No. 22-30581

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Shauna M. Johnson,

Plaintiff - Appellant

v.

Kendall Turner; Melanie Montroll,

Defendants - Appellees

On Appeal from

United States District Court for the Eastern District of Louisiana

2:21-CV-383

BRIEF OF APPELLANT SHAUNA JOHNSON

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of 5TH CIR. R. 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Dated: November 22, 2022

STATEMENT REGARDING ORAL ARGUMENT

Ms. Shauna Johnson, the Plaintiff-Appellant, respectfully requests oral argument. This case presents significant constitutional issues regarding matters of current public concern—the protection of First and Fourth Amendment rights in ordinary traffic enforcement scenarios—in a fact-sensitive context. The record contains several outcome-determinative disputes of material fact. Oral argument would aid the Court's decisional process, permitting counsel to highlight the significance and importance of the disparate accounts in the record. The Court's inquiries would focus the issues with greatest precision and clarity. FED. R. APP. P. 34(a)(1).

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

STATEMENT REGARDING ORAL ARGUMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 2

INTRODUCTION 3

STATEMENT OF THE CASE 5

I. FACTUAL HISTORY 5

II. PROCEDURAL HISTORY 12

SUMMARY OF THE ARGUMENT 13

ARGUMENT 17

I. THE GRANT OF SUMMARY JUDGMENT MUST BE REVERSED BECAUSE POST-HOC PROBABLE CAUSE CANNOT CURE THE INITIAL WRONGFUL DETENTION OR THE ILLEGAL EXPANSION OF THE SCOPE AND DURATION OF THAT DETENTION 18

A. The District Court Erred in Failing to Credit Ms. Johnson's Testimony Regarding Two Disputed Issues of Material Fact 19

1. The Officer Reached in, Turned Off the Ignition, and Told Ms. Johnson She Was "Going to Jail," Even Though She Had Been Complying with

His Instructions and There Were No Facts Indicating She Was Violating Any Law 22

2. The Officers Refused to Permit Ms. Johnson to Display Her License and Handcuffed Her, Prolonging Her Illegal Detention and Increasing Its Scope, Again Violating Her Constitutional Rights 27

B. A Post-Hoc Finding of Probable Cause Cannot Cure the Taint of the Preceding Constitutional Violations 33

II. THE DISTRICT COURT ERRED IN DISMISSING MS. JOHNSON'S FIRST AMENDMENT CLAIM 36

A. The Lower Court Erred in Basing Its Dismissal of the First Amendment Claim on the Finding that There Was Probable Cause for the Arrest. 36

B. Ms. Johnson's Protected Speech Cannot Buttress Probable Cause 38

C. Lieutenant Turner Is Not Entitled to Qualified Immunity on the Retaliatory Arrest Claim 41

III. THE DISTRICT COURT ERRED IN DISMISSING MS. JOHNSON'S STATE LAW CLAIMS 41

A. State False Arrest Claim 41

B. State Negligent Supervision Claim 42

CONCLUSION 46

CERTIFICATE OF SERVICE 47

CERTIFICATE OF COMPLIANCE 48

TABLE OF AUTHORITIES

Cases **Page(s)**

Allemang v. Louisiana Through Dep't of Pub. Safety,
2022 WL 3226620 (5th Cir. Aug. 10, 2022)... 34

Arenas v. Calhoun,
922 F.3d 616 (5th Cir. 2019).. 17

Bigford v. Taylor,
834 F.2d 1213 (5th Cir. 1988)..Passim

Brown v. Miller,
519 F.3d 231 (5th Cir. 2008).. 44

Chaney v. Nat'l R. Passenger Corp.,
583 So. 2d 926 (La. Ct. App. 1991) 45

City of Houston v. Hill,
482 U.S. 451 (1987) 38

Cloud v. Stone,
993 F.3d 379 (5th Cir. 2021).. 17

Club Retro, LLC v. Hilton,
568 F.3d 181 (5th Cir. 2009).. 18, 34, 35, 42

Darden v. City of Fort Worth,
880 F.3d 722 (5th Cir. 2018).. 23

Emesowum v. Cruz,
756 F. App'x 374 (5th Cir. 2018) 29, 32

Florida v. Royer,
460 U.S. 491 (1983) 23

Glenn v. City of Tyler,
242 F.3d 307 (5th Cir. 2001).. 34

Gomez v. Galman,
18 F.4th 769 (5th Cir. 2021) 42

Harrison v. State Through Dept. of Pub. Safety and Corr.,
721 So. 2d 458 (La. 1998)... 41

