for assistance, after getting no response to knocks on the door or repeated calls to Ms. Cook's cellular phone. Complaint at PageID 68

¶41. During the 9-1-1 call from Ms. Cook's mother, Call Taker ANGELIA HEROD-GRAHAM instructed Ms. Cook's mother that the DALLAS POLICE DEPARTMENT would not send officers out and asked whether Ms. Cook's family had contacted the jails and local hospitals to look for Ms. Cook, although they were reporting that DEANNA COOK was missing. Complaint at PageID 68

¶42. ANGELIA HEROD-GRAHAM has stated that she was trained by the DALLAS POLICE DEPARTMENT that in instances such as this she should ask questions that she asked Ms. Cook's mother, despite that Ms. Cook's mother was pleading for help locating her missing daughter. Complaint at PageID 68

¶44. After entering the residence, Ms. Cook's family was nearly overcome by the stench coming from Ms. Cook's bedroom. They also noticed that Ms. Cook's bedroom door had been kicked in and her home showed clear signs of foul play. Complaint at PageID 69

¶45. Upon walking into Ms. Cook's bathroom, the family observed Ms. Cook's partially clad body laying side-ways, half-in and half-out of the bathtub, floating atop the cold overflowing water. Her body was severely discolored and skin abnormally wrinkly. Complaint at PageID 69

¶46. Immediately upon Ms. Cook's family seeing her body, ANGELIA HEROD-GRAHAM overhead Ms. Cook's family screaming in shock and agony at finding their loved one in this condition and despite all the pleas for assistance from the police. Complaint at PageID 69

¶47. More than 12 minutes after her initial 9-1-1 call, Ms. Cook's mother spoke to a 9-1-1 operator again and was advised to exit the home. After the police finally arrived, DEANNA COOK's body was taken directly to the morgue. Complaint at PageID 69

The factual allegations stated above, for instance, specify defendants' conduct, and practice, of (i) giving lower priority to 9-1-1 domestic violence calls than to non-domestic violence calls; (ii) failing to prioritize Ms. Cook's call in the manner defendant would have had Ms. Cook resided in a more affluent, non-minority, neighborhood; (iii) hanging up on Ms. Cook while her attacker was in her home; (iv) refusing to immediately send assistance to Ms. Cook's residence because she was a domestic violence victim, an African-American female and a resident of a "high crime-rate" area; (v) purposefully delaying responding to domestic violence victims; (vi) the custom of giving lower priority to 9-1-1 domestic violence calls than to non-domestic violence calls; (vii) not providing sufficient information demanding that responding officers drive fast with their lights and sirens blaring and to make an emergency residential entry when the investigation involves domestic violence claims; and (viii) ignoring the repeated pleas from Ms. Cook's family to send police to Ms. Cook's residence to open the door to locate Ms. Cook. The Complaint also alleges that Hopkins and Herod-Graham's conduct (e.g. Complaint at PageID 76 ¶ 81 and PageID 78 ¶ 90) violated clearly established statutory or constitutional rights of which a reasonable person should have known and that no reasonably prudent official, under similar circumstances, could have believed that their conduct was justified. See, e.g. Complaint at PageID 78-80 ¶¶ 86, 93, and 96.

To be sure, the evidence is clear that these defendants engaged in certain conduct that, according to the Dallas Chief of Police, was improper and against policy. In fact, these two defendants were disciplined by the City of Dallas for their conduct on August 17 and 19, 2012:

> ¶48. On or about August 25, 2012, while attending a community meeting in South Dallas, Chief David O. Brown ("Chief Brown") admitted that the police communications center caused Ms. Cook's death when the Police Chief stated "[the 9-1-1 operator] obviously failed at that, and it cost the life of Ms. Cook," [sic]. Complaint at PageID 69.

