**UNITED STATES DISTRICT COURT**

**MIDDLE DISTRICT OF LOUISIANA**

**LEROY TENNART, ET AL.**

**VERSUS**

**CITY OF BATON ROUGE, ET AL.**

**CIVIL ACTION**

**NO. 17-179-JWD-EWD**

***CONSOLIDATED WITH***

**NIKOLE SMITH, ET AL.**

**VERSUS**

**CITY OF BATON ROUGE, ET AL.**

**CIVIL ACTION**

**NO. 17-436-JWD-EWD**

# DRAFT JURY INSTRUCTIONS [1.16.2024]

# TABLE OF CONTENTS

## I. Preliminary Matters

**Members of the jury**:

Now that the evidence in this case has been presented, the time has come for me to instruct you on the law. My instructions will be in three parts: first, some instructions on general rules that define and control the jury's duties; second, the instructions that state the rules of law you must apply; i.e., what the Plaintiffs must prove to make their cases; and third, some rules and guidelines for your deliberations.

### A. Duties of the Jury

In defining the duties of the jury, let me first give you a few general rules:

You have been chosen from the community to make a collective determination of the facts in this case. What the community expects of you, and what I expect of you, is the same thing that you would expect if you were a party to this suit: an impartial deliberation and conclusion based upon all the evidence presented in this case and on nothing else.

This means you must deliberate on this case without regard to sympathy, prejudice, or passion for or against any party to this suit. This means the case should be considered and decided as an action between persons of equal standing in the community. All persons stand equally before the law and are to be dealt with as equals in a court of justice.

Above all, the Community wants you to achieve justice, and your success in that endeavor depends upon the willingness of each of you to seek the truth as to the facts from the same evidence presented to all of you and to arrive at a verdict by applying the same rules of law as I give them to you.

If I have given you the impression during the trial that I favor either party, you must disregard that impression. If I have given you the impression during the trial that I have an opinion about the facts of this case, you must disregard that impression. You are the sole judges of the facts of this case. Other than my instructions to you on the law, you should disregard anything I may have said or done during the trial in arriving at your verdict.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You should consider all of the instructions about the law as a whole and regard each instruction in light of the others, without isolating a particular statement or paragraph.

You are required by the law to decide the case in a fair, impartial, and unbiased manner, based entirely on the law and on the evidence presented to you in the courtroom. You may not be influenced by passion, prejudice, or sympathy you might have for any Plaintiff or any Defendant, in arriving at your verdict.

## B. Burden of Proof

In a civil action such as this, each party asserting a claim has the burden of proving every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so. In determining any fact in issue you may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

If a party asserting a claim has proven each element of his case by a preponderance of the evidence, then you must find in favor of that party. However, if a preponderance of the evidence does not support each essential element of a claim, then you, the jury, should find against the party having the burden of proof as to that claim.

## C. Three Forms of Evidence

Next, I want to discuss with you, generally what we mean by evidence and how you should consider it.

The evidence from which you are to decide what the facts are comes in one of three forms:

First, there is the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness.

Second, there are the exhibits which the court has received into the trial record.

Third, there are any facts, to which all the lawyers have agree or stipulated, or which the court has instructed you to find. You must accept a stipulated fact as evidence and treat that fact as having been proven here in court.

The parties have agreed to _____ stipulations, all of which have been entered as Exhibit #___

**D. What Is Not Evidence**

Certain things are not evidence and are to be disregarded in deciding what the facts are:

1. Arguments or statements by lawyers are not evidence. You may, however, consider their arguments in light of the evidence that has been admitted and determine whether the evidence admitted in this trial supports the arguments. It is important for you to distinguish between the arguments and the evidence on which those arguments rest.

2. The questions to the witnesses are not evidence. They can be considered only to give meaning to the witness' answer.

3. Objections to questions and arguments are not evidence. Attorneys have a duty to their client to object when they believe a question is improper under the rules of evidence. You should not be influenced by an objection or by the court's ruling on it. If the objection is sustained, ignore the question; if it is overruled, treat the answer like any other answer.

4. Testimony that has been excluded, stricken or that you have been instructed to disregard is not evidence and must be disregarded. In addition, some testimony and exhibits may have been received only for a limited purpose; where the court has given such a limited instruction, you must follow it.

5. Anything you may have seen or heard outside the courtroom is not evidence. You are to decide the case solely on the evidence offered and received in the trial.

**E. Direct and Circumstantial Evidence**

I have told you about the three forms in which evidence comes: testimony, exhibits, and stipulations. There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as the testimony of an eyewitness. Circumstantial evidence is proof of a chain of circumstances from which

you could infer or conclude that a fact exists, even though it has not been proved directly. You are entitled to consider both kinds of evidence.

The word "infer," or the expression, "to draw an inference," means to find that a fact exists, based on proof of another fact. For example, if you see water on the street outside your window, you can infer that it has rained. In other words, the fact of rain is an inference that could be drawn from the presence of water on the street. Other facts may, however, explain the presence of water without rain. Therefore, in deciding whether to draw an inference, you must look at and consider all the facts in the light of reason, common sense, and experience. After you have done that, the question of whether to draw a particular inference is for the jury to decide.

The fact that a person brought a lawsuit and is in court seeking damages, creates no inference that the person is entitled to a judgment. Anyone may make a claim and file a lawsuit. The act of making a claim in a lawsuit, by itself, does not in any way tend to establish that claim and is not evidence.

**F. Deciding What Testimony to Believe**

In deciding what the facts are, you must consider all the evidence that has been offered. In doing this, you must decide which testimony to believe and which testimony not to believe.

You alone are to determine the questions of credibility or truthfulness of the witnesses. In weighing the testimony of the witnesses, you may consider the

witness's manner and demeanor on the witness stand, any feelings or interest in the case, or any prejudice or bias about the case, that he or she may have, and the consistency or inconsistency of his or her testimony considered in the light of the circumstances. Has the witness been contradicted by other credible evidence? Has he or she made statements at other times and places contrary to those made here on the witness stand? You must give the testimony of each witness the credibility that you think it deserves.

Even though a witness may be a party to the action and therefore interested in its outcome, the testimony may be accepted if it is not contradicted by direct evidence or by any inference that may be drawn from the evidence, if you believe the testimony.

You are not to decide this case by counting the number of witnesses who have testified on the opposing sides. Witness testimony is weighed; witnesses are not counted. The test is not the relative number of witnesses, but the relative convincing force of the evidence. The testimony of a single witness is sufficient to prove any fact, even if a greater number of witnesses testified to the contrary, if after considering all of the other evidence, you believe that witness.

## G. Transcript of Recorded Conversation

A typewritten transcript of an oral conversation, which can be heard on a recording received in evidence [as Exhibit ———], was shown to you. The transcript also purports to identify the speakers engaged in such conversation.

I have admitted the transcript [as Exhibit ———] for the limited and secondary purpose of aiding you in following the content of the conversation as you listen to the recording, and also to aid you in identifying the speakers.

You are specifically instructed that whether the transcript correctly or incorrectly reflects the content of the conversation or the identity of the speakers is entirely for you to determine, based on your evaluation of the testimony you have heard about the preparation of the transcript and on your own examination of the transcript in relation to your hearing of the recording itself as the primary evidence of its own contents. If you should determine that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

## H. Impeachment

If you find that a witness' testimony is contradicted by what that witness has said or done at another time, or by the testimony of other witnesses, you may disbelieve all or any part of that witness' testimony. But in deciding whether or not to believe the witness' testimony, keep this in mind:

1. People sometimes forget things. A contradiction may be an innocent lapse of memory or it may be an intentional falsehood. Consider therefore whether it has to do with an important fact or only a small detail.

2. Different people observing an event may remember it differently and therefore testify about it differently.

Even though a witness may be a party to the action and therefore interested in its outcome, the testimony may be accepted if you believe the testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

## I. Law Enforcement Officer Testimony

You are required to evaluate the testimony of a law-enforcement officer as you would the testimony of any other witness. No special weight may be given to their testimony because they are a law enforcement officer.

## II. LAW OF THE CASE

Over the course of this trial, you have heard evidence relating to the claims of ten individual plaintiffs. The fact that Plaintiffs' claims are joined for trial, however, does not mean that their claims are *identical*. All of the Plaintiffs have named the City/Parish and certain commanding officers as defendants, but other individual BRPD officers involved in each arrest, and the claims made against them, differ. The following instructions and verdict form will specify the Plaintiffs making each claim and the individual defendants against whom the claims are made.

### A. Sec. 1983 Claims

Section 1983 provides a cause of action when a person has been deprived of federal rights under color of state law.[1] "Under color" of state law means under the pretense of law. An officer's acts while performing his or her official duties are done "under color" of state law whether those acts are in line with his or her authority or overstep such authority. An officer acts "under color" of state law even if he misuses the power he possesses by virtue of a state law or because he is clothed with the authority of state law. An officer's acts that are done in pursuit of purely personal

[1] *Shaikh v. Texas A&M University College of Medicine*, 739 Fed.Appx. 215, 218 (5th Cir. 6/20/18) (*citing D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 456 (5th Cir. 2010)).

objectives without using or misusing his or her authority granted by the state are not acts done "under color" of state law.[2]

### i. Fourth Amendment Claims

Plaintiffs claim that BRPD Officers violated the following Fourth Amendment rights:

1. protection from unreasonable arrest or other "seizure";

2. protection from the use of false or fabricated evidence; and

3. protection from the use of excessive force during an arrest.

To recover damages for these alleged constitutional violations, Plaintiffs must prove by a preponderance of the evidence—that is, prove that it is more likely than not—that:

(1) BRPD Officers committed an act that violated one or more of these constitutional rights; and

(2) the act by the BRPD Officer or Officers caused the Plaintiff's damage.

Plaintiffs must prove by a preponderance of the evidence that the act or the failure to act by the BRPD officers was a "cause-in-fact" of the damages Plaintiffs suffered. "Cause in fact" means that an act or a failure to act played a substantial part in bringing about or actually causing the injury or damages.

[2] Fifth Circuit Pattern Jury Instruction § 10.2. (*citing Bustos v. Martini Club, Inc.,* 599 F.3d 458, 464 (5th Cir. 2010); *Townsend v. Moya*, 291 F.3d 859, 861 (5th Cir. 2002)).

Plaintiffs must also prove by a preponderance of the evidence that the act or failure to act by the BRPD Officers was a "proximate cause" of the damages Plaintiffs suffered. An act or failure to act is a proximate cause of Plaintiffs' injuries or damages if it appears from the evidence that the injury or damages was a reasonably foreseeable consequence of the Officers' act or omission.

**1. Unlawful Arrest**

Plaintiffs Leroy Tennart, Deon Tennart, Thomas Hutcherson, Eddie Hughes, Godavari Hughes, Christopher Brown, Brachell Brown, Nikole Smith, and Sean Benjamin claim that BRPD Officers violated the Fourth Amendment right to be protected from an unreasonable seizure. These Plaintiffs claim BRPD's arrests of them on July 9, 2016, violated their constitutional rights. To establish this claim, Plaintiffs must show that the arrests were unreasonable.