Hartman v. Moore,
547 U.S. 250 (2006) 37

Hassan v. Shaw,
761 F. App'x 429 (5th Cir. 2019) 44

Hassan v. City of Shreveport,
No. 15-2820, 2017 U.S. Dist. LEXIS 197685 (W.D. La. Nov. 30, 2017) 44

Henry v. United States,
361 U.S. 98 (1959) 34

Illinois v. Caballes,
543 U.S. 405 (2005) 30
Johnson v. United States,
333 U.S. 10 (1948) 34
Keenan v. Tejeda,
290 F.3d 252 (5th Cir. 2002) 37, 39
Keller v. Fleming,
952 F.3d 216 (5th Cir. 2020) 26, 32, 35
Kelley v. Dyson,
10 So. 3d 283 (La. App. 5th Cir. 2009) 42
Lewis v. City of New Orleans,
415 U.S. 130 (1974) 38
Lincoln v. Turner,
874 F.3d 833 (5th Cir. 2017) 23, 27
London v. Ryan,
349 So. 2d 1334 (La. Ct. App.) 43, 45
Massey v. Wharton,
477 F. App'x 256 (5th Cir. 2012) 36
Mesa v. Prejean,
543 F.3d 264 (5th Cir. 2008) 36, 40
NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 38
Nieves v. Bartlett,
139 S. Ct. 1715 (2019) 37
O'Dwyer v. Nelson,
310 F. App'x 741 (5th Cir. 2009) 41
Orr v. Copeland,
844 F.3d 484 (5th Cir. 2016) 19
Peel & Co. v. Rug Mkt.,
238 F.3d 391 (5th Cir. 2001) 17
Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133 (2000) 19
Rich v. Palko,
920 F.3d 288 (5th Cir. 2019) 17
Rivera v. City of Pasadena,
555 F. Supp. 3d 443 (S.D. Tex. 2021) 23
Roberts v. Benoit,
605 So. 2d 1032 (La. 1991) 43
Rodriguez v. United States,
575 U.S. 348 (2015) 21, 28

Seals v. McBee,
898 F.3d 587 (5th Cir. 2018) 38
Sibron v. New York,
392 U.S. 40 (1968) 21
Spiller v. Texas City,
130 F.3d 162 (5th Cir. 1997) 34
Strong v. Univ. Healthcare Sys., LLC,
482 F.3d 802 (5th Cir. 2007) 40
Terry v. Ohio,
392 U.S. 1 (1968) .... Passim
Trammell v. Fruge,
868 F.3d 332 (5th Cir. 2017) 26
United States v. Breeland,
53 F.3d 100 (5th Cir. 1995) 23
United States v. Brigham,
382 F.3d 500 (5th Cir. 2004) 21, 23
United States v. Lopez-Moreno,
420 F.3d 420 (5th Cir. 2005) 20, 23, 26
United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 34
United States v. Mendenhall,
446 U.S. 544 (1980) 20, 22, 27
United States v. Pack,
612 F.3d 341 (5th Cir. 2010) 25
United States v. Rosales-Giron,
592 F. App'x 246 (5th Cir. 2014) 21, 23, 25
United States v. Sharpe,
470 U.S. 675 (1985) 30
United States v. Valadez,
267 F. 3d 395 (5th Cir. 2001) 28, 29, 32

Statutes

28 U.S.C. § 1291 1
28 U.S.C. § 1331 1
42 U.S.C. § 1983 .... 3, 12
Louisiana Revised Statute § 9:2798.1(B) 44

Rules

Fed. R. App. P. 32(a)(5) 49
Fed. R. App. P. 32(a)(6) 49
Fed. R. App. P. 32(a)(7)(B) 49
Fed. R. App. P. 32(f) 49

Other Authorities

HB 54 Makes LA Wallet Equivalent to Physical Credential, LA WALLET, https://lawallet.com/legal/ 5

JURISDICTIONAL STATEMENT

This civil matter arose under the laws of the United States. The District Court had original jurisdiction. 28 U.S.C. § 1331. This Court has appellate jurisdiction over the final Order granting summary judgment for the Defendants-Appellees. 28 U.S.C. § 1291.

The District Court's Order granting the Motion for Summary Judgment on all claims was filed on August 15, 2022. The Plaintiff-Appellant, Ms. Shauna Johnson, timely filed a notice of appeal on September 13, 2022. ROA.1556–58.