> ¶58. Since Ms. Cook's death, the CITY OF DALLAS has attempted to "pass the buck" away from the CITY OF DALLAS on the inadequate 9-1-1 procedures and customs by firing ANGELIA HEROD-GRAHAM and suspending TONYITA HOPKINS for 10 days and re-assigning her to another work group within the DALLAS POLICE DEPARTMENT.

In sum, the excerpts from the Complaint provide specific notice of Plaintiffs' plausible claims against Hopkins and Herod-Graham, as well as the grounds upon which these claims rest.

2. Defendants' reliance on *Iqbal* is misplaced.

In the Motion to Dismiss, defendants rely on the holding in *Iqbal* to support defendants' contention that the Complaint does not adequately plead a plausible claim for relief for violation of Deanna Cook's equal protection rights. However, the Motion to Dismiss fails to acknowledge the differences in *Iqbal* and this case. The *Iqbal* court found that the Iqbal plaintiff's claim was not plausible because of the existence of an "obvious alternative explanation" to support the "legitimate" policy directing law enforcement to arrest and detain individuals because of their suspected link to the September 11 attacks (i.e. "the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts"). *See Iqbal*, 556 U.S. at 682 (quoting *Twombly*, 550 U.S. at 567). In this case, however, there are no obvious alternative explanations for these facts. In other words, there is no legitimate alternative explanation for defendant's decisions to (i) hang up the phone in Ms. Cook's face as she is making her 9-1-1 call;[2] (ii) provide less protection or assistance to female victims in high crime and minority-race neighborhoods than to victims in other neighborhoods; (iii) give lower priority to 9-1-1 domestic violence calls than to non-domestic violence calls; (iv) deliberately not instruct the officers to drive fast with lights and sirens and to make an emergency residential entry when

[2] See, Complaint at PageID 65 ¶ 21: "At some point during Ms. Cook's 9-1-1 call, JOHNNYE WAKEFIELD advised TONYITA HOPKINS to disconnect Ms. Cook's call and call her back. Not surprisingly, after doing so, she received Ms. Cook's voicemail."

the investigation involves domestic violence claims; (v) refuse to send police out to the home of a domestic violence victim in response to requests from Ms. Cook's family to locate her; and (vi) overall give less attention to the women who complain of domestic abuse, and their families. Accordingly, defendants find no support in the *Iqbal* holding.

3. The Complaint provides sufficient notice of the allegations of the selective denial of assistance by all Defendants.

It is undisputed that the Equal Protection Clause is implicated when protective services are selectively denied to certain disfavored minorities. *DeShaney* 489 U.S. at 197 n. 3 (1989); *see also, Elliot-Park v. Manglona*, 592 F.3d 1003 (9th Cir. 2010) ("the government may not racially discriminate in the administration of *any* of its services"). The equal protection clause also operates to bar discrimination or disparate treatment based on classifications that are not rationally related to a legitimate government purpose. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973). Here, the Complaint alleges that the City of Dallas and the individual defendants have, and practice, a policy or custom of treating domestic assault cases differently than other criminal assaults and treated minority victims different than other victims.

Tellingly, Defendants' Motion to Dismiss also acknowledges that intentionally discriminatory policies, practices, and customs of law enforcement with regard to domestic assault and abuse cases may violate the Equal Protection Clause under the *DeShaney* footnote. *See, Beltran v. City of El Paso*, 367 F.3d 299, 304 (5th Cir.2004)[3] (citing *Shipp v. McMahon*, 234 F.3d 907, 914 (5th Cir.2000), *overruled in part on other grounds, McClendon v. City of Columbia*, 305 F.3d 314, 328-29 (5th Cir.2002) (en banc). Indeed, a significant number of circuit courts also make clear that there is a constitutional right to have police services

[3] In the Motion to Dismiss, defendants rely heavily on the outcome in *Beltran*. The motion fails to note, however, that *Beltran* was decided during a motion for summary judgment, after sufficient discovery had taken place, not during a FRCP 12(b)(6) motion, which has a different level of review.