The arrests in this case were made without a warrant. A warrantless arrest is considered unreasonable under the Fourth Amendment when, at the moment of the arrest, the arresting officer has no probable cause that the person he is arresting has committed a crime. Probable cause is the reasonable belief that a crime has been or is being committed by the person being arrested based on evidence known to the officer. Probable cause does not require proof beyond a reasonable doubt, but only a showing of a fair probability of criminal activity. It must be more than bare suspicion, but need not reach the 50% mark. If an arrest is made without probable

cause, it is unreasonable under the Fourth Amendment, and under Louisiana law, an individual has a right to resist the arrest.

Finally, the reasonableness of an arrest must be judged based on what a reasonable officer would do under the circumstances and does not consider the officer's state of mind. The question is whether a reasonable officer would believe that a crime was committed based on the facts available to that officer at the time of the arrest.

To help you determine whether the BRPD officers who arrested the Plaintiffs had probable cause, I will now instruct you on the elements of Louisiana Revised Statutes § 14:97, "Simple obstruction of a highway of commerce," the crime that officers stated was the reason for the arrests of Leroy and Deon Tennart, Chris and Brachell Brown, Eddie and Godavari Hughes, Mr. Hutcherson, and Mr. Benjamin. I will also instruct you on the elements of Louisiana Revised Statutes § 14:329.2, "Inciting to riot," the crime that officers stated was the reason for Nikole Smith's arrest.

Simple obstruction of a highway is:

1. The intentional or criminally negligent placing of a thing or performance of an act
2. On any road or highway
3. That renders movement on that road or highway more difficult.

The crime of Simple Obstruction of a Highway requires intent or criminal negligence. Louisiana law defines "criminal negligence" as such disregard of the interest of others that the person's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful person under the circumstances.[3] In other words, he must know—or should know from the facts available to him—not only that his conduct creates an unreasonable risk of harm to others but also that there is a high degree of probability that the harm will occur.[4]

"Inciting to Riot" is:

1. The willful or intentional act[5] to incite or procure any other person
2. To create or participate in a riot.

And "riot" is defined as

1. A public disturbance
2. Involving three or more persons acting together
3. Which by tumultuous and violent conduct, or the imminent threat of tumultuous and violent conduct, and

[3] La. R.S. 14:12

[4] *State v. Jones*, 298 So. 2d 774 (La. 1974). **Court's Note:** *Jones* refers to a risk of "bodily" harm and a high degree of probability that "substantial" harm will occur . Other parts of the case refer to a "serious danger to others." The parties have agreed to this instruction, but the omission does seem significant. The parties should be prepared to discuss this issue at the charge conference.

[5] *Louisiana v. Emmit J. Douglas*, 278 So. 2d 485, 487 (La. 1973) (interpreting La. R.S. 14:329.2's language of "endeavor" to mean "willful or intentional").

4. Either:

a. Results in injury or damage to persons or property; OR

b. Creates a clear and present danger of injury or damage to persons or property.

So, you must determine whether a reasonable officer presented with the facts and circumstances observed by the arresting officers would have thought that there was probable cause to arrest these Plaintiffs for "Simple Obstruction of a Highway of Commerce" or, in Ms. Smith's case, "Inciting to Riot" on July 9, 2016. ~~If you determine that a[6] reasonable officer would not think that there was probable cause that the Plaintiffs had committed one of these crimes, then Plaintiffs' Fourth Amendment rights were violated.~~

If you find that Plaintiffs have proven by a preponderance of the evidence that Defendants lacked probable cause to make the arrests on July 9, 2016, then Defendants violated Plaintiffs' constitutional right to be free from unreasonable arrest or "seizure," ~~and your verdict will be for Plaintiffs on this claim or~~ and you must then consider whether Defendants are entitled to qualified immunity, which is the bar to liability that I will discuss later. If Plaintiffs failed to make this showing,

[6] Defendants object to use of "a reasonable officer" here and submit that the language should be "no reasonable officer." Plaintiffs respond that this would create a double negative. **Court's ruling:** Objection sustained. This entire sentence seems confusing and redundant to the more neutral paragraph that comes after. This sentence will be removed.

then the arrests were constitutional, and your verdict will be for Defendants on the unreasonable-arrest claim.[78]

## 2. False or Fabricated Evidence

Plaintiffs Hill, Hutcherson, Benjamin, Leroy and Deon Tennart, Chris and Brachell Brown, and Eddie Hughes claim that Defendants violated their Fourth and Fourteenth Amendments protection to be free from false or fabricated evidence.

~~An officer violates the Fourth Amendment by intentionally or recklessly including a false statement in a warrant application.[9] Liability requires a certain mindset and certain conduct: an officer must intentionally, or with a reckless disregard for the truth, include a false statement in a warrant application or omit a material fact from it.[10] There is no liability for an honest mistake.[11][12]~~

[7] Fifth Circuit Pattern Jury Instruction §10.1.

[8] Plaintiffs incorporate here their previous objection to instructions on qualified immunity. **[Court's ruling: Overruled; see below.]**

[9] *Nerio v. Evans*, 974 F.3d 571, 577 (5th Cir. 2020); *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)'

[10] *Id*. (cleaned up).

[11] *Id*. (citation omitted).

[12] Plaintiffs object to this paragraph to the extent that instructing the jury on the lawfulness of warrant applications will only serve to confuse the jury, where this case deals exclusively with post-arrest probable-cause affidavits and arrest reports. Plaintiffs assert that the language in the following paragraph setting out the elements encapsulates the relevant authority from *Franks* and *Nerio*. [**Court's ruling**: Objection sustained in part and denied in part. The Court agrees that Plaintiff's proposed instruction is a clearer summary of the law on this issue, so the Court will use those elements. However, the Court has included the language from *Nerio* and *Imani* that there is no liability for an innocent mistake, as this provides a more complete summary of the law.]

To prevail on this claim, plaintiffs must prove by a preponderance of the evidence that:[13]

(1) An officer included a false statement or omitted a material fact in an affidavit of probable cause or arrest report, and

(2) The officer acted intentionally, or with a reckless disregard for the truth.[14] There is no liability for an honest mistake.

### 3. Excessive Use of Force

Plaintiffs Zachary Hill, Thomas Hutcherson, Leroy Tennart, Deon Tennart, Chris Brown, Brachell Brown, and Sean Benjamin also claim that officers violated the Fourth Amendment by using excessive force in arresting them on July 9, 2016. The Constitution prohibits the use of unreasonable or excessive force while making an arrest, even when the arrest is otherwise proper. To prevail on a Fourth Amendment excessive-force claim, these Plaintiffs must prove the following by a preponderance of the evidence:

[13] Derived from *Imani*, Doc. 347, Ruling on Motions for Summary Judgment, at Pg. 71; 614 F. Supp. 3d 306, 362 (discussion of *Franks v. Delaware*, 438 U.S. 154 (1978)), citations omitted.

[14] Defendants object to this language, and assert that in previous paragraph on *Franks* should be more fully incorporated in this paragraph. [**Court's ruling**. For the reasons given above, Defendant's objection is overruled. Plaintiff's language encapsulates the same ideas in a more concise and clearer form. The Court has included the language about honest mistakes, which is the only area of no overlap between Plaintiffs' and Defendant's instructions.]

(1) an injury, even if it is relatively insignificant or purely psychological;[15]

(2) that the injury resulted directly from the use of force that was excessive to the need; and

(3) that the excessiveness of the force was objectively unreasonable.

To determine whether the force used was reasonable under the Fourth Amendment, you must carefully balance the nature and quality of the intrusion on Plaintiffs' right to be protected from excessive force against the government's right to use some degree of physical coercion or threat of coercion to make an arrest. Not every push or shove, even if it may later seem unnecessary in hindsight, violates the Fourth Amendment.[16] In deciding this issue, you must pay careful attention to the facts and circumstances, including the severity of the crime at issue, whether Plaintiffs posed an immediate threat to the safety of the officers or others, and whether they were actively resisting or attempting to evade arrest.

Finally, as with the other rights I have discussed, the reasonableness of a particular use of force is based on what a reasonable officer would do under the circumstances and not on these particular officers' states of mind. You must decide whether a reasonable officer on the scene of Plaintiffs' arrests would view the force

[15] *Brown v. Lynch*, 524 F. App'x 69, 79 (5th Cir. 2013) ("As long as a plaintiff has suffered 'some injury,' even relatively insignificant injuries and purely psychological injuries will prove cognizable when resulting from an officer's unreasonably excessive force.") (cited with approval by the Fifth Circuit pattern instructions).

[16] Fifth Circuit Pattern Jury Instruction §10.1.

as reasonable, without the benefit of 20/20 hindsight. This inquiry must consider the fact that police officers are sometimes forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

If you find that Plaintiffs have proved by a preponderance of the evidence that the force used was objectively unreasonable, then the officers who used that force violated Plaintiffs' Fourth Amendment protection from excessive force and you must then consider if the City/Parish is responsible for that violation. You must also then consider whether the BRPD officer Defendants are entitled to qualified immunity, which is the bar to liability that I will discuss later.[17][18] If Plaintiffs failed to make this showing, then the force was not unconstitutional, and your verdict will be for the City/Parish and individual officers on the excessive-force claim.

### ii. First Amendment Claims

The plaintiffs claim that Defendants violated their rights to freedom of speech, freedom of assembly, freedom to petition the government for a redress of grievances, and freedom to record interactions with police officers. Each of these rights is protected by the First Amendment to the United States Constitution.

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[17] Fifth Circuit Pattern Jury Instruction §10.1.

[18] Plaintiffs object to inclusion of an instruction on qualified immunity, incorporating their arguments above. **[Overruled; see below.]**

Plaintiffs claim that Defendants violated their First Amendment constitutional rights in four ways:

1. Defendants used the "Simple obstruction of a highway of commerce" and "Inciting to Riot" laws to stop Plaintiffs from their exercise of free speech because of the content or viewpoint they were expressing;
2. Defendants unreasonably restricted the time, place, or manner of Plaintiffs' speech;
3. Defendants arrested Plaintiffs as retaliation for Plaintiffs' speech; and
4. Defendants arrested Plaintiff Thomas Hutcherson to suppress his filming of BRPD officers in a public space in the course of their official duties.

If Plaintiffs prove any one of these four violations by Defendants, they have proven their First Amendment claim. You must then consider whether the Defendants are entitled to qualified immunity, which again is the bar to liability that I will discuss later.[19][20]

[19] Fifth Circuit Pattern Jury Instruction §10.1.

[20] Plaintiffs object to inclusion of an instruction on qualified immunity, incorporating their arguments above. **[Overruled; see below]**

## 1. First Amendment – Right to Protest as Protected Speech

Organized political protest is a form of classically political speech.[21] The First Amendment safeguards an individual's right to participate in the public debate through political expression and political association.[22] That safeguard reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.[23]

For that reason, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.[24] That protection extends to assembly, in part because effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.[25] Thus, police may not interfere with orderly, nonviolent protests merely because they disagree with the content of the speech or because they

[21] *Boos v. Barry*, 485 U.S. 312, 318 (1988).

