No. 14-17-00732-CV

In the

Fourteenth Court of Appeals

HARRIS COUNTY, TEXAS and KEVIN VAILES,

Appellants,

v.

BARBARA COATS and ALI AMRON,

Appellees.

On Appeal from the 80th Judicial District Court
Harris County, Texas
No. 2012-55551

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS AND THE TEXAS STATE CONFERENCE OF NAACP UNITS IN SUPPORT OF APPELLEES' MOTION FOR EN BANC RECONSIDERATION

BRIAN KLOSTERBOER
Texas Bar No. 24107833
ADRIANA PIÑON
SAVANNAH KUMAR
ANDRE SEGURA
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF TEXAS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union Foundation of Texas ("ACLU of Texas") is a nonpartisan organization with approximately 60,000 members across the State. Founded in 1938, the ACLU of Texas is headquartered in Houston and is one of the largest ACLU affiliates in the nation. The ACLU of Texas is the State's foremost defender of the civil liberties and civil rights of all Texans as guaranteed by the U.S. Constitution and our nation's civil rights laws.

The National Association for the Advancement of Colored People (NAACP) was founded in 1909 with the principal objectives to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state, and local laws securing civil rights. The Texas State Conference of NAACP Units was organized in 1937 with a key purpose to support the policies of the Association. That work has ranged widely from a successful assault on the Democratic Party's White Primaries to systemic attacks on segregated public education, resulting, in part, in Heman M. Sweatt's eventual admission to the University of Texas Law School, to filing two U.S. Supreme Court amicus briefs in support of UT's affirmative action efforts, to voter protection work, including

litigation involving redistricting, voter ID, and a challenge to the Governor's one-drop-box-per county rule. The State Conference recently called out law enforcement's response to the U.S. Capitol riot as a double standard. The State Conference also commissioned a study analyzing the racial dimension of automobile police stops in Texas and in 2020 released a criminal justice reform plan emphasizing police training and accountability.

INTRODUCTION

"I can't breathe."

Years before George Floyd and Eric Garner uttered these last words, a constable deputy in Harris County suffocated Jamail Amron to death. Lying on the pavement as the deputy pressed his boot against his mouth and nostrils, Mr. Amron could not breathe nor lift his head for more than two to five minutes. When Mr. Amron took his final breath on September 30, 2010, he was just 23 years old and aspired to become an engineer. Like so many Black people before and after him, Mr. Amron's future was stolen by police violence that is rampant and deeply entrenched in our society.

Though no lawsuit can bring Mr. Amron back to life, his family filed this case in 2012 and met every burden required of them under the law. At trial in 2017, a jury found in their favor and granted them a glimmer of accountability, but the jury's verdict was overturned earlier this year by a deeply flawed panel decision from this Court. Left uncorrected, the legal errors in that decision will deny justice not only for Mr. Amron and his family but also for others seeking justice for the excessive force used by constables and their deputies. These legal infirmities would also impose long-lasting damage to the law of this Court. Under the decision's reasoning, constables and their deputies will largely be immune from municipal liability and could adopt unconstitutional policies that largely fall

beyond judicial review. This decision would also require plaintiffs in civil rights cases to shoulder the impossible burden of disproving all other proximate causes of death. Neither of these conclusions comports with Texas law or binding precedent from the U.S. Supreme Court, and they should not become the law of this Court.

A decade has passed since Mr. Amron was suffocated to death and no court can ever make his family whole again. But it is still not too late for this Court to act to provide some form of accountability. We urge you to exercise the Court's plenary power to correct the legal errors contained in the panel's decision.

SUMMARY OF ARGUMENT

The panel decision erred in its analysis on two fundamental questions: (1) whether a constable is a final policymaker for the county for policies that were promulgated by the constable and caused the constitutional violations at issue; and (2) whether plaintiffs in a civil rights case need to disprove all other possible causes of death to prevail.

In the final policymaker analysis, the decision imposed a categorical, all-or-nothing analysis as to whether the overall "function" of a deputy constable was to engage in "law enforcement" instead of following binding U.S. Supreme Court precedent instructing courts to look at the specific policies and practices that cause the constitutional violations at issue in a particular case. This analysis finds no support anywhere in law and is entirely untethered from the specific policies of Harris County Constable Precinct Four that the jury found to be the moving force behind Mr. Amron's death.

The opinion also erred by assuming that in order for a constable to be a final policymaker for the county, the constable's jurisdiction needs to be county-wide. But such a requirement is a legal impossibility because a constable's jurisdiction is constitutionally constrained to their precinct, even though each constable is an officer of county government. The panel decision contravenes Texas law and precedent where this Court and other Texas Courts of Appeal have held that

constables are final policymakers over the policies and practices of deputies in their precincts. This flawed analysis resulted in the erroneous conclusion that Ron Hickman, the Constable of Harris County Precinct Four, was not the final policymaker for the policies and practices of Precinct Four, even though the Constable himself promulgated these policies and no one else in Harris County was able to review, challenge, or question them.