STATEMENT OF THE ISSUES

I. Whether it was error to grant summary judgment based on a post-hoc justification for probable cause despite disputed material facts concerning (1) whether police seized Ms. Johnson without any justification at the inception of the Fourth Amendment intrusion and (2) whether they unlawfully prolonged and increased the scope of her detention by preventing her from providing readily available exculpatory evidence, each in violation of the Fourth Amendment.

II. Whether it was error to grant summary judgment despite disputed material facts concerning whether Ms. Johnson's arrest was supported by probable cause, where there is record evidence that her exercise of First Amendment protected speech substantially motivated her arrest.

III. Whether it was error to grant summary judgment on Ms. Johnson's state law claims for false arrest and negligent supervision despite disputed material facts concerning the legal justification for her arrest.

INTRODUCTION

Ms. Shauna Johnson is a Black woman and lifelong resident of New Orleans who was "immediately treated with contempt and suspicion" by police during an ordinary interaction. ROA.13. When she forthrightly sought respectful treatment, she was seized and handcuffed without any cognizable legal justification. Police then prevented her from showing her license, which was readily available exculpatory evidence that would have quickly ended the incident. Instead, she sat handcuffed in the back of a police car and was eventually arrested on minor traffic charges that were unilaterally dismissed shortly after the incident occurred.

Discovery in this action, brought under 42 U.S.C. § 1983, revealed disputed issues of material fact ripe for jury determination. By granting summary judgment, the District Court erred in resolving those disputes of material fact and only considering the Fourth Amendment implications of the Defendants-Appellees' account.

This case presents two independent material disputes. If a jury credited Ms. Johnson as to either dispute, it could find that the police are liable for violating her clearly established constitutional rights. First, the lower court failed to analyze the legal implications of Ms. Johnson's testimony that the police seized her without any legal justification. Second, the lower court failed to credit and consider her testimony that the Defendants-Appellees prevented her from showing her license to

them. On summary judgment, both sides' facts must be analyzed, and credibility determinations are left to the jury. It was reversible error to find that there were no disputed material facts.

The lower court relied on the rule that one officer's representation to another may establish probable cause. However, on this record, the representation relied upon was a post-hoc justification that cannot cure the unconstitutional seizure and detention; those violations had already occurred. There was no reasonable suspicion or probable cause at the inception of this intrusion nor adequate justification for prolonging its length and scope.

Because the lower court erroneously found probable cause for her arrest, it was also error to dismiss Ms. Johnson's First Amendment claim. A properly instructed jury would have ample grounds to find that the officers detained and arrested her without articulable suspicion or probable cause and in retaliation for her speech. The record supports the inference that at several critical junctures, when she voiced her intention to file a complaint, the level of Fourth Amendment intrusion increased.

Similarly, it was error to dismiss Ms. Johnson's state law claims. A jury could find that the officers are liable for false arrest under Louisiana law and that Captain Montroll is liable for negligent supervision. Given that all claims should have

survived summary judgment, the Order should be reversed, and the case remanded for further proceedings.

STATEMENT OF THE CASE

I. FACTUAL HISTORY

A. To Support Her Family, Ms. Johnson Takes Up Additional Work as a Lyft Driver

Ms. Shauna Johnson, the Plaintiff-Appellant, is a Black woman, a mother to three children, a small business owner, and a former school bus driver. ROA.410, 413, 420. At the time this case arose, Ms. Johnson had a valid Commercial Driver's License ("CDL"). ROA.414–19. To supplement the income from her retail store, she decided to drive for Lyft. ROA.420–22. On February 23, 2020, in accordance with the law, Ms. Johnson had an electronic copy of her valid CDL on her phone in the LA Wallet application[1] ("LA Wallet app").

Ms. Johnson was ill that February, suffering from a painful rash on her arms. ROA.476–77. She had been hospitalized the previous night and, although she was still experiencing arm pain, she sought passengers on Lyft because she needed to pay her electric bill. ROA.431, 488.

[1] LA Wallet is a phone application allowing users to access their driver identification on their smartphone. The application is a valid form of identification in Louisiana and is an equivalent credential to a physical driver's license. *HB 54 Makes LA Wallet Equivalent to Physical Credential*, LA WALLET, https://lawallet.com/legal/ (last visited Nov. 15, 2022).

B. Lieutenant Turner Refuses to Tell Ms. Johnson Where He Sent Her Passengers

At around 11:00 AM on February 23, 2020, Lyft assigned Ms. Johnson to pick up passengers at the Port of New Orleans. ROA.432. Unfamiliar with the area, she followed her passengers' directions to their location. ROA.439, 441. Arriving, she pulled over on the right side of the road. ROA.444–45. No signs, barriers, or other markers restricted access to that location. ROA.337, 445.