[22] *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 203 (2014).

[23] *Id*. (internal citations omitted).

[24] *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 913 (1982) (internal quotations and citation omitted)); *see also McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 347 (1995) (political speech, especially that involving controversial issues, is "the essence of First Amendment expression.")

[25] *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

simply fear possible disorder.[26] And where some protesters are peaceful and others are not, the proper response to potential and actual violence is for the government to ensure an adequate police presence,[27] and to arrest only those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct.[28]

Sidewalks, streets, and parks owned by the government that have historically been used as places of assembly and communication are categorized as traditional public forums.[29] Public streets are a traditional public forum.[30] And streets and parks have for time out of mind been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.[31] And so, consistent with the traditionally open character of public streets and sidewalks the government's ability to restrict speech in such locations is very limited.[32] In particular, the guiding First Amendment principle that the government has no power to restrict expression

[26] *Jones v. Parmley*, 465 F-.3d 46, 56 (2nd Cir. 2006) (citing *Cox v. Louisiana*, 379 U.S. 536, 550 (1965)).

[27] *Cox v. Louisiana*, 379 U.S. 536, 551 (1965).

[28] *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996) (citing *Kunz v. New York*, 340 U.S. 290, 294–95 (1951)).

[29] *United States v. Grace*, 461 U.S. 171, 179 (1983); *Hague v. CIO*, 307 U.S. 497, 515 (1939).

[30] *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

[31] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citing *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802 (1985))

[32] *McCullen v. Coakley*, 134 S.Ct. 2518, 2529, 573 U.S. 464 (2014); *see also Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (noting "government entities are strictly limited in their ability to regulate private speech" in "such 'traditional public fora'" as public streets and parks).

because of its message, its ideas, its subject matter, or its content applies with full force in a traditional public forum.[33]

That said, First Amendment protections, while broad, are not absolute.[34] The government has somewhat wider leeway to regulate features of speech unrelated to its content.[35] Even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.[36]

Thus, for example, the government has the right place reasonable restrictions on demonstrations to keep their streets open and available for movement, but that does not allow the City to exercise unbridled discretion, selective enforcement, or invidious discrimination against those exercising their rights.[37]

Further, it is clear that government officials may stop or disperse public demonstrations or protests where clear and present danger of riot, disorder,

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[33] *McCullen*, 573 U.S. at 477 (citations omitted).

[34] *Jones*, 465 F.3d at 56–57 (citations omitted).

[35] *McCullen*, 134 S. Ct. at 2529.

[36] *McCullen*, 134 S. Ct. at 2529..

[37] Doc. 347, Ruling on Motions for Summary Judgment, at pg. 44 (citing *Cox I*, 379 U.S. at 354–55, 557–58).

interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears.[38]

Finally, the government cannot allow an individual to protest at a particular location and then, without justification, revoke the order.[39] But the government can do so in the event of a breach of the peace, violence, or riotous behavior.[40]

~~**a. Defendants' Proposed Additional Instruction on Right to Protest**[41]~~

~~However, the "First Amendment does not protect violence."[42] And as a general matter, "[n]o federal rule of law restricts a State from imposing tort liability" for damages "that are caused by violence and by threats of violence."[43] But where otherwise tortious conduct "occurs in the context of constitutionally protected activity ... 'precision of regulation' is demanded."[44] Such protected activity "imposes restraints on the grounds that may give rise to damages~~

[38] *Jones*, 465 F.3d at 56–57 (citations omitted).

[39] *Imani*, Doc. 347, Ruling on Motions for Summary Judgment, at pg. at 44-45.

[40] *Id.* at 45.

[41] **Court's Ruling:** The Court finds that the instructions which the Court has opted to include (taken largely from the *Imani* instructions) captures better the balancing of policy concerns that must take place. That said, the Court will hear argument from the parties on whether they still want to include Defendants' proposed instructions.

[42] *Doe v. McKesson*, 71 F.4th 278, 290 (M.D. La. 06/16/2023) (on appeal).(*citing NAACP v. Claiborne Hardware*, 458 U.S. 886, 916 (1982)).

[43] *Id.*

[44] *Id.* (*quoting NAACP v. Button*, 371 U.S. 415, 438 (1963)).

liability and on the persons who may be held accountable for those damages."[45] Although the specific contours of these limitations are not enumerated, the guiding principle is to ensure that any liability is molded to prevent wrongful conduct, not stifle legitimate expressive activity.[46]

### b. Plaintiffs' Proposed Additional Instruction on Right to Protest

Sidewalks, streets, and parks owned by the government that have historically been used as places of assembly and communication are categorized as traditional public forums.[47] Public streets are a traditional public forum.[48] And streets and parks have for time out of mind been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[49] And

[45] *Claiborne Hardware*, 458 U.S. at 916.

[46] *Doe v. McKesson*, 71 F.4th 278, 290 (5th Cir. 2023) .

[47] *United States v. Grace*, 461 U.S. 171, 179 (1983); *Hague v. CIO*, 307 U.S. 497, 515 (1939).

[48] *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

[49] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (citing *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802 (1985))

~~so, consistent with the traditionally open character of public streets and sidewalks the government's ability to restrict speech in such locations is very limited.~~[50][51]

~~As a result, even where protesters "violate the law by entering the roadway and obstructing traffic," arrests will be subject to the "'exacting scrutiny' to which restrictions on First Amendment rights to political speech and assembly are subject."~~[52][53]

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[50] *McCullen v. Coakley*, 134 S. Ct. 2518, 2529, 573 U.S. 464 (2014); *see also Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (noting "government entities are strictly limited in their ability to regulate private speech" in "such 'traditional public fora'" as public streets and parks).

[51] Defendants' Objection: Misapplication of jurisprudence to the facts here. Namely, in *Frisby*, the context of public street being categorized as a traditional public forum was limited to a narrow, residential street. *Frisby* states, in pertinent part:

Our prior holdings make clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood. In Carey v. Brown—which considered a statute similar to the one at issue here, ultimately striking it down as a violation of the Equal Protection Clause because it included an exception for labor picketing—we expressly recognized that "public streets and sidewalks in residential neighborhoods," were "public for[a]." 447 U.S., at 460–461, 100 S.Ct., at 2289–2291. Frisby, 487 U.S. at 480.

Unlike *Frisby* and the similar line of cases, this protest took place on and around a four-lane State Highway near its intersection with an interstate entrance ramp. Public safety issues take a higher priority under such circumstances.

**Court's ruling**: **Overruled in part and sustained in part**. The Court will leave this paragraph in (included above), but will balance it by stating how the City/Parish can act to ensure that the roadways stay clear and that order is maintained.

[52] *Lucha Unida de Padres y Estudiantes*, 470 F. Supp. 3d 1021 (D. Ariz. 2020).

[53] Defendants' Objection: Unfairly prejudicial application of complete language from the non-binding jurisprudence. It reads in its entirety:

"[T]he First Amendment protects the "freedom to associate with others for the common advancement of political beliefs and ideas." *Kusper v. Pontikes*, 414 U.S. 51, 56–57, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973). However, the right to associate is not absolute. *Perry v. Schwarzenegger*, 591 F.3d 1126, 1139 (9th Cir. 2009). "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623, 104 S.Ct. 3244. "The government must justify its actions not only when it imposes direct limitations on associational rights, but also when government action 'would have the practical effect of discouraging the exercise of constitutionally protected political rights." *Schwarzenegger*, 591 F.3d at 1139 (internal citations and quotations omitted). "Such actions have a chilling effect on, and therefore infringe, the exercise of fundamental

~~Furthermore, "the government cannot allow an individual to protest at a particular location and then, without justification, revoke the order."~~[54][55]

## 2. Content and Viewpoint Discrimination

Under the First Amendment, the government may not regulate speech based on its substantive content or the message it conveys.[56] Above all else, the First Amendment means that government' generally has no power to restrict expression because of its message, its ideas, its subject matter, or its content.[57]

Accordingly, the first step in a First Amendment inquiry is to determine whether a challenged restriction on speech is either content based or content neutral.[58] Government regulation of speech is content based if a law applies to

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rights." *Id.* "Accordingly, they must survive exacting scrutiny." *Id. Lucha Unida de Padres y Estudiantes*, 470 F. Supp. 3d at 1039. [**Court's ruling: Objection sustained in part and overruled in part**. Again, the above language, taken from *Imani*, adequately governs the law in this area.]

[54] *Imani*, ECF No. 347 at 44–45.

[55] Defendants' Objection: Relevance. This application of language from *Imani* goes against the *in limine* topic previously discussed and maintained by the Defendants as to be excluded. No facts of this case have been presented to demonstrate a comparison in the *Imani* protest of July 10, 2016 with the events of this *Tennart* protest of July 9, 2016. E.g., Whether officers gave orders as to locations for allowable protest and then, "without justification, revoke the order." [**Court's ruling**. The objection is **deferred in part** and **sustained in part.** The Court will keep this language in the jury instructions for now, until the close of Plaintiff's case in chief, when it can determine if the language is relevant to the facts of this case. However, if the Court does include this language, it will also include the following language also used in *Imani*: "But the government can do so in the event of a breach of the peace, violence, or riotous behavior." *Cox v. State of La.*, 379 U.S. 536, 551 (1965).

[56] *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 350 (5th Cir. 2001) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 828 (1995)).

[57] *Barr v Am. Assn. of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346, 591 U.S. ____ (2020) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

[58] *Denton v. City of El Paso, Texas*, 861 F. App'x 836, 839 (5th Cir. 2021) (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015)).

particular speech because of the topic discussed or the idea or message expressed.[59] If it is content-based, the restriction on protected First Amendment expression is presumptively unconstitutional.[60] A restriction is content neutral if it 'serves purposes unrelated to the content of the expression, even if it has an incidental effect on some speakers or messages but not others.[61] If the government treatment of speech is content based, the government must show that its restriction is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.[62] Narrow tailoring requires that the regulation be the least restrictive means available to the government.[63] ~~it will violate the First Amendment unless the government uses the least restrictive means available to the government.~~[64]

A restriction may also be viewpoint-based if the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.[65] If

[59] *Id*. (citations omitted).

[60] *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

[61] *Denton*, 861 F. App'x at 839 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

[62] *Imani*, Doc. 347, Ruling on Motions for Summary Judgment, at pg. 35–36 (citing *Denton*, 861 F. App'x at 839 (cleaned up))

[63] *Id*.

[64] *Imani*, R. Doc. 347 at 47 (citing *Denton*, 861 F. App'x at 839 (cleaned up)).