Left uncorrected, this decision could allow constables to adopt unconstitutional policies with impunity and make it virtually impossible for such policies to be challenged in court, including in cases for injunctive relief. Justice and common sense cannot countenance allowing constable precincts to entirely escape judicial scrutiny of unconstitutional policies or practices, especially when there are thousands of constable deputies patrolling Texas streets. Other law enforcement agencies do not benefit from such sweeping immunity and constable precincts should not be permitted to operate outside the law. *See Harris County v. Coats*, 607 S.W.3d 359, 394 (Tex. App.—Houston [14th Dist.] 2020, no pet. h.) (Bourliot, J., dissenting from denial of en banc reconsideration) ("The majority opinion neuters the protections set forth in *Monell*—protections carefully designed to ensure that citizens can hold local government and other municipalities accountable for violating their clearly established constitutional rights through unconstitutional policies, practices, customs or procedures.").

The panel decision committed further legal error by demanding that Appellees disprove all other possible causes of Mr. Amron's death, even though Texas law clearly allows for liability to be imposed where there are multiple proximate causes of death. The opinion also impermissibly reweighed the evidence on appeal by discounting Appellees' witnesses and experts and giving additional credibility to the officers found responsible for Mr. Amron's death.

By erroneously heightening the burden on Appellees in this case, the panel decision further insulates all law enforcement from future civil liability. The evidentiary standard requiring plaintiffs to disprove all other causes of death is nearly impossible to meet. No matter how unjustified the use of force may be, a police officer and municipality could claim immunity under the panel decision's reasoning if the victim has an underlying heart condition, is having a heat stroke, or has some other factor contributing to their death. Such a defense is squarely at odds with Texas law, where it is clearly established that there can be multiple proximate causes of death and each person who contributes to someone's death may still be held responsible for their own behavior.

In this moment, as our country is grappling with systemic racism and police violence on a massive scale, courts and judges play a critical role in ensuring that no person or law enforcement agency is above the law. The panel opinion erroneously deprived Mr. Amron's family of the verdict that the jury found in their

favor by imposing impossible burdens that have no basis in Texas or federal law. If the panel opinion's analysis is left unchanged, then justice will be denied to the Amron family and others who seek to hold constables and their deputies accountable for unconstitutional policies and egregious acts of violence. *Amici* ask this Court to correct the legal errors contained in the panel decision.

ARGUMENT

I. The Panel Decision's Articulation of the Final Policymaker Test Ignored U.S. Supreme Court Precedent and Texas Law, Wrongfully Imposing Additional Barriers to Holding Law Enforcement Liable for Unlawful Conduct

In reversing the jury's verdict, the panel opinion misapplied the legal standard for establishing a final policymaker for purposes of municipal liability. Absent action from this Court, this error has the potential to foreclose the ability of civil rights plaintiffs to challenge policies and practices of Texas constable precincts that are clearly unconstitutional. To establish municipal liability under 42 U.S.C. § 1983, a civil rights plaintiff must identify "a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (quoting *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978)). The test established by the U.S. Supreme Court for determining whether a person is a final policymaker requires identifying a specific, narrow area or issue that caused the constitutional violations and then applying state law to see who has final policymaking authority over that area. *McMillian v. Monroe Cty., Ala.*, 520 U.S. 781, 785 (1997); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988).

But the panel decision in this case required the impossible: that Appellants show that the Constable for Harris County Precinct Four was the final policymaker for *all* law enforcement in Harris County, not just for specific unconstitutional

policies governing his Precinct. This analysis erred by misinterpreting both federal and Texas law, and it has the effect of insulating unconstitutional policies and practices in constable precincts throughout Texas from judicial review. That result is untenable.

A. The Supreme Court Requires Appellees to Identify a Final Policymaker "In a Particular Area" or "On a Particular Issue"

The Supreme Court has long made clear that the final policymaker question cannot be decided in a vacuum, nor in "some categorical, 'all or nothing' manner." *McMillian*, 520 U.S. at 785. Instead, courts must specifically ask "whether governmental officials are final policymakers for the local government *in a particular area*, or *on a particular issue*." *Id.* (emphasis added). Such specificity is important because it is well-established that there can be multiple final policymakers for a given municipality. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (explaining that "municipalities often spread policymaking authority among various officers and official bodies" and "particular officers may have authority to establish binding county policy respecting particular matters"). Thus, municipal liability attaches "where the decisionmaker possesses final authority to establish municipal policy *with respect to the action ordered*." *Id.* at 481; *see also Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (requiring courts to identify "those officials who have the power to make official policy *on a particular issue*") (emphasis added); *Praprotnik*, 485 U.S. at 123 ("[T]he

challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy *in that area* of the city's business.").

In Texas, the State Constitution creates the office of the constable. Tex. Const. art. V, § 18(a). Constables are peace officers with the responsibility to serve warrants and civil papers, and to serve as bailiffs in the county's justice of the peace courts. Tex. Loc. Gov't Code § 86.021. Critically, constables also perform various law enforcement duties. Since they are peace officers, a constable must preserve the peace within their jurisdiction and has authority to "use all lawful means" to do so. *See* Tex. Code Crim. Proc. arts. 2.12(2), 2.13(a). Constables may also appoint deputies to work under their supervision at the constable's precinct "to properly handle the business of the constable's office" and to act as peace officers. Tex. Loc. Gov't Code § 86.011(a).