administered in a nondiscriminatory manner - a right that is violated when a state actor denies such protection to disfavored persons. *See Navarro* 72 F.3d at 715-17 (recognizing a cause of action under § 1983 based upon the discriminatory denial of police services); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 700-01 (9th Cir.1990) (same); *see also Beltran*, 367 F.3d at 304; *Estate of Macias v. Ihde*, 219 F.3d 1018 (9th Cir. 2000); *Fajardo v. Los Angeles*, 179 F.3d 698 (9th Cir. 1999); *Hynson v. City of Chester Legal Dep't*, 864 F.2d 1026 (3d Cir. 1988) (claim that police officers had policy of ignoring domestic abuse complaints); *Watson v. Kansas City*, 857 F.2d 690 (10th Cir. 1988) (police department policy of not providing assistance to victims of spousal abuse in same manner as other assault victims stated proper equal protection claim); *Penrod v. Zavaras*, 94 F.3d 1399, 1406 (10th Cir.1996) (citing *Cleburne v. Cleburne Living Ctr., Inc*., 473 U.S. 432, 439 (1985)); *Watson v. City of Kansas City, Kansas*, 857 F.2d 690, 694 (10th Cir.1988); cf. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U.Chi.L.Rev. 1161, 1179 (1988) ("Equal Protection Clause ...is grounded in a norm of equality that operates largely as a critique of traditional practices"). One of the constitutional deprivations alleged was Defendants' denial, individually or in conjunction with the city, of equal assistance to Ms. Cook.

The Complaint also alleges that the conduct of the defendants in essentially "permitting" Ms. Cook to be attacked/killed was "intentional" and grossly negligent (Complaint at PageID 80, 83 ¶¶ 96-98, 112), and that the defendants denied protection to Ms. Cook because of her race and/or gender (Complaint at PageID 74-78 ¶¶ 73, 78-81, 83, 85, 86 and 90.) as well as because of her classification as a domestic violence victim. Complaint at PageID 73-78 ¶¶ 70, 76-78, 83, 84, 86, and 90. Hopkins' inexcusable delay in ensuring that emergency help was dispatched after hearing Ms. Cook's screams and the astonishing delay by the responding officer (e.g.,

stopping at a 7-11 convenience store before responding to Ms. Cook's distress call) is evidence of an intentional deprivation of assistance and protection to domestic violence callers such as Ms. Cook. Additionally, Herod-Graham's policy of requiring that domestic violence victims in Ms. Cook's neighborhood first contact "jails" and hospitals show a clear discriminatory animus towards Ms. Cook. Complaint at PageID 68 ¶¶ 76-82. Defendants knew or should have known the impact their actions and inaction would have on the rights of citizens such as Ms. Cook. The Complaint also asserts at PageID 75-77 ¶¶ 76-82 that the policy practiced by all of the Defendants of treating domestic violence victims, such as Ms. Cook, differently was the "moving force" that caused the constitutional violations. Indeed, the City of Dallas police chief admitted that the 9-1-1 system (where these defendants were employed) caused Ms. Cook's death:

> ¶48. On or about August 25, 2012, while attending a community meeting in South Dallas, Chief David O. Brown ("Chief Brown") admitted that the police communications center caused Ms. Cook's death when the Police Chief stated "[the 9-1-1 operator] obviously failed at that, and it cost the life of Ms. Cook," [sic] Complaint at PageID 69 ¶ 48.

In other words, it is clear that the Complaint alleges that Deanna Cook died as the result of the Defendants' unconstitutional acts and pleads the facts of Plaintiffs' allegations against Hopkins and Herod-Graham of the selective denial of police assistance to Ms. Cook and Plaintiffs on August 17 and August 19, 2012, based on Ms. Cook's status. The evidence eventually gathered through discovery will confirm these factual allegations.