[65] *Heaney v. Roberts,* 846 F.3d 795, 802 (5th Cir. 2017).

the government's treatment of the speech is viewpoint based, the restriction will necessarily violate the First Amendment.[66]

~~The first of Plaintiffs' four First Amendment Claims is that Defendants' suppression of their speech was content-based. To establish that Defendants violated a plaintiff's rights under the First Amendment by content or viewpoint discrimination, the plaintiff must prove the following elements by a preponderance of the evidence:~~

~~1. The plaintiff engaged in speech or conduct protected by the First Amendment. I instruct you that participating peacefully in a protest is protected activity under the First Amendment; and~~

~~2. The defendant's actions were motivated by the content and/or viewpoint of plaintiff's speech. and~~

~~3. Defendants' arrest of Plaintiffs under "Simple obstruction of a highway of commerce" or "Inciting to riot" laws was not the least restrictive means available to achieve a compelling government interest.~~[67][68]

[66] *Heaney v. Roberts*, 147 F. Supp. 3d 600, 606 n.4 (E.D. La. 2015), *aff'd*, 846 F.3d 795 (5th Cir. 2017).

[67] *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); *Denton v. City of El Paso*, 861 F. App'x 836, 839 (5th Cir. 2021) ("Narrow tailoring requires that the regulation be the least restrictive means available to the government.").

[68] Defendants' Objection to formulation of elements of content and viewpoint discrimination: Unfairly prejudicial as narrative argument. [**Court's Ruling: Objection sustained in part and deferred in part**. The Court agrees with Defendants that these elements are redundant to the description of the claim listed above. Additionally, this formulation of the elements may not be entirely correct. Specifically, it appears as though it is the Government's burden to justify its conduct:

> When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. *Greater New Orleans Broadcasting Assn., Inc. v. United States,* 527 U.S. 173, 183, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999) ("[T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction"); *Reno,* 521 U.S., at 879, 117 S.Ct. 2329 ("The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective ..."); *Edenfield v. Fane,* 507 U.S. 761, 770–771, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) ("[A] governmental body seeking to sustain a restriction on commercial speech

### 3. Unreasonable restriction on time, manner, or place of Speech

Plaintiffs' second claim under the First Amendment is that, regardless of whether Defendants' actions were motivated by content or viewpoint discrimination (that is, the acts were "content neutral"), Defendants violated Plaintiffs' rights because their acts enforcing these statutes were not narrowly tailored to serve a significant governmental interest.[69] That said, to be constitutionally permissible, a time, place, and manner restriction need not be the least restrictive or least intrusive means of serving the government's interests.[70]

The Government may engage in content-neutral restrictions of speech in public spaces, but the restrictions must be justified without reference to the content of the regulated speech, narrowly tailored to serve a significant governmental

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must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"); *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) ("[T]he State bears the burden of justifying its restrictions ..."); *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 509, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) ("In order for the State ... to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"). When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. "Content-based regulations are presumptively invalid," *R.A.V. v. St. Paul,* 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), and the Government bears the burden to rebut that presumption.

*United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816–17 (2000). The elimination of Plaintiffs' proposed elements and the above addition seems to remedy this problem as well as any confusion that may arise between content-based regulations (which are presumptively unconstitutional) and viewpoint based ones (which are necessarily so). However, the Court is willing to entertain a revised listing of elements, if the parties choose to submit new ones.

[69] *Turner v. Lieutenant Driver*, 848 F.3d 678, 690 (5th Cir. 2017) (citing *McCullen*, 573 U.S. at 486).

[70] *Turner*, 848 F.3d at 690 (*citing McCullen*, 134 S. Ct. at 2535).

interest, and leave open ample alternative channels for communication of the information.[71] Such a narrow tailoring is demonstrated if the restriction does not burden substantially more speech than is necessary to further the government's legitimate interests.[72]

~~Therefore, to prevail on this claim, Plaintiff's must prove the following elements by a preponderance of the evidence:~~

~~1. The plaintiff engaged in speech or conduct protected by the First Amendment. I instruct you that participating peacefully in a protest is protected activity under the First Amendment;~~

~~2. Defendant's arrest of Plaintiff under "Simple obstruction of a highway of commerce" or "Inciting to riot" laws burdened substantially more speech than necessary to further a significant government interest.~~

~~3. Defendants' restrictions on plaintiff's speech provided insufficient alternatives for Plaintiffs to protest.~~[73]

### 4. Retaliatory Arrest[74]

The third basis for Plaintiffs' allegation that BRPD officers violated their First Amendment rights is that BRPD officers detained and arrested them as retaliation

[71] *McCullen v. Coakley*, 573 U.S. 464, 477 (2014)

[72] *McCullen*, 573 U.S. at 486.

[73] Defendants' Objection to elements of unreasonable restriction on time/place/manner : Unfairly prejudicial as narrative argument without citation to jurisprudence. **Court's ruling**: **Objection sustained**, for the reasons given above..

[74] Largely taken from Model Civ. Jury Instr. 9th Cir. 9.11 (2022), to the extent consistent with *Imani*, 614 F. Supp. 3d at 356–57.

for their free-speech activities: their presence at the protest and the statements they directed to BRPD Officers and the City/Parish.

As a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech. To prevail on a First Amendment retaliation claim, Plaintiff must prove the following elements by a preponderance of the evidence:

(1) Plaintiff was engaged in a constitutionally protected activity;

(2) Defendant's actions against the Plaintiff would chill a person of ordinary firmness from continuing to engage in the protected activity; and

(3) Plaintiff's protected activity was a substantial or motivating factor in the defendant's conduct.

As to the first, I instructed you in the previous sections on how to determine if Plaintiffs were engaged in activity protected by the First Amendment.[75]

For the second element, in deciding whether the officer's action would likely deter a similarly situated person from engaging in protected First Amendment activity, you should consider only whether the officer's action would deter an ordinary person in the Plaintiffs' circumstances. It is not relevant whether a

[75] This sentence was added to the 9th Circuit pattern charge to put into context the sections that follow.

particular plaintiff in this case was actually prevented from exercising his or her constitutional rights.

Further,[76] an officer's motive or intent at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind. In determining whether a Plaintiff's participation in protected activity was a substantial or motivating factor in the officer's decision to take an action against the Plaintiff, you may consider any statements made or act done or admitted by the officer, and all other facts and circumstances in evidence indicating the officer's state of mind. You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts to find from the evidence received during this trial.

Additionally, as to the third element, plaintiffs must generally prove the absence of probable cause.[77] The presence of probable cause generally speaks to the objective reasonableness of an arrest and suggests that the officer's animus is not what caused the arrest.

However, there is a narrow exception to this no-probable-cause requirement. Plaintiffs must present objective evidence that they were arrested when otherwise

[76] 1A Kevin F. O'Malley, et al., *Federal Jury Practice & Instruction* § 17:07 (6th ed. 2023).

[77] Derived from notes to the Ninth Circuit's pattern charge.

similarly situated individuals not engaged in the same sort of protected speech had not been.

If you find that Plaintiffs were treated differently from other similarly situated people and if Plaintiffs have overcome the no-probable cause requirement,[78] then you must ask whether exercise of their free-speech rights was a but-for cause of the officers' decision to arrest Plaintiffs. In other words, if it were not for Plaintiffs' exercise of their free speech rights, is it more likely than not that they would not have been arrested by the officers? If yes, then the arrest was retaliatory and a violation of their First Amendment Rights.

Lastly, the City/Parish may be held liable if you find that BRPD Officers were acting according to a City/Parish policymaker's orders and those orders were motivated by a desire to retaliate against the Plaintiffs' and protesters' speech on July 9, 2016. I will explain to you more in detail later about the circumstances for imposing liability on the City/Parish.[79]

If the Plaintiffs establishes each of the above three elements, the burden shifts to Defendant to prove by a preponderance of the evidence that Defendants would have taken the action(s) in question, even in the absence of any motive to retaliate

[78] *Kokesh v. Curlee*, 422 F. Supp. 3d 1124, 1132 (E.D. La. 2019) ("courts do not reach the causation analysis described above unless the plaintiff establishes an absence of probable cause." (citing *Nieves*, 139 S. Ct. at 1722)).

[79] The Court proposes this addition to ensure compliance with *Monell*, but the Court is willing to entertain argument on it.

against Plaintiff. If you find that Defendants were able to demonstrate this, you must find for the Defendants. If you find that the defendant was not able to demonstrate this, then Plaintiff has established a constitutional violation, and you must next determine if Plaintiffs are entitled to qualified immunity, which is a bar to liability I will discuss later.

~~The first question to consider is whether the officers had probable cause to arrest Plaintiffs. If Plaintiffs have shown that officers did not have probable cause for the arrest, and you next determine that qualified immunity does not apply,[80] then you must then decide whether Plaintiffs have established, by a preponderance of the evidence, that their exercise of free-speech rights was a but-for cause of the officers' decision to arrest them. By a "but-for cause" I mean that if it weren't for Plaintiffs' exercise of their free speech rights, the officers would not have arrested them. So, if you find no probable cause for Plaintiffs' arrests and that their exercise of free speech rights was the but-for cause of the arrest, then the BRPD Officers committed a retaliatory arrest in violation of Plaintiffs' First Amendment rights.[81]~~

[80] Plaintiffs object to the inclusion of this clause on qualified immunity—"and you next determine that qualified immunity does not apply" —as discussed in detail above. [**Court's Ruling: Overruled in part and sustained in part.** The qualified immunity instruction will be included, but as stated below.]

[81] Defendants' objection to this paragraph: No citation to jurisprudence. Narrative argument, unfairly prejudicial. [**Court's Ruling: Objection sustained.** The Court has opted to use the 9th Circuit pattern charge, which is more consistent with *Imani* and Supreme Court law]

~~Alternatively, if you earlier found that BRPD officers did have probable cause for the arrest, then there may still have been a violation of Plaintiffs' First Amendment rights. You must consider whether Plaintiffs have proved that other similarly situated people not engaged in the same sort of speech as Plaintiffs were *not* arrested.~~[82]

~~Here, "similarly situated" means people who were engaged in the similar conduct except for the particular speech Plaintiffs were engaged in. For example, many people unlawfully jaywalk at intersections, but police officers very rarely arrest people for jaywalking. If the police arrest a person for jaywalking who is vocally speaking out about police conduct, then he has been treated differently than those jaywalkers who do not criticize the police while jaywalking who the police did not arrest.~~[83][84]

[82] Defendants' objection to this paragraph: No citation to jurisprudence. Narrative argument, unfairly prejudicial. **[Court's Ruling: Objection sustained.** The Court agrees that this example, while coming from *Nieves*, is argumentative.]

[83] *Nieves v. Bartlett*, 587 U.S. __, 139 S. Ct. 1715, 1727 (2019) ("For example, at many intersections, jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest. In such a case, because probable cause does little to prove or disprove the causal connection between animus and injury, applying *Hartman*'s rule would come at the expense of *Hartman*'s logic.")

[84] Defendants' Objection: Relevance. The analogy of a singular jaywalker for purpose of *Nieves* case wherein a singular intoxicated man yelled at police officers in a negative manner and was arrested for it is not analogous to thousands of people converging in the Greater Baton Rouge area for the express purpose of protesting with the potential for interference in public safety and general welfare. **[Court's Ruling: Objection sustained**, but for the reasons given above rather than for Defendants' reasons.]