Seeing her passengers, she exited her vehicle and opened the trunk. ROA.440, 445. There were no cars behind her vehicle, and she was not blocking the travel lane. ROA.455. Standing at the back of her car, she saw an officer redirect her passengers as they walked toward her. ROA.446. She later learned that the officer was Lieutenant Kendall Turner. Seeing them turn away, she asked the officer where he sent her passengers. ROA.447.

In reply, he "screamed" at Ms. Johnson to move her vehicle. ROA.447. She described his conduct as "harsh[], rude[] and abrupt[]." ROA.450. He did not answer her question. ROA.447. Ms. Johnson then told Lieutenant Turner that he should not come to work with a bad attitude and that he should not address a woman in such a way. ROA.447. Their exchange took about a minute, and Ms. Johnson expressed criticism of the officer's conduct. ROA.452.

C. Lieutenant Turner Does Not Assist Ms. Johnson in Moving Her Vehicle

Ms. Johnson then returned to her car, started the engine, and turned her steering wheel to move into the left lane and depart in compliance with Lieutenant Turner's instructions. ROA.452–54. Passing traffic in the travel lane, however, prevented her from merging. ROA.454–56. She "gestured to [Lieutenant] Turner" that she needed help. ROA.457. He met her eyes but did not assist her, instead "roll[ing] his eyes like [Ms. Johnson] was a nuisance" to him. ROA.457–58.

D. Lieutenant Turner Approaches Ms. Johnson's Vehicle and Detains Her Without Probable Cause

Approximately thirty seconds after Ms. Johnson began to try to pull out, Lieutenant Turner came up to her window, which she opened. ROA.461. Lieutenant Turner reached inside the car, turned the ignition off, and told her she was "going to jail." ROA.462–63. Ms. Johnson responded, "[n]o I'm not. I haven't done anything wrong." ROA.463. Lieutenant Turner insisted that Ms. Johnson was "going to jail," to which Ms. Johnson responded, "I haven't done nothing wrong. No, I'm not [going to jail]. I haven't done nothing wrong. I'm leaving." ROA.463.

E. Lieutenant Turner Prevents Ms. Johnson from Accessing Her Valid LA Wallet Driver's License

Only after Lieutenant Turner turned off the ignition and told Ms. Johnson she was going to jail did he ask for her license, insurance, and registration. ROA.361,

464. She "reached for [her] phone" to show her license on the LA Wallet app. ROA.464, 470. Lieutenant Turner ordered her not to reach for her phone. ROA.470. She told him that her license was on her phone and asked him whether he did not want her to access her license or did not want to be recorded. ROA.465, 470–71. She told him she was going to report him. ROA.471. He then directed Ms. Johnson to get out of her car. ROA.471. She complied without argument. ROA.471–72.

F. While Retrieving Her License at Corporal Tillery's Direction, Lieutenant Turner Orders Ms. Johnson Handcuffed in Retaliation for Her Proclamation That He Will Be Held Accountable

Corporal Logan Tillery arrived as Ms. Johnson and Lieutenant Turner stood on the sidewalk. ROA.472. He asked Ms. Johnson for her license. ROA.472. She told him that her license was in the LA Wallet app. ROA.472. Corporal Tillery instructed her to retrieve it. ROA.472–73.

As she walked back toward her vehicle to get her phone, Ms. Johnson told Lieutenant Turner that "he was going to be held accountable for . . . harassing [her]." ROA.473. Lieutenant Turner then ordered Corporal Tillery to "cuff her." ROA.473. Corporal Tillery obeyed. ROA.473. Ms. Johnson was prevented from retrieving her phone and displaying her license to the officers. ROA.473.

Ms. Johnson, handcuffed, was placed in the back seat of a police car, where she says she remained for about forty minutes. ROA.473. She was upset. ROA.473.

She criticized Lieutenant Turner's behavior to Officer Drew Mercadel. ROA.475–76. She asked to speak with a supervisor. ROA.476.

When Captain Montroll arrived, neither she nor any other supervisor spoke to Ms. Johnson. ROA.478, 480. Ms. Johnson was transported to the Harbor Police Department, where she was detained for an additional four hours and finally released. ROA.482, 489.

Once released, Ms. Johnson called the Harbor Police to file a complaint. ROA.493. She was told there was "no need" to take her complaint. ROA.493. After asking to speak to the ranking officer on duty, she was again told that there was no need to record or investigate her complaint. ROA.496–97.