4. The clear violation of Art. 5.04(a) and failure to prepare mandatory required reports are factual allegations of specific conduct that support Plaintiffs' claim of equal protection violations.

As alleged in the Complaint at PageID 73 ¶ 68, TEX. CODE CRIM. PROC. ANN. ART. 5.04(a), addressing the domestic violence epidemic, provides that "the responding law enforcement or judicial officers shall protect the victim, without regard to the relationship between the alleged offender and victim. Art. 5.04(a) also provides that "[a] peace officer who

investigates a family violence allegation or who responds to a disturbance call that may involve family violence shall advise any possible adult victim of all reasonable means to prevent further family violence, including giving written notice of a victim's legal rights and remedies and of the availability of shelter or other community services for family violence victims." Despite Art. 5.04(a)'s clear mandate, the Complaint confirms that the officers did not fulfill the requirements to provide information and protection to domestic violence victims when they visited Ms. Cook's residence on August 17, 2012. *See*, Complaint at PageID 76, 79, 81, 82 ¶¶ 81, 95, 104 and 108.

Defendants allege in the Motion to Dismiss, at PageID 319, that Art. 5.04(a) may not be applicable to these two defendants. However, conduct such as "fail[ure] to generate offense reports, fail[ure] to report family violence to the DPS, and fail[ure] to conduct the primary duties of police officers as mandated by the Family Violence Prevention provisions of the Texas Code of Criminal Procedure" could be evidence of a custom of law enforcement to provide less protection to victims of domestic than to other victims. *Kelley v. City of Wake Village, Texas*, 264 Fed Appx 437 *5 (5th Cir.2008) (unpub). In this case, if the defendant had supplied the officers with the information alerting of the emergency nature of Ms. Cook's 9-1-1 call, perhaps the officers would had complied with Art 5.04(a), and entered Ms. Cook's residence to provide her with the required information, and consequently would have been able to save her life. Moreover, ignoring Art. 5.04's mandate in to "protect the victim, without regard to the relationship between the alleged offender and victim" is consistent with Defendants' practice of ignoring the desperate pleas of domestic violence victims, delay the response and dispatch time, conduct shoddy investigations of such claims, and refuse to send police to help locate a domestic violence victim as Hopkins and Herod-Graham did in this case.

5. The Complaint provides specific allegations of violations of due process, of which these Defendants were active participants.

Ms. Cook was deprived of her right to life and liberty in violation of substantive due process because Defendants' egregious actions and inaction, which caused Ms. Cook's eventual death, were an abuse of executive power so clearly unjustified by any legitimate objective of law enforcement as to be barred by the Fourteenth Amendment. S*ee, e.g. Collins v. Harker Heights*, 503 U.S. 115, 126 (1992) (noting that the Due Process Clause was intended to prevent government officials "from abusing [their] power, or employing it as an instrument of oppression'") (quoting *DeShaney* 489 U.S. at 196, in turn quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)). It is clear from the Complaint that providing less assistance to Ms. Cook specifically, generally to female victims in high crime and minority-race neighborhoods than to victims in other neighborhoods, and dispatching officers to arrive at Ms. Cook's residence at a time considerably in excess of the time in which Defendants would have responded to a similarly situated person in a more affluent section of the City of Dallas constitutes abuses of power and/or gross negligence. Furthermore, Hopkins' act of hanging up on Ms. Cook's frantic 9-1-1 call, while her life lay in the balance, is unjustified, as is Herod-Graham's policy of denying Plaintiffs' request for assistance in locating Ms. Cook. Indeed, it was Hopkins' decision to hang up on Cook that set in motion this series of conduct of ignore and delay.