~~Objective evidence of different treatment for "similarly situated" people can come in several forms.[85] Plaintiffs may point to specific people who were not engaging in First Amendment activity but were otherwise similarly situated and not arrested by BRPD; for example, they stepped foot in a roadway but were not engaged in protest and were not arrested. Another form of objective evidence might be data or statistics on how often arrests are made under a statute. Or Plaintiffs may point to statements of officers or policy makers that demonstrate the retaliatory intent behind the arrests.~~

~~If you find that Plaintiffs were treated differently from other similarly situated people, then you must ask whether exercise of their free-speech rights was a but-for cause of the officers' decision to arrest Plaintiffs. In other words, if it were not for Plaintiffs' exercise of their free speech rights, is it more likely than not that they would not have been arrested by the officers? If yes, then the arrest was retaliatory and a violation of their First Amendment Rights.[86]~~

[85] In light of the recent grant of certiorari in *Gonzalez v. Trevino*, 42 F.4th 487 (5th Cir. 2022), *cert. granted*, No. 22-1025, 2023 WL 6780371 (Oct. 13, 2023), the Supreme Court will consider the circuit split giving rise to the questions presented: "1. Whether the *Nieves* probable cause exception can be satisfied by objective evidence other than specific examples of arrests that never happened. 2. Whether the *Nieves* probable cause rule is limited to individual claims against arresting officers for split-second arrests." Plaintiffs recognize that the Fifth Circuit's panel opinion is *Gonzaelez* is binding on this Court pending the Supreme Court's decision. They propose to include the language in this instruction and a parallel jury interrogatory to preserve their rights and to determine whether the jury makes its finding on retaliatory arrest based on the Fifth Circuit's interpretation of *Nieves* or instead upon the more flexible standard favored by the Ninth and Seventh Circuits. **[Court's Ruling:** The Court will hear argument on this issue, but the Court is not inclined to provide alternative verdict questions to the jury in a case this complicated. Further, neither party has moved to stay the case pending a determination by the Supreme Court on whether *Gonzales* should be overruled. Therefore, the Court is tentatively not including this, but it will hear argument on the issue.]

[86] **[Court's Note:** The remaining paragraphs have been included, but they have been re-arranged in the instruction.

~~Lastly, the City/Parish may be held liable if you find that BRPD Officers were acting according to a City/Parish policymaker's orders and those orders were motivated by a desire to retaliate against the Plaintiffs' and protesters' speech on July 9, 2016.~~

~~In deciding whether the defendant's action would likely deter a similarly situated person from engaging in protected First Amendment activity, you should consider only whether the officer's action would deter an ordinary person in the plaintiff's circumstances. It is not relevant whether a particular plaintiff in this case was actually prevented from exercising their constitutional rights.~~

~~An officer's motive or intent at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind. In determining whether a plaintiff's participation in protected activity was a substantial or motivating factor in the officer's decision to take an action against the plaintiff, you may consider any statements made or act done or admitted by the officer, and all other facts and circumstances in evidence indicating the officer's state of mind. If you find that a plaintiff has proved all of the three elements listed above by a preponderance of the evidence, you must return a verdict for that plaintiff. However, if you find that the plaintiff did not prove any one or more of these elements as to a particular defendant, then you must find for that defendant on this claim.~~

### 5. **Right to record interactions with police officers**

Plaintiff Thomas Hutcherson claims that BRPD officers arrested him to stop his recording of the protests on July 9, 2016. The First Amendment protects freedom of speech and freedom of the press.[87] News-gathering, for example, is entitled to first amendment protection, for without some protection for those seeking out the news, freedom of the press could be eviscerated, even though this right is not absolute.[88] Further, there is an undoubted right to gather news from any source by means within the law.[89]

In addition to the First Amendment's protection of the broader right to film, the principles underlying the First Amendment support the particular right to film or record the police.[90]

But, this right is not without limitations.[91] Like all speech, filming the police may be subject to reasonable time, place, and manner restrictions.[92] When police departments or officers adopt time, place, and manner restrictions, those restrictions

[87] *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017).

[88] *Turner*, 848 F.3d at 688.

[89] *Turner*, 848 F.3d at 688.

[90] *Turner*, 848 F.3d at 689.

[91] *Id*. (quoting *Glik*, 655 F.3d at 84).

[92] *Id*. (cleaned up).

must be narrowly tailored to serve a significant governmental interest.[93] To be constitutionally permissible, a time, place, and manner restriction need not be the least restrictive or least intrusive means of serving the government's interests.[94] As long as the restriction promotes a substantial governmental interest that would be achieved less effectively without the restriction, it is sufficiently narrowly tailored.[95]

~~To prevail on this claim, Plaintiff Hutcherson must prove by a preponderance of the evidence that:~~[96]

~~1. He was filming police officers in a public space while officers were engaged in their official duties.~~

~~2. Defendants acted to prevent Mr. Hutcherson from continuing to film police officers.~~

~~3. Defendants' prevention of Mr. Hutcherson's filming restricted substantially more speech than would have been necessary to further a significant government interest.~~

~~4. Defendants provided insufficient alternatives for Mr. Hutcherson to~~

[93] *Id*. (*quoting McCullen v. Coakley*, 573 U.S. 464, 134 S. Ct. 2518, 2529 (2014)).

[94] *Id*. (quoting *McCullen*, 134 S. Ct. at 2535 (internal quotation marks omitted)).

[95] *See Imani*, Doc. 347, Ruling on Motions for Summary Judgment, at pg. 35–36 (describing law governing intermediate scrutiny) (citing *Denton*, 861 F. App'x at 839 (cleaned up))

[96] Defendants' Objection to right-to-record elements: Unfairly prejudicial as narrative argument without citation to jurisprudence. **[Court's Ruling: Objection sustained**, in part for Defendant's reasons, and in part for the burden shifting described above. Again, the Court will entertain a request for further instructions on this issue, but the Court believes this instruction adequately governs the law.]

~~record the police response to the protest.~~

**6. First Amendment – Conclusion**

As to each of these claims, if you find that an individual BRPD Officer violated the First Amendment, then you must consider whether that BRPD Officer is entitled to qualified immunity, which is a bar to liability that I will explain later. If Plaintiff failed to make this showing set out above, then Defendants did not commit a First Amendment violation, and your verdict will be for Defendants on that First Amendment claim.

### iii. Failure to intervene / Bystander Liability[97]

Plaintiffs contend that a group of Defendants violated their First and Fourth Amendment rights by arresting them and using excessive force against them and that another group of bystander Defendants who themselves did not physically arrest or use force against Plaintiffs are also liable for those violations because these bystander Defendants failed to intervene to stop unlawful arrests and/or excessive force.

Bystander Defendants are liable for a violation of constitutional rights if Plaintiffs have proven all of the following four things by a preponderance of the evidence:

[97] Model Civ. Jury Instr. 3rd Cir. 4.6.2, *Section 1983 — Liability in Connection with the Actions of Another — Failure to Intervene* (2023).

(1) A law enforcement officer violated plaintiff's constitutional rights.

(2) Defendant knew that a fellow officer was violating plaintiff's constitutional rights;

~~Defendant had a duty to intervene to prevent the violation of constitutional rights.~~

~~a. Regarding this requirement that Plaintiffs prove that the Defendants had a duty to intervene, I instruct you that police officers have a duty to intervene to prevent an unlawful arrest or the use of excessive force by fellow officers.~~

(3) Defendant had a reasonable opportunity to prevent the excessive use of force or the arrest.

(4) Defendant failed to intervene.

~~I will now turn to Plaintiffs' claims that BRPD officers violated their First Amendment rights.~~

### iv. Qualified Immunity[98]

[98] Plaintiffs object to the inclusion of any instruction on qualified immunity. With the exception of Zachary Hill's unlawful-arrest claim, the Court denied Defendants' assertions of qualified immunity in its disposition of Defendants' summary-judgment motion. (ECF No. 386). As the Pattern Jury Instructions note, "The qualified-immunity issue 'ordinarily should be decided by the court long before trial.'" Fifth Circuit Pattern Jury Instructions § 10.3 n.1 (citing *McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000)). Only if qualified immunity has *not* been decided pretrial should a jury "determine the objective reasonableness of the officers' conduct." *Id.* (citing *Snyder v. Trepangier*, 142 F.3d 791, 799 (5th Cir. 1998)). Here, Defendants' summary-judgment motion unambiguously asserted qualified immunity as a defense to all of Plaintiffs' claims. (ECF No. 347-1 at 4, 6–8, 30.) Defendants chose to concentrate their arguments on the first prong of qualified immunity analysis: whether the evidence demonstrated violation of a clearly established right. (*Id.*) Plaintiffs' opposition to summary judgment explicitly argued against both prongs of the qualified immunity analysis. (*See, e.g.*, ECF No. 364 at 20–22, 26, 28.) In their reply, Defendants did not provide any argument on qualified immunity; Defendants' only mention of qualified immunity was the passing statement in the concluding sentence of their brief praying that the Court dismiss Plaintiffs' claims without argument: "Rather than engage in a legal shouting match, defendants urge the Court to look at the record, and dismiss plaintiffs' claims, by way of qualified immunity or otherwise." (ECF No. 368 at 7.) The Court denied Defendants' summary-judgment motion, noting that there was ample evidence of Defendants' violations of Plaintiffs' rights. (*See, e.g.*, ECF no. 386 at 12–14 (denying summary judgment on excessive force claims because evidence demonstrated that plaintiffs "suffered at least some harm from the uses of force" and that said force could be found objectively unreasonable because all alleged claims were minor traffic violations, none of the plaintiffs posed an immediate danger to officer safety or committed acts of violence, and that none attempted to flee). As the Court's ruling on Defendants' qualified immunity defenses issued over a year ago, the time for Defendants to seek reconsideration or an interlocutory appeal on the legal question of "whether a given course of conduct would be objectively unreasonable in light of clearly

As to each claim for which Plaintiffs have proved each essential element, you must consider whether each Defendant (other than the City/Parish) is entitled to what the law calls "qualified immunity." Qualified immunity bars a defendant's liability even if he or she violated a plaintiff's constitutional rights. Qualified immunity exists to give government officials breathing room to make reasonable but mistaken judgments about open legal questions. Qualified immunity provides protection from liability for all but the plainly incompetent government officers, or those who

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established law," *Mote v. Walthall*, 902 F.3d 500, 504 (5th Cir. 2018), has long since expired. Defendants' qualified immunity defense has therefore been thoroughly adjudicated.

Plaintiffs reserve the right to further object, at the close of evidence, that there is no evidentiary basis for an instruction on qualified immunity.

Defendants respond that denial of their motion for summary judgment does not bar the assertion of that defense at trial. Further, Plaintiffs did not file a motion for summary judgment or other dispositive motion to preclude the defense at trial.

[**Court's ruling:** Plaintiff's first objection to this charge is **overruled**. The Court ruled that there were sufficient questions of fact on the issue of qualified immunity for the matter to go to the jury. The Court did not rule that a reasonable jury could also not find in Defendant's favor on these claims. Such a ruling would have been inappropriate anyway, as Plaintiffs did not move for summary judgment on the issue of qualified immunity. In short, this issue is properly before the jury.]