At the time of Mr. Amron's death, Constable Hickman was the elected Constable for Harris County Precinct Four and had approximately 500 constable deputies working under his supervision and control.[1]

[1] Precinct Four is the largest constable's office in Harris County and throughout the entire country. *See About the Precinct Four Constable's Office*, Harris County Constable Precinct Four, *available at* https://www.constablepct4.com/about-precinct-4.html (last accessed Dec. 30, 2020).

In its verdict, the jury identified four specific sections of the Harris County Precinct Four Policy and Ethics Manual as the policies that were the moving force behind the constitutional violations resulting in Mr. Amron's death, including the precinct's policies on conduct and behavior, necessary force in making arrests, use of force, and deadly force. R.8204. The jury also found several practices of Precinct Four to have resulted in constitutional violations: (1) that Constable Hickman acted with deliberate indifference in failing to enforce a Precinct Four verbal policy prohibiting deputies from exerting force by using their feet unless the life of the officer was threatened; (2) that he failed to train and supervise his deputy constables with regards to these policies; and (3) that he ratified the constable deputies' constitutional violations that resulted in Mr. Amron's death. R.8205–09.

These policies and practices identified by the jury were unique to Harris County Constable Precinct Four—and not all law enforcement throughout the county—and are the relevant policies and practices for the final policymaker inquiry. But the panel decision erred by conducting a final policymaker analysis completely untethered from these specific policies and practices.

B. The Texas Constitution, Statutes, and Case Law All Demonstrate that Constable Hickman Was the Final Policymaker for the Specific Policies and Practices that the Jury Found to Be the Moving Force Behind the Constitutional Violations

Under Texas law, Constable Hickman was the final policymaker for Harris County for each of the policies and practices on which the jury rested its verdict. In

line with Supreme Court precedent, the key question is whether the specific policies that the jury found to be the moving force behind constitutional violations were "adopted by the official or officials responsible under state law for making policy in *that area* of the [county]'s business." *Praprotnik*, 485 U.S. at 123. "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law." *Pembaur*, 475 U.S. at 483.

To guide this analysis, the Supreme Court looks to the "definition of the official's functions under relevant state law." *McMillian*, 520 U.S. at 786. The Court also looks to certain indicia that demonstrate whether that official has ultimate authority over that area of municipal business, including the constitutional and statutory parameters of officials' duties, who exercises control over how municipal officials perform specific duties at issue, and how such officials are removed from office. *Id.* at 788–91. Texas courts have interpreted Supreme Court precedent to require that a final policymaker is someone who "(1) decides the goals for a particular city function, (2) devises the means of achieving those goals, (3) acts in the place of the governing body in the area of delegated responsibility, and (4) is not supervised except as to the totality of performance." *Democracy*

Coalition v. City of Austin, 141 S.W.3d 282, 293 (Tex. App.—Austin 2004, no pet.).

Under each of these factors, Texas law mandates that Constable Hickman was the final policymaker for the policies and practices at issue in this case. Section 86.011(c) of the Texas Local Government Code provides that "[t]he constable is responsible for the official acts of each deputy of the constable." And a "constable, like a justice of the peace or a county commissioner, is a county officer elected on a precinct-wide basis." *Harris County v. Nagel*, 349 S.W.3d 769, 793 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (citing Tex. Const. art. V, § 18(a) (providing for election of constables and justices of the peace by precinct); art. V, § 24 (setting forth the conditions for removing from office "County Judges, county attorneys, clerks of the District and County Courts, justices of the peace, constables, and *other county officers*") (emphasis added)). A constable is not subject to discipline from any other county official, and the constable's actions are not reviewable for conformance to any policies established by the commissioners court. *See* Tex. Const. art. V, § 24; Tex. Loc. Gov. Code § 87.013.

Critically, under Texas law, a constable has total control over the policies and practices of deputies in their precinct. Outside of approval from the commissioner's court before securing funding to appoint new deputies, the constable alone is responsible for all other aspects of the precinct's operation,

including the deputies' policies, practices, training, and supervision; and the constable alone retains the authority to discipline or fire their deputies. *Nagel*, 349 S.W.3d at 793 ("Only the constable has supervisory authority over the deputy constables; the commissioners court's only authority over the deputies is budgetary."). A constable is not removable by the commissioners court, but may only be removed by a district court judge after a showing of "incompetency, official misconduct, habitual drunkenness, or other causes defined by law." Tex. Const. art. V, § 24. Thus, a constable is not supervised by anyone else and is only accountable to the voters of their precinct based on the totality of the constable's performance. Under Texas law, the constable (1) decides the goals of deputies in their precinct; (2) devises the means of achieving those goals through policies and practices; (3) acts on behalf of the county for all matters in the precinct; and (4) is only supervised based on the totality of the constable's performance. *See Democracy Coalition*, 141 S.W.3d at 293.

The plain conclusion that a constable is the final policymaker over the specific policies of their precinct is buttressed by multiple decisions from this Court and other Texas Courts of Appeal. In *Nagel*, this Court determined that "the constable is *the only* official who has supervisory authority over the deputies [in their precinct] and is responsible for their official conduct as a matter of state law." 349 S.W.3d at 786 (emphasis added).