Plaintiffs' Complaint also makes clear that Ms. Cook made, and all Defendants ignored, previous complaints against her suspected attacker. See, Complaint at PageID 65 ¶ 21. Defendants' acquiescence (e.g. disconnecting Ms. Cook's 9-1-1 call, delaying the police dispatch and ignoring complaints of previous stalking) in the suspected killer's illegal conduct encouraged the suspect to keep attacking Ms. Cook. Indeed, this scenario is even more egregious than the conduct in *Okin v. Village of Cornwall-On-Hudson Police Department*, 577 F.3d 415 (2d Cir.2009), which held that police officers' implicit approval of domestic violence against the

plaintiff constituted a violation of the plaintiff's Due Process Clause rights. In *Okin*, the plaintiff called the police repeatedly to report incidents of domestic violence, but the arriving police officers laughed at her complaints and expressed camaraderie with her alleged abuser. *Id*. at 419-426. The *Okin* court found that the police officers "rachet[ed] up the threat of danger to Okin" through an "escalating series of incidents" where the officers ignored Okin's complaints and made the abuser feel that his conduct was sanctioned. *Id*. at 430. *See also, Freeman v. Ferguson,* 911 F.2d 52 (8th Cir.1990). In *Freeman,* the court considered the matter of a woman killed by her estranged husband after the chief of police had directed his officers to ignore her pleas that they stop the husband, who was the police chief's friend, from threatening and intimidating her. The court concluded that *DeShaney* would not bar a § 1983 claim asserting that the violence complained of "was not solely the result of private action, but that it was also the result of an affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community-with such interference increasing the vulnerability of [the victim] to the actions of [the private individual] and possibly ratifying or condoning such violent actions on his part.... Without such affirmative actions on the part of the chief of police, the danger faced by the [victim] would have arguably been less." 911 F.2d at 54-55. Here, it is clear that defendants followed through on, and continued, the practice of ignoring the severity of domestic violence, ignoring Ms. Cook's pleas to the police, and leaving the attacker alone in Ms. Cook's house as the attacker observed the 9-1-1 call center hanging up in Ms. Cook's face. Indeed, the Complaint shows that the 50 minute delay in responding to Ms. Cook's desperate pleas for help shocks the contemporary conscience. The egregious delay both restrained Ms. Cook's ability to escape the grasp of the suspected attacker and her right to life and liberty. In other words, Defendants' actions increased the danger to Ms. Cook, and Defendants acted with

deliberate indifference. Similarly, Herod-Graham's decision to refuse to send police assistance on August 19, 2012, and to notify the family that 9-1-1 had been called previously was indefensible.

The Complaint alleges that the 9-1-1 operators, dispatchers, supervisors and officers and police department all had knowledge of the specific threats of violence to Ms. Cook by a known attacker, yet refused to act:

> ¶100. DEANNA COOK had a protective order against the suspect who police have identified as her suspected killer. Ms. Cook had also contacted the DALLAS POLICE DEPARTMENT on several previous occasions to report that the suspect physically abused and was stalking her. Complaint at PageID 80.
>
> ¶101. On one such occasion, just a week before her murder, Ms. Cook called 9-1-1 to report that the suspect was across the street from her house stalking her. The police made no arrest and filed no criminal complaint. Instead, the police simply drove the stalking suspect home. Complaint at PageID 80.
>
> ¶32. At the time of Ms. Cook's 9-1-1 call, as the result of numerous other calls Ms. Cook made to police, THE DALLAS POLICE DEPARTMENT was aware that DEANNA COOK had been a domestic abuse victim and that the alleged suspect had been stalking her at her residence. Complaint at PageID 67.
>
> ¶102. The DALLAS POLICE DEPARTMENT clearly had duty to protect DEANNA COOK since the police had knowledge of specific threats of violence to her by the suspected attacker, yet refused to act to protect her. Complaint at PageID 81.