If there were to be a qualified-immunity instruction to the jury, Plaintiffs further object that Defendants' proposed instruction unnecessarily departs from the Pattern Jury Instruction, particularly in paragraph two of the proposed instruction and provides insufficient instruction on relevant "clearly established law." The clearly established law relevant here is what has been clearly established to be an unlawful arrest, an arrest using excessive force, a suppression of First Amendment rights, and a failure to intervene to prevent such violations. Statutory definitions of charges may be relevant to these inquiries but, standing alone, are insufficient.

**[Court's ruling:** Plaintiff's second objection to this charge is **sustained**. The Court agrees that Defendants' proposed charge deviates too far from the Fifth Circuit pattern jury instruction. The Court has attempted to make the charge as consistent with the Fifth Circuit pattern charge as possible, moving the entire charge to after the constitutional violations and keeping to the language in the pattern charge, except as highlighted below. These changes were intended to simplify things as much as possible and to make the charges consistent with the *Imani* instructions, which captured things well.]

knowingly violate the law. It is Plaintiffs' burden to prove by a preponderance of the evidence that qualified immunity does not apply in this case.

Qualified immunity applies if a reasonable officer could have believed that the arrests and the uses of force were lawful in light of the information that Defendants possessed and the clearly established law articulate above governing the First and Fourth Amendments. But a BRPD Officer Defendant is not entitled to qualified immunity if, at the time of the July 9, 2016, arrests and uses of force, a reasonable officer with the same information could not have believed that his or her actions were lawful. Law enforcement officers are presumed to know the clearly established constitutional rights of individuals they encounter.

~~In this case, the clearly established law at the time was that [specify what constitutes the clearly established law.6]~~

If, after considering the scope of discretion and responsibility generally given to BRPD officers in performing their duties and after considering all of the circumstances of this case as they would have reasonably appeared to the Defendants at the time of the arrests and uses of force, you find that Plaintiffs failed to prove that no reasonable officer could have believed that the arrests and uses of force were lawful, then Defendants are entitled to qualified immunity, and your verdict must be for Defendants on those claims. But if you find that Defendants violated Plaintiffs'

constitutional rights and that Defendants are not entitled to qualified immunity as to those claims, then your verdict must be for Plaintiffs on those claims.

~~As to each claim for which Plaintiffs have proved each essential element, you must consider whether Defendant [name] is entitled to what the law calls "qualified immunity."[99] Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation."[100] Qualified immunity bars a defendant's liability even if he or she violated a plaintiff's constitutional rights. Qualified immunity exists to give government officials breathing room to make reasonable but mistaken judgments about open legal questions. Qualified immunity provides protection from liability for all but the plainly incompetent government officers or officials, or those who knowingly violate the law.[101]~~

~~An officer is due qualified immunity, "even if he did not have probable cause to arrest a suspect," so long as "a reasonable person in his position would have believed that his conduct conformed to the constitutional standard in light of the information available to him and the clearly established law."[102] Stated another~~

[99] Fifth Circuit Pattern Jury Instruction § 10.3.

[100] *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (*quoting Mitchell v. Forsyth*, 472 U.S. 511, 526, (1985)).

[101] *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

[102] *Perry v. Mendoza*, 83 F.4th 313, 317 (5th Cir. 09/23/23) (*citing Voss v. Goode*, 954 F.3d 234, 239 (5th Cir. 2020) (cleaned up) (*quoting Freeman v. Gore*, 483 F.3d 404, 415 (5th Cir. 2007).

~~way, officers who reasonably but mistakenly conclude that probable cause is present are entitled to immunity.~~[103]

~~It is Plaintiff's burden to prove by a preponderance of the evidence that qualified immunity does not apply in this case.~~[104] ~~Qualified immunity applies if a reasonable officer could have believed that the Plaintiffs' arrests were lawful in light of clearly established law and the information the officers possessed. *See Wilson v. Layne*, 526 U.S. 603, 615 (1999). But the officers are not entitled to qualified immunity if, at the time of the arrests, a reasonable officer with the same information could not have believed that his or her actions were lawful. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086 (2011) (citations omitted). Law enforcement officers are presumed to know the clearly established constitutional rights of individuals they encounter.~~

~~In this case, the applicable clearly established laws at the time were those as defined by La. R.S. 14:97 and La. R.S. 14:329, *et seq*., which state, respectively:~~

~~**La. R.S. 14:97. Simple Obstruction of a Highway of Commerce**~~

~~A. Simple obstruction of a highway of commerce is the intentional or criminally negligent placing of anything or performance of any act on any railway, railroad, navigable waterway, road, highway,~~

[103] *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2020) (*quoting Hunter v. Bryant*, 502 U.S. 224, 227 (1991)).

[104] *Jimenez v. Wood Cty*., 621 F.3d 372, 378 (5th Cir. 2010) (observing that burden is on plaintiff once defendant raises defense).

thoroughfare, or runway of an airport, which will render movement thereon more difficult.

B. Whoever commits the crime of simple obstruction of a highway of commerce shall be fined not more than two hundred dollars, or imprisoned for not more than six months, or both. La. R.S. 14:97.

**La. R.S. 14:329.2. Inciting to Riot**

Inciting to riot is the endeavor by any person to incite or procure any other person to create or participate in a riot. La. R.S. 14:329.2.

**La. R.S. 14:329.7. Punishment**

A. Whoever willfully is the offender or participates in a riot, or is guilty of inciting a riot, or who fails to comply with a lawful command to disperse, or who is guilty of wrongful use of public property, or violates any other provision hereof shall be fined not more than five hundred dollars or be imprisoned not more than six months, or both.

B. Where as a result of any willful violation of the provisions of R.S. 14:329.1 through 329.8 there is any serious bodily injury or any property damage in excess of five thousand dollars, such offender shall be imprisoned at hard labor for not more than five years.

C. Where, as a result of any willful violation of the provisions of R.S. 14:329.1 through 329.8, the death of any person occurs, such offender shall be imprisoned at hard labor for not to exceed twenty-one years. La. R.S. 14:329.7.

If, after considering the scope of discretion and responsibility generally given to the officers in performing their duties and after considering all of the circumstances of this case as they would have reasonably appeared to the officers at the time of the July 9, 2016 protest, you find that Plaintiffs failed to prove that no reasonable officer could have believed that Plaintiffs being in the roadway

~~during the protest or inciting a riot) was lawful, then the officers are entitled to qualified immunity, and your verdict must be for Defendants on those claims. But if you find that any Defendant violated any Plaintiff's constitutional rights and that the Defendant(s) is not entitled to qualified immunity as to that claim, then your verdict must be for the Plaintiff(s) on that claim.~~[105]

### v. Municipal Liability

In addition to their claims against BRPD officers, Plaintiffs are suing the City/Parish of East Baton Rouge~~, alleging violations of their constitutional rights and their rights under state law~~.[106] A city is not liable for the actions of its employees unless the constitutional violation was caused by a city's policy or custom.

I will first discuss the rights that Plaintiffs allege the City/Parish's employees to have violated. Plaintiffs allege that BRPD officers violated their Fourth Amendment rights in two ways: (1) by falsely detaining, arresting, and imprisoning them, and (2) by using excessive force to detain and arrest them.

Plaintiffs also alleges that the City/Parish violated their First Amendment rights when its officers arrested ~~him~~ them in retaliation for exercise of their freedom of expression.

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[105] Fifth Circuit Pattern Jury Instruction § 10.3.

[106] **Court's Note:** Minor change made by Court to make this more consistent with the pattern jury instructions and to avoid confusion arising from reference to state law claims.

To prevail on his claim against the City/Parish, Plaintiffs must prove by a preponderance of the evidence that:

(1) an official policy or custom existed;

(2) a policymaker for the city knew or should have known about the policy or custom;

(3) the policymaker was deliberately indifferent ~~to the consequences of the policy or custom~~;[107] and

(4) the policy or custom was the moving force leading to the constitutional violation.

A "policy" can be official without being stated in a formal document. While a policy can be a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the city's officers, it can also be a single decision or an order by an official with policy-making authority.[108]

A pattern is tantamount to official policy when it is so common and well-settled as to constitute a custom that fairly represents municipal policy.[109]

A "custom" is a persistent, widespread practice of City officials or employees that, although not formally adopted, is so common and well-settled that it fairly represents City policy. But to show a custom, Plaintiffs must prove that either the

[107] Removed to be consistent with the Fifth Circuit pattern instructions

[108] *See Imani v. City of Baton Rouge*, 614 F. Supp. 3d 306, 364 (M.D. La. 2022) (citing *Milam v. City of San Antonio*, 113 F App'x 622, 626 (5th Cir. 2004) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480–81, 484–85 (1986))).

[109] *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 850 (5th Cir. 2009) (citing *Piotrowski,* 237 F.3d at 579 (quoting *Webster v. City of Houston,* 735 F.2d 838, 841 (5th Cir.1984) (en banc)).

City/Parish's governing body or some official with policymaking authority knew or should have known about the custom.

Alternatively, an official policy or custom can exist under certain circumstances when a city ratifies its subordinate's conduct. Plaintiffs may show that the City/Parish ratified the officers' decisions by approving of the decisions and their ~~basis~~ bases later on. However, the theory of ratification is limited to extreme factual situations.[110] Ratification requires more than defending conduct that is later shown to be unlawful or making good faith statements in the defense of complaints of an employee's constitutional violations.[111] Rather, to establish ratification, the subordinate's actions must be sufficiently extreme, such as an obvious violation of clearly established law.[112]

~~An official to whom final policy-making authority has been delegated is an official whose actions can be said to represent a decision of the municipal entity itself.~~ [113] ~~The policy-making official may cause injury by issuing orders, by~~

[110] Defendants' Objection: no citation; the statement is argument narrative that is unfairly prejudicial in favor of Plaintiff. **Court's ruling**: Defendant's Objection is **overruled in part and sustained in** part. Ratification is a viable theory, and the proposed language comes from *Peterson*. To this extent, the objection is overruled. However, the Court agrees with Defendants that the instructions provide insufficient guidance on ratification liability, so the additional language has been inserted.

[111] *See Davidson v. City of Stafford*, 848 F.3d 384, 395 (5th Cir. 2017), as revised (Mar. 31, 2017).

[112] *World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 755 (5th Cir. 2009).

[113] **Court's Note:** The Court finds these two paragraphs to be confusing and redundant, so it has omitted them from the instructions. The Court is willing to entertain argument on them though, particularly if both sides agree on their inclusion.