In holding that a constable is a final policymaker in their precinct for the policies and practices regarding the apprehension of individuals identified in mental health warrants, the *Nagel* Court correctly emphasized that the final policymaker question turns on the specific area of the county's business. The Court focused on the arrest and apprehension of people pursuant to mental health warrants, because that was the specific policy that was the moving force behind the constitutional violations that occurred. *Id.* at 794. Although Constable Precinct One executed these warrants in every part of Harris County, the Court's final policymaker analysis did not turn on this county-wide action. Instead, the Court's reasoning makes clear that Harris County constables are final policymakers over official policies and practices that govern the deputies in their precinct. Following the Supreme Court's instruction in *McMillian*, the Court specifically found that:

- "Harris County deputy constable's actions are subject to review by the constable, and the constable can terminate the employment of a deputy whose actions do not conform to departmental policy," *id.* at 792 (citing *Harris County v. Vernagallo*, 181 S.W.3d 17, 20–22, 29 (Tex. App. —Houston [14th Dist.] 2005, pet. denied));

- "The constable is not subject to discipline, and the constable's actions are not reviewable for conformance to policy" by the commissioners court or anyone else, *id.* at 793 (citing Tex. Const. art. V, § 24; Tex. Loc. Gov't Code § 87.013);

- "Only the constable has supervisory authority over the deputy constables; the commissioners court's only authority over the deputies is budgetary," *id.* (citing *Renken v. Harris County*, 808 S.W.2d 222, 225–26 (Tex. App. —Houston [14th Dist.] 1991, no writ)); and

- "[T]he constable is the only official who has supervisory authority over the deputies and is responsible for their official conduct as a matter of state law."

Id. at 794. Each of these findings shows that Harris County constables have final policymaking authority over the policies and practices of deputies in their precinct with no oversight or higher approval from the commissioners court or anyone else. *See McMillian*, 520 U.S. at 788–91. But the panel decision overlooked these findings in an effort to factually distinguish *Nagel* and avoid having to follow it. *See Coats*, 607 S.W.3d at 379 (concluding that the *Nagel* Court's final policymaker analysis was limited to whether the constable "performed a narrow function for the entire county to the exclusion of all other constable precincts"). The panel decision's singular focus on the fact that the constable in *Nagel* executed mental health warrants county-wide does not supplant the broader import of this Court's analysis in *Nagel*.

The First Court of Appeals also reached this same conclusion that a constable is the final policymaker over policies in their precinct in *Harris County v. Walsweer*, where the court held that a constable's policy or custom of providing inadequate training to deputies in that constable's precinct was attributable to Harris County for purposes of municipal liability. 930 S.W.2d 659, 666 (Tex. App.—Houston [1st Dist.] 1996, writ denied). The court endorsed a prior decision from the Eleventh Court of Appeals in the same case, finding that "the record is

clear that Constable Maxon had authority to establish county policy as to the training and qualification of the deputies in his precinct." *Id.* (citing *Walsweer v. Harris County*, 796 S.W.2d 269, 273 (Tex. App.—Eastland 1990, writ denied) (noting that the commissioners court only has budgetary control over constable precincts with no supervisory approval or final policymaking authority)).

In *Walsweer*, the Eleventh Court of Appeals correctly emphasized the need to identify a specific area of the county's business when conducting the final policymaker analysis. The court found that because the Harris County constable had final authority over the training and supervision of deputies in his precinct, "[t]he county cannot escape liability by now arguing that the constable did not have policy-making powers *in his portion of the county*." *Walsweer*, 796 S.W.2d at 273 (emphasis added).

Instead of following *Nagel* and *Walsweer*, which resolve the final policymaker inquiry in this case, the panel decision erroneously relied on *Rhode v. Denson*, 776 F.2d 107 (5th Cir. 1985), but such reliance is misplaced. In *Rhode*, the Fifth Circuit held that episodic torts committed by the constable himself do not amount to a precinct policy such that a constable could be the final policymaker for the county under those circumstances. 776 F.2d at 110. The Fifth Circuit considered whether San Jacinto County could be liable for an elected constable personally engaging in a wrongful arrest and act of excessive force. The plaintiff in

Rhode asserted that "because a constable is a policymaking official, his every tortious act committed within the general ambit of his authority is a policy decision, which exposes the County to direct liability." *Id.* at 108. In rejecting this argument, the Fifth Circuit found that imposing municipal liability for *every* action committed by a constable undermines the core tenets of *Monell* since "imposing liability upon a county for an episodic tort by such officials is functionally indistinguishable from the imposition of vicarious liability." *Id.* The Fifth Circuit therefore concluded that "a discrete tort [does not] express policy." *Id.*

In *Walsweer*, the Eleventh Court of Appeals correctly found that *Rhode* does not foreclose municipal liability for systemic injuries where official policy is the moving force behind constitutional violations:

> *Rhode* is factually distinguishable because Harris County argued in this case that Constable Maxon was the final authority in his precinct on the selection, training, and activities of his deputies . . . the Court in *Rhode* was facing an isolated incident while the evidence before us shows that Constable Maxon's policies were of long standing duration.