The Complaint makes clear, at PageID 67, that defendants, individually, were aware of Ms. Cook's circumstances:

> ¶32. At the time of Ms. Cook's 9-1-1 call, as the result of numerous other calls Ms. Cook made to police, THE DALLAS POLICE DEPARTMENT was aware that DEANNA COOK had been a domestic abuse victim and that the alleged suspect had been stalking her at her residence.
>
> ¶36. While at the residence, Officers MENCHACA and WILBURN were aware that Ms. Cook had previously reported claims of domestic violence and stalking [presumably, this information was provided to the officers by Hopkins and/or Wakefield, her supervisor].

The Complaint also alleges that defendants' conduct demonstrated a deliberate indifference to Ms. Cook's rights. Complaint at PageID 76-77 ¶¶ 80-82. Moreover, the facts make clear that a constitutional due process violation also occurred when Defendants arbitrarily

prevented the rescue of a person (Ms. Cook) in known danger. *See, Salas v. Carpenter*, 980 F.2d 299, 307 (5th Cir.1992) (noting that officials who arbitrarily prevent the rescue of persons in known danger deny due process if they act with the requisite mental state). Accordingly, the Motion to Dismiss should be denied since the allegations in the Complaint identify the specific conduct or customs of the Defendants and how they permitted or possibly encouraged a violation of Deanna Cook's rights.

E. The Complaint Also Successfully Pleads a Constitutional Violation Under the "Class of One" Doctrine.

Plaintiffs and Deanna Cook were treated unfairly because Ms. Cook was a minority female, a domestic violence victim, and a member of a disadvantaged (and predominantly minority) neighborhood. *See, e.g*. the Complaint at PageID 75-77 ¶¶ 78, 79, 81, and 85. The Supreme Court has "recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)(per curiam); *Mikeska v. City of Galveston*, 451 F.3d 376, 381 (5th Cir.2006); *see also Lindquist v. City of Pasadena, Tex*., 525 F.3d 383, 386 (5th Cir.2008) (holding that *Mikeska* applies to plaintiffs' equal protection claim based upon allegations that the city council refused to grant plaintiffs a car dealer license while granting licenses to others similarly situated, without a rational basis); *Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 824 (5th Cir.2007) (citing *Vill. of Willowbrook*, 528 U.S. at 564). Here, Plaintiffs do not have to allege that Ms. Cook had membership in a protected class or group. *Shipp*, 234 F.3d at 916. The Complaint makes sufficient factual allegations with respect to the two prong test described in *Vill. of Willowbrook*. For instance, the Complaint at PageID 75-76 ¶¶ 79 and 81 clearly alleges that Ms. Cook was treated differently from other "similarly situated" individuals. The Complaint

then alleges at PageID 77, 80 ¶¶ 83, 84, 85, 97 and 98 that there is no rational basis on which the defendants should have treated Plaintiffs differently from other similarly situated victims.

F. The Complaint Successfully Pleads a Bystander Claim Against Defendants.[4]

A bystander who witnesses a negligently inflicted serious or fatal injury may recover for damages if: (1) the bystander was located near the scene of the accident as contrasted with one who was a distance away from it; (2) the shock resulted from a direct emotional impact upon the bystander from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and (3) the bystander and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship. *Estate of Barrera v. Rosamond Village Ltd. P'ship*, 983 S.W.2d 795, 799 n. 1 (Tex.App.-Houston [1st Dist.] 1998, no pet.); *Edinburg Hosp. Authority v. Trevino*, 941 S.W.2d 76, 80 (Tex.1997); *Freeman v. City of Pasadena*, 744 S.W.2d 923, 924 (Tex.1988); *Boyles v. Kerr*, 855 S.W.2d 593, 597–98 (Tex.1993). Here, Plaintiffs have alleged facts that establish the bystander claim. Complaint at PageID 84-85 ¶¶ 113-121. Plaintiffs have also alleged that Ms. Cook's immediate family is undergoing extensive counseling and therapy from the shock of personally witnessing the death of their loved one, since Herod-Graham refused to send police in response to Plaintiffs' calls. Complaint at PageID 85, 87 ¶¶ 121, 137(d).