~~ratifying a subordinate's decision and the basis for it, or by establishing a policy for municipal employees that, when followed by those employees, results in injury.~~

~~An official with final policy-making authority can delegate that authority to one or more subordinates. Likewise, an official with final policy-making authority can ratify the decisions of one or more subordinates after those decisions have been made. Either the delegation of authority to subordinates or the ratification of the subordinates' decisions makes those decisions the policy of the municipality.~~

For an official to act with deliberate indifference, the official must ~~both~~ be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists or a violation of constitutional rights exists, and he must also draw the inference. To prove deliberate indifference, Plaintiffs must show more than simple or even heightened negligence.[114]

Again, Plaintiffs must show that the municipal policy was the "moving force" that caused the specific constitutional violation.[115] In other words, the plaintiff must establish a direct causal link between the municipal policy and the constitutional injury.[116]

~~**a. Defendants' Proposed Additional Instruction on**~~

[114] *Imani*, 614 F. Supp. 3d at 364 (quoting *Valle*, 613 F.3d at 542).

[115] *Imani*, 614 F. Supp. 3d at 364 (quoting *Valle*, 613 F.3d at 546).

[116] *Imani*, 614 F. Supp. 3d at 364 (quoting *Valle*, 613 F.3d at 546).

**~~Municipal Liability~~**[117]

~~Deliberate indifference requires proof of egregious conduct.~~[118] ~~Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference.~~[119]

~~In addition to culpability, there must be a direct causal link between the municipal policy and the constitutional deprivation.~~[120] ~~*Monell* describes the high threshold of proof by stating that the policy must be the "moving force" behind the violation.~~[121]

## B. State Law Claims

[117] Plaintiffs object to inclusion of this formulation of the deliberate indifference standard. The first sentence requiring proof of egregious conduct is drawn from Pattern Jury Instruction 10.8, which concerns Eighth Amendment deliberate-indifference-to-medical-care claims of prisoners. The following sentence in the pattern instruction illustrates why "egregious" is used here: "Only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." This line of authority is inapposite to *Monell* claims for police misconduct, which is better encompassed by the definition of "deliberate indifference" in the pattern jury instruction on Municipal Liability: "For an official to act with deliberate indifference, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists or a violation of constitutional rights exists, and he must also draw the inference." Defendants' suggested language of egregiousness creates an inappropriately high burden. Similarly, the qualification of the "moving force" requirement being a "high threshold of proof" is unduly prejudicial. Furthermore, the description of the necessity of a moving-force determination is already laid out in the pattern instruction in a more neutral manner. For these reasons, Plaintiffs object to the inclusion of this section. **Court's ruling**: The objection is **sustained in part and overruled in part**. The Court agrees that some of the Defendants' language is unduly prejudicial. The Court has included similar, more neutral language that is consistent with Fifth Circuit caselaw on municipal liability.

[118] *Cooper v. Johnson*, 353 F. App'x 965, 968 (5th Cir. 2009) (per curiam) ("A defendant's conduct must rise 'to the level of egregious conduct.'" (*quoting Gobert v. Caldwell*, 463 F.3d 339, 351 (5th Cir. 2006))).

[119] *Alderson*, *v. Concordia Par. Corr. Facility*, 848 F.3d 415, 420 (5th Cir. 2017) (*quoting Alton v. Tex. A & M Univ.*, 168 F.3d 196, 201 (5th Cir. 1999)).

[120] *Piotrowski*, 237 F.3d at 580.

[121] *Monell v. Dep't of Social Services,* 436 U.S. 658, 694 (1978); *see also Canton,* 489 U.S. at 389.

I am now going to explain the claims Plaintiffs raise under Louisiana state law. The rules of law governing the state law claims are sometimes different from those governing Federal constitutional claims. I will tell you directly whether a state law claim has specific rules for decision different than those governing Federal constitutional claims.

**i. Vicarious Liability**

Normally one person is not responsible for the conduct of another person who may have caused damage to someone. But in certain situations, the law imposes responsibility upon a person or entity—like a city or employer—for the conduct of another, if they are in a relationship which can serve as an appropriate basis for imposing such responsibility. The law calls this "vicarious liability," which simply means that one entity may be liable for the acts of another even though that first entity is not itself at fault. In this case, the ~~Baton Rouge Police Department and its~~ officers of the Baton Rouge Police Department are employees of the City of Baton Rouge and the Parish of East Baton Rouge.

The ~~City or Parish~~ City/Parish may be liable for the intentional tort of its employee if the employee's conduct is primarily employment-rooted. By that I mean that it is so closely connected in time, place and causation to his employment duties as to be regarded as a risk of harm fairly attributable to the employer's business.

If, however, the conduct of the employee was motivated entirely by personal issues or antagonisms, then the City/Parish is not liable for the conduct.

Because Louisiana state law holds an employer vicariously liable for the conduct of its employees, you do not need to find any official policy, or decision by a final policy-making official, in order to find that the employer is responsible for violations of the Louisiana constitution or law that damage individuals.[122]

### ii. Free Expression Protections of the La. Constitution

Plaintiffs allege that the City/Parish violated their rights to free expression under Article I, Section 7 of the La. Constitution. This claim is judged by the same standard as Plaintiffs' claims under the First Amendment of the U.S. Constitution. However, as I have just instructed you, if you find that individual employees of the City/Parish violated Plaintiffs' state constitutional rights to free expression as detailed above, then you must hold the City/Parish liable under state law for ~~its~~ their acts ~~under state law~~.

### iii. Right to Privacy, Right to be Left Alone, and Rights of the Accused

Similarly, Plaintiffs have alleged claims under Article I, § 5 of the La. Constitution for violations of their right to be left alone and their right to privacy, and under Article I, § 13 for the rights of the accused, which are judged under the

[122] **Court's Question:** Is there a stipulation that the officers were within the course and scope at all pertinent times? If not, is there a serious dispute that any of them were not within the course and scope?

same standard as Plaintiffs' claims under the Fourth Amendment of the U.S. Constitution.

**iv. Intentional Infliction of Emotional Distress**

A person who intentionally or recklessly causes severe emotional distress to another by virtue of extreme and outrageous conduct is liable for that emotional distress and for any bodily harm as a result.

By extreme and outrageous conduct, I mean conduct which is so extreme in degree and so outrageous in character, as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community.

In order to recover for intentional infliction of emotional distress, the plaintiff must establish that (1) the conduct of the defendant was extreme and outrageous, as I have defined that term for you; (2) the emotional distress which the plaintiff suffered was severe; and (3) the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct.

**v. False Imprisonment**

The City/Parish is subject to liability to Plaintiffs for BRPD Officers' false imprisonment of Plaintiffs if:

(1) BRPD Officers acted intending to confine Plaintiffs or a third person

within boundaries fixed by the Officers, and

(2) the Officers' acts directly or indirectly resulted in Plaintiffs' confinement, and

(3) Plaintiffs were conscious of the confinement or were actually harmed by it.

The confinement may be by actual or apparent physical barriers, by overpowering physical force, by submission to physical force, by submission to a threat to apply physical force to the plaintiff's person immediately if plaintiff goes or attempts to go beyond the area in which the defendant intended to confine him, by submission to duress other than threats of physical force, where such duress is sufficient to make the consent given ineffective to bar the action, or by taking the person into custody under an asserted legal authority.

**vi. Assault and Battery**

An assault took place if the BRPD officers intentionally placed Plaintiffs in imminent apprehension of a harmful or offensive contact when the BRPD Officers had the apparent ability to carry out the threatened conduct at that time.

Words alone may not be sufficient to constitute an assault. However, threats coupled with the present ability to carry out the threats are sufficient when a plaintiff is placed in reasonable apprehension of receiving an injury.

Battery is a harmful or offensive contact with a person resulting from an act intended to cause the plaintiff to suffer such a contact, under circumstances in which the defendant has no reason to think that the plaintiff would consent to such a contact.

A bodily contact is "offensive" if it offends a reasonable sense of personal dignity. "Harmful contact" is any physical impairment of another's body, or physical pain or illness.

However, police officers may legitimately employ reasonable force to perform their duties and preserve order.[123] Their use of force is privileged so long as the force used is not objectively unreasonable or excessive.

Whether the force used is reasonable depends upon the totality of the facts and circumstances in each case. You must evaluate the officer's actions against those of ordinary, prudent and reasonable men placed in the same position as the officers and with the same knowledge. In determining whether the force used by a police officer was unreasonable under the circumstances, factors to be considered are: (1) the known character of the arrestee, (2) the risks and dangers faced by the officers, (3) the nature of the offense involved, (4) the chance of the arrestee's escape if the particular means are not employed, (5) the existence of alternative methods of arrest,

[123] **Court's Note:** These two paragraphs have been added to the parties' proposed instruction to take into account the specific situation of assault and battery claims involving police officers. It has been derived from *Imani*, 614 F. Supp. 3d at 380–81 and *Golden v. Columbia Cas. Co.*, No. 13-547, 2015 WL 3650761, at *26 (M.D. La. June 11, 2015) (deGravelles, J.), with all citations omitted.

(6) the physical size, strength, and weaponry of the officers as compared to the arrestee, and (7) the exigency of the moment.

If you find that Plaintiffs have proved that it is more likely than not that BRPD officers used objectively unreasonable or excessive force, ~~intentionally harmfully or offensively touched Plaintiffs, causing them injury or damage,~~ then you must find for Plaintiffs on this claim. If Plaintiffs failed to make this showing as to the City/Parish's employees, then the City/Parish is not liable for battery, and your verdict will be for the City/Parish.[124]

**C. Damages**

If Plaintiffs have proved their claims against Defendants by a preponderance of the evidence, you must determine the damages to which Plaintiffs are entitled. You should not interpret the fact that I am giving instructions about damages as an indication in any way that I believe that Plaintiffs should, or should not, win this case. It is your task first to decide whether Defendants are liable. I am instructing you on damages only so that you will have guidance in the event you decide that Defendants are liable and that Plaintiffs are entitled to recover money from Defendants.

[124] **Court's Question:** Again, is there a genuine dispute about course and scope? If not, at the end of the evidence, can the Court find it to be uncontested?

### i. Compensatory Damages

If you find that the Defendants violated Plaintiffs' rights, then Plaintiffs are entitled to be compensated for the actual damages suffered. You must then determine an amount that is fair compensation for all of Plaintiffs' damages. These damages are called compensatory damages. The purpose of compensatory damages is to make Plaintiffs whole—that is, to compensate Plaintiffs for the damage they have suffered. Compensatory damages are not limited to expenses that Plaintiffs may have incurred because of his injury. If Plaintiffs win, they are entitled to compensatory damages for the physical injury, pain and suffering, and mental anguish that they have suffered because of Defendants' wrongful conduct.

You may award compensatory damages only for injuries that Plaintiffs prove were proximately caused by Defendants' allegedly wrongful conduct. The damages that you award must be fair compensation for all of Plaintiffs' damages, no more and no less. You should not award compensatory damages for speculative injuries, but only for those injuries that Plaintiffs actually suffered or that Plaintiffs are reasonably likely to suffer in the future.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that Plaintiffs prove the amount of his losses with

mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence. You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence:

**ii. Emotional Distress**

To recover compensatory damages for mental and emotional distress, Plaintiffs must each prove that they have suffered a specific discernable injury with credible evidence. Hurt feelings, anger, and frustration are part of life and are not the types of harm that could support a mental-anguish award. Evidence of mental anguish need not be corroborated by doctors, psychologists, or other witnesses, but Plaintiffs must support their claims with competent evidence of the nature, extent, and duration of the harm. Damages for mental or emotional distress must be based on the evidence at trial. They may not be based on speculation or sympathy.