Walsweer, 796 S.W.2d at 273. The court correctly interpreted *Rhode* to conclude that constables *are* final policymakers over certain areas of the county's business, even though every decision they make does not automatically constitute a precinct-wide policy or custom that is attributable to the county.[2] Unlike the commissioners

[2] The panel opinion cites several Fifth Circuit and district court cases that reiterate *Rhode*'s holding that constables in Texas are not final policymakers for every act or omission that a constable makes. *See Coats,* 607 S.W.3d at 378 (citing *Castro v. McCord*, 259 F. App'x 664, 668

court, which is the highest governing body of counties in Texas, Tex. Const. art. V, § 18, every single decision or act of a constable does not automatically constitute policy or custom that binds the county itself. But this does not exempt counties completely from official policies promulgated by constables to govern deputies in their precinct.

The isolated acts in *Rhode* are vastly different from this case, where the jury found multiple policies and practices of Harris County Constable Precinct Four to be the moving force behind violations to Mr. Amron's constitutional rights. At trial, Appellees presented unrebutted evidence that Constable Hickman, and he alone, had final policymaking authority over the specific policies and practices for Harris County Constable Precinct Four that resulted in Mr. Amron's death.[3] By

---

(5th Cir. 2007); *Keenan v. Tejeda*, 290 F.3d 252, 263 (5th Cir. 2002); *Bowles v. Cheek*, 44 F. App'x 651 (5th Cir. 2002); *Pena v. Jimenez*, 31 F. App'x 833 (5th Cir. 2002); *Sorrells v. Warner*, 21 F.3d 1109 (5th Cir. 1994); *Gremar v. Bexar County, Tex.*, No. SA-13-CV-434-XR, 2014 WL 906796, at *2 n.1 (W.D. Tex. Mar. 7, 2014); *Birge v. Harris County*, No. 4:09-CV-660, 2009 WL 10693565, at *2 (S.D. Tex. May 21, 2009); *Ramos v. Lucio*, No. B-08-122, 2008 WL 11503546, at *3 (S.D. Tex. Sept. 25, 2008); *Drain v. Galveston County*, 979 F. Supp. 1101, 1103 (S.D. Tex. 1997).

While these cases are not binding on this Court, they must also be read in harmony with Supreme Court precedent in the same way as *Rhode*. Even where constables are not final policymakers over *every* law enforcement action in a municipality, they can be final policymakers "in a particular area" or "on a particular issue," like all county officers. *See McMillian*, 520 U.S. at 785. Ultimately, whether a constable is a final policymaker is also a question of state law, and this Court should apply Texas and U.S. Supreme Court precedent even if these federal court precedents reached a different result.

[3] As the panel decision noted, "The policy manual states that Constable Hickman is the chief executive for the Precinct Four Constable department. Constable Hickman testified that he is the 'number one guy' in the Precinct Four Constable's Office as to constable policies, which are not subject to review by 'higher authority' and are not reviewed by the sheriff. Other county representatives confirmed that Constable Hickman

dismissing this evidence and imposing a legal standard that does not exist under Texas or federal law, the panel opinion committed fundamental errors that must be corrected by this Court.

C. The Panel Decision Impermissibly Broadened the Final Policymaker Question to Ask Whether Constables Have Policymaking Authority Over *All* Law Enforcement in Harris County

On appeal, the opinion's logic should have rested on the analysis outlined above to determine who had final policymaking authority over the specific policies and practices of Harris County Constable Precinct Four. Instead, the panel decision departed far beyond Supreme Court precedent and Texas law, requiring that the municipal actor must have final policymaking authority for *all* law enforcement in *all* of Harris County in order for municipal liability to attach. This analysis is wrong for two reasons.

First, the panel's opinion erroneously broadened the final policymaker inquiry far beyond the particular policies at issue in this case. Although the panel decision cited appropriate rule language from the Supreme Court instructing it to "consider the particular area of local government at issue," *Coats*, 607 S.W.3d at

---

had ultimate responsibility for Precinct Four Constable policies." *Coats*, 607 S.W.3d at 377. The panel also decision acknowledged that "Constable Hickman has the final word in Precinct Four as to office policies," *id.*, and there is no evidence in the record that Constable Hickman lacked final policymaking authority over the specific policies and practices of Precinct Four that were the moving force behind violations to Mr. Amron's constitutional rights.

375 (citing *McMillian*, 520 U.S. at 785), and acknowledged the four specific policies from the Harris County Constable Precinct Four Policy Manual that the jury determined were the moving force behind the constitutional violations, the opinion required Appellees to establish that Constable Hickman was in charge of all law enforcement in the entire county. *Id.*

Instead of focusing its analysis on the specific policies that were the moving force behind constitutional violations, the panel opinion determined that "*the function* Deputy [Kevin] Vailes was performing at the time of the violation was a law enforcement activity." *Id.* (emphasis added). Because of this "function," the court determined "that the local government area in question is fairly characterized as law enforcement." *Id.* This function-based analysis finds no bearing in Texas or federal law and has the effect of broadening the final policymaker question far beyond the specific policies of Precinct Four. By ignoring the specific policies that the jury found to be the moving force behind the constitutional violations at issue here, the panel decision analyzed the final policymaker question in a "categorical, 'all or nothing' manner" that is prohibited by the Supreme Court. *McMillian*, 520 U.S. at 785. This error was outcome-determinative and repeated throughout the court's analysis.