G. Defendants are Not Entitled to a Dismissal of the Other Individual Claims Arising Under Texas State Law.

To the extent the defendants move for dismissal of Texas Torts Claims, this relief should be denied as a matter of law. See TEX. CIV. PRAC. & REM.CODE ANN. § 101.106(e) (Vernon 2011) (emphasis added). It is the governmental unit that moves for dismissal of the claims

[4] In the Motion to Dismiss, Defendants have not fully briefed, or even provided reasons why they believe Defendants should be entitled to a dismissal of, the bystander argument. Accordingly, the Court should deny the Motion to Dismiss on these grounds.

against its employee; the employee does not move for dismissal under subsection (e). *See id.*; *see also Hernandez v. City of Lubbock*, 253 S.W.3d 750, 753–56 (Tex.App.-Amarillo 2007, no pet.) (holding that motion to dismiss employee filed under section 101.106(e) must be filed by governmental unit, not employee).

Furthermore, as discussed in Plaintiffs' Response (Dkt. Entry. No. 12, PageID 121-130) to the City of Dallas's Motion to Dismiss Plaintiffs' State Law Claims Against Individual Defendants, this is not a case where identical state law claims are being brought against both the City of Dallas and the Individual Defendants in their personal-capacity. In addition to the § 1983[5] claims alleged against all Defendants, Plaintiffs allege conduct by the City of Dallas, as well as the Individual Defendants, which potentially contributed to Plaintiffs' damages. Plaintiffs also make clear that some of the defendants' conduct is personal-capacity conduct, for which the defendants could be held personally liable. *See, e.g.* Complaint at PageID 78, 83 ¶¶91, 110. Discovery will reveal which of the violations alleged in the Complaint, for instance, were committed by the Defendants in their official-capacity for the City of Dallas and which violations were committed in Defendants' personal-capacity. Accordingly, neither the City of Dallas nor the individual defendants has any entitlement to dismissal of the state law claims where such claims involve defendant's conduct in their personal-capacity.

H. Arguing in the Alternative, to the Extent the Complaint Lacks More Specificity, the City of Dallas's Refusal to Provide Information in Accordance with the Public Information Statute has Led to this Impediment.

[5] Plaintiffs' claims under Section 1983 against the individual defendants are not barred by the election-of-remedies provision in the Texas Tort Claims Act. *See Baker v. Sheriff Jim Bowles,* Civ. A. No. 3:05–cv–1118–L, 2005 WL 5773665 (N.D.Tex. Dec. 14, 2005) (election-of-remedies bar under Section 101.106 does not apply to Section 1983 claim because it is not brought under the Texas Tort Claims Act); *see also Estate of Sorrels v. City of Dallas*, 45 Fed. App'x 325, 2002 WL 1899592, at *4 (5th Cir. July 10, 2002) (per curiam) (concluding that Section 101.106 of the Texas Tort Claims Act does not apply to a plaintiff's Section 1983 claim); *Rogers v. Bonnette*, 2005 WL 1593437, at *3 (W.D.Tex. July 5, 2005) (denying motion to dismiss Section 1983 claims on the basis of Section 101.106 of the Texas Tort Claims Act).

The Texas Legislature has expressed an intent that governmental entities respond promptly to requests for public information. TEX. GOV'T CODE § 552.221(a). The act's fundamental purpose is to mandate the maximum disclosure of public information and it prohibits unreasonable delays in providing public information. In this matter, the City of Dallas has refused to provide Plaintiffs and the media with basic information regarding customs, policies, and practices, especially as it relates to what went wrong on August 17 and 19, 2012, including the conduct of each of the Individual Defendants. In fact, the police have refused even to release the 9-1-1 tapes for August 17 or August 19, 2012 or the incident reports for the police's response to Ms. Cook's home on August 17, 2012, including all added remarks and all message traffic from field units. This discovery would establish additional evidence of the actual application of the customs and practices about which Plaintiffs complain. Yet, Defendants claim, disingenuously, that they should be allowed to shield incriminating information from Plaintiffs and the media, while simultaneously asking the Court to dismiss Plaintiffs' claims.