**iii. Injury and Pain**

You may award damages for any bodily injury that Plaintiffs sustained and any pain and suffering, disability, disfigurement, mental anguish, and/or loss of capacity for enjoyment of life that Plaintiffs experienced in the past or will experience in the future as a result of the bodily injury they allege. No evidence of

the value of intangible things, such as mental or physical pain and suffering, has been or need be introduced. You are not trying to determine value, but an amount that will fairly compensate Plaintiffs for the damages they have suffered. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award that you make must be fair in the light of the evidence.

### iv. Nominal Damages

Nominal damages are an inconsequential sum awarded to a plaintiff when a technical violation of his rights has occurred but the plaintiff has suffered no actual loss or injury.

If you find from a preponderance of the evidence that Plaintiffs sustained a technical violation of any of the following rights: their rights to be free from unreasonable arrest, manufacture of evidence, excessive uses of force, and/or infringements on their freedom of speech, but that Plaintiffs suffered no actual loss as a result of this violation, then you may award Plaintiffs nominal damages.

### v. Punitive Damages[125]

If you find that an individual Defendant is liable for a Plaintiff's injuries, you must award Plaintiff the compensatory damages that they have proved. There can be no punitive damages against a government entity like the City/Parish. You may award punitive damages if you find that an individual Defendant acted with malice

[125] Fifth Circuit Pattern Jury Instruction, § 15.7.

or with reckless indifference to the rights of others. One acts with malice when one purposefully or knowingly violates another's rights or safety. One acts with reckless indifference to the rights of others when one's conduct, under the circumstances, manifests a complete lack of concern for the rights or safety of another.

~~Punitive damages may be awarded "only when the defendant's conduct is motivated by evil intent or demonstrates reckless or callous indifference to a person's constitutional rights." *Williams v. Kaufman Cty.*, 352 F.3d 994, 1015 (5th Cir. 2003) (citations and internal quotation marks omitted).~~[126]

A person acts recklessly if:

(a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and

(b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.

Plaintiffs have the burden of proving that punitive damages should be awarded by a preponderance of the evidence.

[126] Plaintiffs object to this inclusion of the language of "evil intent" as an unnecessary and potentially prejudicial diversion from the Pattern Jury Instruction. [**Court's ruling: Objection sustained.** This addition unnecessarily deviates from the pattern jury instruction. It's also redundant to the pattern jury instruction.

The purpose of punitive damages is to punish and deter, not to compensate. Punitive damages serve to punish a defendant for malicious or reckless conduct and, by doing so, to deter others from engaging in similar conduct in the future. You are not required to award punitive damages. If you do decide to award punitive damages, you must use sound reason in setting the amount. Your award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. It should be presumed that a Plaintiff has been made whole by compensatory damages, so punitive damages should be awarded only if a Defendant's misconduct is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

If you decide to award punitive damages, the following factors should guide you in fixing the proper amount:

(1) the reprehensibility of Defendant's conduct, including but not limited to whether there was deceit, cover-up, insult, intended or reckless injury, and whether Defendant's conduct was motivated by a desire to augment profit;

(2) the ratio between the punitive damages you are considering awarding and the amount of harm that was suffered by the victim or with which the victim was threatened;

(3) the possible criminal and civil sanctions for comparable conduct.

You may consider the financial resources of Defendants in fixing the amount of punitive damages.

You may impose punitive damages against one or more of Defendants and not others. You may also award different amounts against different Defendants.

### ~~vi. Failure to Mitigate Damages~~[127]

[127] Plaintiffs object to any failure-to-mitigate instruction. Failure to mitigate damages is an affirmative defense, which under Federal Rule of Civil Procedure 8(c) must be pleaded in an answer lest it be waived. *See, e.g.*, *E.E.O.C. v. Service Temps, Inc.*, 679 F.3d 323, 334 n.30 (5th Cir. 2012). Defendants' answers to Plaintiffs' complaints have never included a failure-to-mitigate defense. *Defendants' Answer to Plaintiffs' Fifth Amended Complaint*, ECF No. 311 (asserting only "Comparative Fault/Assumption of the Risk" for Plaintiffs' decision "to attend large public protests, failure to seek a permit for marches or demonstration, and failure to maintain a reasonable awareness of the behavior of the crowds.") The Fifth Circuit has held that "the 'duty to mitigate' refers to methods of apportioning damages in light of a plaintiff's reasonable efforts to reduce loss *after* an injury occurs, not before." *Energy Intelligence Group Inc. v. Kayne Anderson Capital Advisors LP*, 948 F.3d 261, 274 (5th Cir. 2020) (emphasis in original). "The duty to mitigate arises after an injury occurs, not before." *Id.* at 1175. Defendants therefore failed to plead the affirmative defenses of mitigation of damages. Similarly, Louisiana law recognizes that failure to mitigate is a duty that arises "after the injury has been inflicted." *Flemings v. State*, (La. App. 4th Cir 8/26/09), 19 So. 3d 1220, 1228 (quoting *Riley v. Frantz*, 253 So. 2d 237, 245 (La. App. 4th Cir. 1971)).

Plaintiffs further object to this instruction on the grounds that there is also insufficient evidence in the record of a failure to mitigate damages. Plaintiffs reserve the right to further object, at the close of evidence, that there is no evidentiary basis for an instruction on mitigation of damages.

[**Court's ruling:** The Court will **defer** ruling on this issue until the jury charge conference. Preliminarily, the Court is inclined to agree with Plaintiffs. As Wright and Miller states:

> It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule of Civil Procedure 8(c) results in the waiver of that defense and its exclusion from the case.1 This proposition has been announced by numerous federal courts in cases involving a variety of affirmative defenses that should be pleaded affirmatively in a responsive pleading according to the requirements of Rule 8(c).

5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278 (4th ed. 2023) (citing, *inter alia*, *Travellers Intern., A.G. v. Trans World Airlines, Inc*., 41 F.3d 1570 (2d Cir. 1994) ("Failure to mitigate damages is an affirmative defense and therefore must be pleaded. The general rule in federal courts is that a failure to plead an affirmative defense results in a waiver." (cleaned up)). Here, Defendants did not specifically plead failure to mitigate damages in their answer (Doc. 311) or their Pretrial Order insert (*see* Doc. 423 at 9–10). Thus, again, the Court is inclined to exclude this instruction.

"But it should be noted that Rule 15(b) does give the trial court discretion, which a number have exercised, to permit the amendment of the pleadings over objection when doing so will promote the presentation of the merits of the action, the adverse party will not be prejudiced by the sudden assertion of the defense, and will have ample opportunity to defend against the substance of the issue." *Id.* Since Defendants have failed to provide *any* argument in response to Plaintiff's position, the Court wants to hear further argument at the charge conference as to the extent to the type of evidence Defendant intends to present on this issue and the extent to which Plaintiffs would be prejudiced by it.

~~A person who claims damages resulting from the wrongful act of another has a duty under the law to use reasonable diligence to mitigate his/her damages, that is, to avoid or to minimize those damages.~~

~~If you find the defendant is liable and the plaintiff has suffered damages, the plaintiff may not recover for any item of damage which he could have avoided through reasonable effort. If you find that the defendant proved by a preponderance of the evidence the plaintiff unreasonably failed to take advantage of an opportunity to lessen his damages, you should deny him recovery for those damages that he would have avoided had he taken advantage of the opportunity. You are the sole judge of whether the plaintiff acted reasonably in avoiding or minimizing his damages. An injured plaintiff may not sit idly by when presented with an opportunity to reduce his damages. However, he is not required to exercise unreasonable efforts or incur unreasonable expenses in mitigating the damages. The defendant has the burden of proving the damages that the plaintiff could have mitigated. In deciding whether to reduce the plaintiff's damages because of his failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the~~

~~defendant has satisfied his burden of proving that the plaintiff's conduct was not reasonable.~~[128]

## III. CLOSING INSTRUCTIONS

This completes my remarks on the law applicable to the case. Remember, I told you at the beginning of the trial that you were not to discuss the case among yourselves. I now remove that restriction. It is now your duty to deliberate and to consult with one another in an effort to reach a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to re-examine your own opinions and change your mind if you are convinced that you were wrong. But do not give up on your honest beliefs because the other jurors think differently, or just to finish the case.

Remember at all times, you are the judges of the facts.

Remember that your verdict must be based solely on the evidence in the case, not on anything else.

Remember also that opening statements, closing arguments, or other statements or arguments of counsel are not evidence. If your recollection of the facts differs from the way counsel has stated them, then your recollection controls.

[128] Fifth Circuit Pattern Jury Instruction §15.5.

When you go into the jury room to deliberate, the first thing you need to do is elect a Foreperson who will preside over the deliberations and be your spokesperson here in court. After you have reached a unanimous agreement on a verdict, the Foreperson will fill in the jury verdict form, which has been prepared for you, and ensure that each of you has signed and dated the bottom of the jury form. After that, you will return with it to the courtroom.

You are being asked to answer certain questions, from which answers your verdict will be determined.

**A. Jury Verdict Form**

[*separate document*]

Your verdict on each question must be unanimous. After you have reached a unanimous verdict, your jury foreperson must fill out the answers to the written questions on the verdict form. Each of you will sign and date the form. After you have concluded your service and I have discharged the jury, you are not required to talk with anyone about the case.

If you need to communicate with me or ask me a question during your deliberations, the jury foreperson should write the question or communication and give it to the Court Security Officer. After consulting with the attorneys, I will respond either in writing or by meeting with you in the courtroom in the presence of the parties and their attorneys. Keep in mind, however, that no member of the

jury should ever attempt to communicate with the Court except by a signed writing, and the Court will not communicate with any member of the jury on any subject touching the merits of the case other than in writing, or orally here in open Court. Bear in mind that you are not to disclose to anyone--not even the Court--how the jury stands, numerically or otherwise, on the questions you must decide, until after you have reached a unanimous verdict or have been discharged.

Finally, let me remind you again that you represent the community in the determination of this dispute. The community appreciates your service on this jury, and, at the same time, expects you to reach a fair and impartial verdict.

The Court must allow the parties an opportunity to address some procedural matters. This will take only a few minutes. The verdict form and a copy of the jury instructions will be gathered up and brought to you in the jury room. The exhibits that have been introduced into evidence will be made available electronically, and Ms. Causey will instruct you how to access them. When you have reached your verdict, please sign and date the verdict form and have the foreperson notify the Court Security Officer that you have reached a verdict.

**[Break while attorneys and Court go to the headphones]**

You may now proceed to the jury room, ~~but do not~~ select a jury foreperson and begin deliberations ~~until the Court Security Officer gives you the OK to begin~~. The verdict forms and one copy of these instructions will be brought to you. Please

ensure that you bring both documents back to the courtroom after you have reached a verdict.