Second, the panel opinion erred by requiring a final policymaker for the county to have county-wide jurisdiction. Even though the panel opinion explicitly

acknowledged that "*Constable Hickman has the final word in Precinct Four as to office policies*," it imposed a different burden on Appellees that fails to track what the law demands:

> Appellees' burden, however, was to identify a final policymaker who speaks on law enforcement matters for the local government unit at issue—Harris County. Appellees direct us to no authority or evidence showing that Constable Hickman had policymaking authority *over any precinct other than Precinct Four or over the county as a whole*.

Coats, 607 S.W.3d at 377. This fundamentally misstates what the law requires. The Supreme Court does not require civil rights plaintiffs to identify a final policymaker for *all* law enforcement activity in an entire municipality—or for parts of the county outside the constable's constitutionally prescribed precinct. This legal error manifests a burden that can never be met because a constable's policymaking authority is constitutionally limited to the constable's precinct, even though the constable is a county officer whose official acts are attributable to county government. *See* Tex. Const. art. V, § 18(a). Appellees did not allege that Constable Hickman was the final policymaker for law enforcement activity over the entire county or any precinct other than Precinct Four, because this was never their burden to bear.

This error in the panel's analysis explains its unease at arriving at a conclusion where there are "nine law enforcement final policymakers for all of Harris County: the county sheriff and all eight constables." *Coats*, 607 S.W.3d at

378. Finding that a constable is the final policymaker over the specific policies and practices of their precinct does not mean that each of the eight constables in Harris County is responsible for *all* law enforcement policies in the entire county. Instead, it simply means that each constable *is* the final policymaker with regard to the policies and practices of their specific precinct. This conclusion comports with Texas law and also with common sense because, as mentioned *supra*, no one else has the power or authority to review the policies in a constable precinct except the constable.

In a large municipality with multiple law enforcement agencies, the Supreme Court recognizes that "municipalities often spread policymaking authority among various officers and official bodies" and "particular officers may have authority to establish binding county policy respecting particular matters." *Pembaur*, 475 U.S. at 483. Ultimately, no one official has final policymaking authority over *every* law enforcement matter in the entire county. Here, Constable Hickman had final authority over the policies and procedures of Precinct Four with no oversight or approval from the sheriff, commissioners court, or anyone else. Constable Hickman was therefore the final policymaker for Harris County over the specific policies and practices in this case.

II. Plaintiffs Provided Ample Evidence of Causation, But the Panel Opinion Imposed Additional Burdens Beyond What Is Required under Texas Law

In overturning the jury verdict below, the panel opinion imposed evidentiary burdens on Appellees that exceed what is required under Texas law and resulted in upending, without valid basis, factual conclusions reached by the jury. The jury decided, based on a preponderance of the evidence, that Precinct Four Constable Deputy Kevin Vailes proximately caused Mr. Amron's death, which means that his conduct was "a substantial factor in bringing about the harm at issue," and absent such conduct, "the harm would not have occurred." *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 122 (Tex. 2009). The jury reached this conclusion based on the testimony of multiple eyewitnesses *and* several experts, yet the panel opinion reversed the verdict by reweighing testimony and impermissibly assessing the credibility of certain witnesses. Critically, the panel decision also erred by requiring Appellees to disprove *all* other possible causes of death, when their only burden under Texas law was to establish that Deputy Vailes' conduct was *one* substantial factor in causing the harm.

A. The Panel Decision Erred By Requiring Appellees to Disprove All Other Proximate Causes of Death

The panel opinion failed to acknowledge that under Texas law, "there can be more than one proximate cause of an injury." *Stanfield v. Neubaum*, 494 S.W.3d

90, 97 (Tex. 2016). It is well-established that "[t]here can be concurrent proximate causes of an accident. All persons whose negligent conduct contributes to the injury, proximately causing the injury, are liable." *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). "It has long been the law in this state that a defendant's act or omission need not be the sole cause of an injury, as long as it is a substantial factor in bringing about the injury." *Bustamante v. Ponte*, 529 S.W.3d 447, 457 (Tex. 2017).

In *Bustamante*, the Texas Supreme Court clarified that when there is more than one proximate cause of an injury or death, a plaintiff need only establish that the defendant's negligence was one substantial factor in bringing about the harm without disproving all other contributing factors. *Id.* A plaintiff "need not speculate about other possible unknown causes and then disprove them," *Id.* (internal quotation and citation omitted); *see also Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 784 (Tex. 2001) ("[T]he question here is whether an act by LLC was 'a' proximate cause, not 'the' proximate cause, of Harrison's death. More than one act may be the proximate cause of the same injury.").[4] This means that if someone

[4] The court in *Bustamante* acknowledged a line of cases in which expert witnesses have been required to opine on other possible causes of medical injuries to bolster the credibility of their opinions. 529 S.W.3d at 456 (citing *Jelinek v. Casas*, 328 S.W.3d 526, 536 (Tex. 2010); *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 720 (Tex. 1997)). In each of these cases, the Texas Supreme Court held that expert medical testimony on causation could be deemed insufficient if "there are other plausible causes of the injury or condition that could be negated," and the plaintiff's medical expert does not "offer evidence excluding those causes with reasonable certainty." *Havner*, 953 S.W.2d at 720.