Instructive is *Petty v. County of Franklin*, Ohio, 478 F.3d 341 (6th Cir.2007), where the court acknowledged the difficulty of knowing whether a policy or custom exists at the time a complaint is filed and before discovery has taken place. In *Petty*, the court considered "whether or not Petty's complaint properly states a claim for municipal liability under *Monell* and *Tuttle*." *Petty*, 478 F.3d at 347. Petty's claim of "Municipal Liability" contained the following paragraph:

> Said acts by the individual Defendants County, Franklin County Sheriff's Department, Jim Karnes, John Doe # 1 and John Doe # 2, were proximately caused by certain customs and policies of Defendants County, Franklin County Sheriff's Department and Karnes, including but not limited to, a failure to adequately and reasonably train, supervise and discipline officers in such a way to properly protect the constitutional rights of citizens; and a specific set of policies established during the days of the incidents described above, which had the effect of permitting, encouraging, approving and ratifying violations of the constitutional rights of citizens, including Plaintif[f], as described above.

Petty, 478 F.3d at 347-348. As the court observed, "[w]e wonder how Petty would necessarily know, at the point of his complaint [the 12(b)(6) stage], and without the benefit of discovery, whether such a custom or policy might exist, and if it does exist, what its contours might be or how exactly it effected a violation of his constitutional rights." *Id.* It follows that Plaintiffs cannot be expected to show "significant" knowledge of the specific conduct, customs or policies to allege more detail regarding the specific unconstitutional practices and customs that led to Ms. Cook and Plaintiffs' constitutional injuries. Indeed, "[t]he issue [on a Rule 12(b)(6) motion] is not whether [plaintiffs] may ultimately prevail on [a] theory, but whether the allegations are sufficient to allow them to conduct discovery in an attempt to prove their allegations." *Jackam v. Hospital Corp. of America Mideast, Ltd*., 800 F.2d 1577, 1579-1580 (11th Cir.1986). *See also Duke v. Cleland*, 5 F.3d 1399, 1405 (11th Cir.1993) (citing *Jackam*, 800 F.2d at 1579-1580). On October 22, 2012, Plaintiffs submitted their First Request for Discovery upon the Individual Defendants. (Dkt. Entry No. 27). The responses to these requests, as well as oral discovery, will allow Plaintiffs to provide evidence supporting each of the allegations in Plaintiffs' Complaint.

III. PRAYER

Plaintiffs' Complaint sufficiently alleges "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. The Complaint also demonstrates that Defendants have no objectively reasonable reliance on existing law to justify their conduct. For these reasons, Plaintiffs ask that the Court deny the Motion to Dismiss. Arguing in the alternative, if the Court should determine that more specificity is required with regard to the claims asserted in the Complaint, Plaintiffs request leave to amend their Complaint.[6] Plaintiffs

[6] When a plaintiff's complaint fails to state a claim, the court should generally give the plaintiff at least one chance to amend the complaint under Rule 15(a) before dismissing the action with prejudice. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co*., 313 F.3d 305, 329 (5th Cir.2002) ("[D]istrict courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before

additionally ask that the Court allow Plaintiffs to take discovery to secure the additional evidence that Defendants have refused to produce in response to requests from the media and Ms. Cook's family.

Respectfully Submitted,

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dismissing a case…."); *see also United States ex rel. Adrian v. Regents of the Univ. of Cal.*, 363 F.3d 398, 403 (5th Cir.2004) (leave to amend should be freely given).

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2012 the foregoing pleading was filed with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this Notice as service of documents by electronic means.

/s/ Aubrey "Nick" Pittman
AUBREY "NICK" PITTMAN