is hit by a car and has a heart attack at the same time, the driver of the car is still liable as long as that person's conduct was a substantial factor in bringing about the person's death.[5]

The trial court in this case correctly recognized that there can be multiple proximate causes of injury under Texas law and asked the jury to apportion responsibility for Mr. Amron's death. In identifying who "proximately caused the death of Jamail Amron," the jury answered that Harris County, Deputy Vailes, and Mr. Amron himself all caused his death. R.8210. In apportioning responsibility, the jury found that Harris County was 60% responsible for "caus[ing] or contribut[ing] to cause the death of Jamail Amron," Deputy Vailes was 20% responsible, and Mr. Amron was 20% responsible. R.8211.[6]

This case differs significantly from *Jelinek* and *Havner*, because here the jury explicitly found that there were multiple proximate causes of Mr. Amron's death. Appellees' expert did not need to discount or disprove other possible causes of Mr. Amron's injuries when it was uncontested that multiple causes existed.

[5] This causal chain may be broken if there is a new, intervening, or superseding cause of death, but that would have to be something that is not foreseeable. "If the act or omission alleged to have been a new and independent cause is reasonably foreseeable at the time of the defendant'' alleged negligence, the new act or omission is a concurring cause as opposed to a superseding or new and independent cause." *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 857 (Tex. 2009).

Here, Mr. Amron called 911 because he was having a bad response to cocaine, so his use of cocaine cannot constitute a new or superseding cause of death. It was entirely foreseeable that he was in need of medical attention when Deputy Vailes responded to the emergency by forcing Mr. Amron's head into the pavement. And under Texas law, this is the kind of fact pattern in which there can be concurring causes of death.

[6] Texas used to have a "winner take all" system of recovery that barred plaintiffs' recovery if they contributed to their own injuries, but this no longer exists. Gone is the "harsh system of absolute victory or total defeat." *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 518 (Tex.

Texas law explicitly recognizes that there can be multiple proximate causes of an injury, yet the panel decision never addressed this possibility. Instead of recognizing that the jury explicitly found multiple proximate causes of Mr. Amron's death, the panel opinion framed the causation analysis as an either/or question and overturned the verdict since Appellees failed to disprove all other possible causes of death. "According to Deputy Vailes, appellees offered no competent expert evidence establishing, within a reasonable medical probability, that asphyxia was the cause of death *and that acute cocaine toxicity was not the cause of death*. . . . We agree with Deputy Vailes." *Coats*, 607 S.W.3d at 387 (emphasis added). The decision then repeated this legal error throughout its analysis by framing proximate causation as an either/or question. *Id.* at 390 ("*[W]hether* Jamail died from suffocation as a result of Deputy Vailes's actions *or* died of acute cocaine toxicity is outside the common knowledge and experience of jurors") (emphasis added); *id.* ("[A]ppellees were required to present expert evidence establishing a reasonable medical probability that Deputy Vailes proximately caused Jamail's death by suffocation, *and excluding* with reasonable

1978). Under the current standard of proportionate responsibility, the fact-finder apportions responsibility according to the relative fault of the actors, thus allowing a plaintiff to recover while reducing that recovery by the percentage for which the plaintiff was at fault. As long as the plaintiff's own responsibility does not exceed 50%, he is entitled to a recovery reduced by his responsibility percentage. Tex. Civ. Prac. & Rem. Code §§ 33.001, 33.012; *Nabors Well Servs., Ltd. v. Romero*, 456 S.W.3d 553, 559–60 (Tex. 2015).

certainty the other plausible cause that Jamail died from acute cocaine toxicity.") (emphasis added). By requiring Appellees to prove that cocaine did *not* cause Mr. Amron's death, the panel decision set forth an evidentiary burden that does not exist under Texas law.

B. The Panel Opinion Should Not Have Second-Guessed the Combination of Lay and Expert Testimony Credited by the Jury

The panel decision also erred by inappropriately reweighing facts and testimony credited by the jury and by requiring Appellees to present a single, unifying expert on causation, even though Appellees adduced significant lay testimony *and* expert testimony to enable the jury to determine that Deputy Vailes' conduct was a proximate cause of Mr. Amron's death. The decision devoted much of its causation analysis to determining whether lay or expert testimony is required to prove material facts in this case. However, this is not the critical question to ask, since ultimately the jury's verdict rested on *both* eyewitness accounts and expert opinions.

Many of the key facts in this case came from lay witnesses and did not require additional experts on causation. *See Soto v. State*, 156 S.W.3d 131, 137 (Tex. App.—Fort Worth 2005, pet. denied) ("It is common knowledge that suffocation, if it lasts long enough, may cause death. No expert testimony is necessary to prove this fact, just as no expert testimony is necessary to prove that drowning can cause death."); *see also Ex parte Sheikh*, No. 03-10-00370-CR, 2012

WL 3599826, at *12 (Tex. App.—Austin Aug. 17, 2012, pet. denied) (finding lay witness testimony sufficient to establish strangulation as a cause of death).

This Court need not decide the legal sufficiency question based on this evidence alone, however, since Appellees also adduced testimony on causation from multiple experts, including their own expert on toxicology and cross-examination testimony from Appellants' expert on causation. *Coats*, 607 S.W.3d at 390. When combined with eyewitness accounts, this expert testimony established a sequence of events that provides a strong, logically traceable connection between Deputy Vailes' actions and Mr. Amron's death, but the panel decision rejected such evidence as insufficient because Appellees did not provide a single, unifying expert on causation. Texas law does not require an expert to give a single, all-encompassing opinion that connects every dot for the jury. Rather, the evidence taken as a whole must establish a "sequence of events which provides a strong, logically traceable connection between the event and the condition," *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 733 (Tex. 1984), that is "apparent to the casual observer." *Jelinek v. Casas*, 328 S.W.3d 526, 533 (Tex. 2010).

Here, the record as a whole provided more than enough evidence for the jury to make a finding of proximate causation—especially when the record is viewed in a light most favorable to the verdict. As fact-finders, the jury alone is permitted to weigh evidence and examine witness credibility, yet the panel decision departed

from these principles by assuming the role of the fact-finder. In its causation analysis, the panel opinion diminished the weight of an eyewitness account by postulating that "Lansdale saw Deputy Vailes with his boot on Jamail's face at two moments, but she did not see Deputy Vailes keep his foot on Jamail's face for any sustained period." *Coats*, 607 S.W.3d at 388. The panel decision then afforded significant weight and credibility to the testimony of the constable deputies by stating that "[t]hose present with Jamail, *on the other hand,* gave *unrefuted* testimony that Jamail's airway was not obstructed and that he continued breathing until after Deputy Vailes left the immediate scene." *Id.* While the deputy constables may have proffered this testimony, the jury could have found them to be entirely uncredible, and likely did, given its verdict. The panel opinion should not have implicitly bolstered the officers' credibility nor put itself in a position to weigh witnesses' testimony against one another. Instead, "all the record evidence must be considered in the light most favorable to the party in whose favor the verdict has been rendered," *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), including evidence offered by the opposing party that supports the verdict. *City of Keller v. Wilson,* 168 S.W.3d 802, 827 (Tex. 2005). The panel decision erred by straying from these principles and holding Appellees to unfounded evidentiary standards that do not exist under Texas law.

III. The Effects of the Panel Opinion's Legal Errors Are Harmful and Profound

The panel decision committed several fundamental legal errors and the harms from these errors redound beyond the parties in this case. Absent correction by this Court, this decision erects additional barriers for plaintiffs to hold police accountable for their unconstitutional conduct and vitiates the ability of civil rights plaintiffs to remedy the unconstitutional policies and practices of constables and their deputies. Carving out immunity for constables and their deputies violates the most basic precepts of the Constitution and Section 1983. Since no other law enforcement agency enjoys such widespread immunity, the thousands of constable deputies who are sworn to protect Texas citizens should not be above the law either.[7] *C.f. Coats*, 607 S.W.3d at 399 (Poissant, J., dissenting from denial of en banc reconsideration) ("Three years later, in 2020, the same message is being heard across the country: citizens will not tolerate official policies or customs that cause an individual to be subjected to a denial of a constitutional right. Based on the importance of this ruling, justice requires this case be heard en banc by the full court.").

[7] *2019-2020 Justice of The Peace & Constable Directory*, Texas Justice Court Training Center, *available at* https://www.tjctc.org/JP-Constable-Directory.html (last accessed Dec. 30, 2020).

The panel decision's legal errors are especially harmful for Black Texans who already face widespread police violence that ended the life of Mr. Amron and too many others. As *amici* and other groups work to confront systemic police violence throughout our society, this Court has a responsibility to preserve and follow existing laws that allow for police officers to be held accountable for their actions. Such accountability extends to constables and their deputies, including the deputy constables who riddled Harry Walsweer's unarmed body with bullets inside his home the moment his front door was opened, *see Walsweer*, 796 S.W. 2d at 271, the deputy constables who tased Joel Don Casey eighteen times before hog-tying him, pressing on his chest, and ultimately killing him, *see Nagel*, 349 S.W.3d at 774–75, and the deputy constable whose boot smothered Jamil Amron's nose and mouth, resulting in his death.

Such violence cannot be met with impunity nor by heightening the legal and evidentiary burdens on civil rights plaintiffs beyond what they already are. But allowing the panel decision to stand will do just that. We urge you to revisit and overturn this legally erroneous and deeply harmful decision.

CONCLUSION

In accordance with Rules 41.2 and 49.7 of the Texas Rules of Appellate Procedure, the American Civil Liberties Union Foundation of Texas and the Texas

State Conference of NAACP Units respectfully request that this Court grant en banc reconsideration *sua sponte* and vacate the Panel Opinion.

Respectfully submitted,

By: /s/ *Brian Klosterboer*

BRIAN KLOSTERBOER
Texas Bar No. 24107833
ADRIANA PIÑON
Texas Bar No. 24089768
SAVANNAH KUMAR
Texas Bar No. 24120098
ANDRE SEGURA
Texas Bar No. 24107112

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF TEXAS