Ms. Johnson returned to the cruise ship terminal and learned that her car had been towed. ROA.497. Exhausted, and in pain from the handcuffs, she got a ride home and retrieved her car the following day. ROA.498–99. She received notice that the citations issued against her in this incident were dismissed. ROA.1113. Ms. Johnson received medical treatment for arm injuries caused by the handcuffs. ROA.512–13. Her continued severe anxiety caused her to stop driving altogether. ROA.508–10, 515–16.

G. The Police Gave Materially Different Accounts of Their Interactions with Ms. Johnson

1. Lieutenant Turner's Testimony

Lieutenant Turner testified that, after he told Ms. Johnson to move her vehicle, he stood in the middle of the traffic lane "to stop the traffic to let her come out." *Compare* ROA.347 *with* ROA.457 *and* 461 ("I gestured to Officer Turner that I needed to get in." "[H]e didn't stop traffic to let me in."). He claims that he again directed her to pull out, and she "didn't take any action to move" her vehicle. ROA.347. He said, in contrast to Ms. Johnson's testimony, that she did not turn her steering wheel. *Compare* ROA.347 *with* ROA.454. Lieutenant Turner also testified that Ms. Johnson was in her car for "five minutes or so," not thirty seconds, before he approached her vehicle again. *Compare* ROA.352 *with* ROA.461.

He claimed that upon again approaching her, he immediately asked for her license. ROA.357. According to him, she said she did not have a license, and he had no recollection of her reaching for her cellphone or any exchange between the two about reaching for a phone. *Compare* ROA.362–63 *with* ROA.464–65. He had no recollection that she said she had her license on the LA Wallet app, *compare* ROA.363 *with* ROA.465, and denied reaching into the car and turning off the ignition. *Compare* ROA.359–60 *with* ROA.462.

He said that after their exchange and as her car sat at the curb, he asked Corporal Tillery to take over and had no further contact with Ms. Johnson. ROA.365.

He said that Ms. Johnson was arrested on his authority because she failed to move her vehicle and did not have a driver's license. ROA.365. In these respects, Lieutenant Turner's testimony materially contradicts Ms. Johnson's testimony that (1) she tried but was unable to move her car due to heavy traffic, (2) Lieutenant Turner pulled the keys out of her car's ignition, and (3) she was prevented from showing officers her valid CDL via the LA Wallet app.

2. Corporal Tillery's Testimony

Corporal Tillery testified that Ms. Johnson "refused to present" her driver's license and then said her license was in the LA Wallet app on her phone. *Compare* ROA.1368–69 *with* ROA.472. He testified that Ms. Johnson exited her vehicle of her own accord, ROA.1369, and that he observed her holding her phone, saw the LA Wallet app on her phone, and observed her trying unsuccessfully to access her license on the app. ROA.1370. He described her as compliant, albeit rude and upset with Lieutenant Turner. ROA.1370, 1372–73. He said that he handcuffed her after she was unable to produce her license on the LA Wallet app. ROA.1374–75. In these respects, Corporal Tillery's testimony materially contradicts Ms. Johnson's testimony that she was prevented from showing officers her valid CDL via the LA Wallet app.

3. Officer Mercadel's Testimony

According to Officer Mercadel, Ms. Johnson was handcuffed when he arrived. ROA.1482. He was "instructed" to secure Ms. Johnson in the back of his police car. ROA.1483. Officer Mercadel said that he understood that Lieutenant Turner had decided to detain Ms. Johnson because she was not following instructions and was "irate." ROA.1486. He also said that in his extensive experience as an officer, he had resolved without arrest similar situations involving questions about driver's licenses and issues with non-compliance. ROA.1477.

Officer Mercadel said that Ms. Johnson wanted to show her license on the LA Wallet app, but he did not allow her access to her phone. ROA.1488. Instead, he conducted a database search. ROA.1488. Officer Mercadel testified that he used variations of the identifying information and could not verify that Ms. Johnson held a valid license. ROA.1488–90. He shared those findings with Lieutenant Turner. ROA.1490.

II. PROCEDURAL HISTORY

On February 22, 2021, Ms. Johnson filed an action pursuant to 42 U.S.C. § 1983 against Lieutenant Turner and Captain Montroll in the United States District Court for the Eastern District of Louisiana, arguing that she was unlawfully arrested in violation of the First and Fourth Amendments and Louisiana law, and that Captain

Montroll failed to properly supervise Lieutenant Turner, in violation of Louisiana law. ROA.12–24.

Defendants-Appellees filed a Motion for Summary Judgment, arguing that there was probable cause to arrest Ms. Johnson and they are entitled to qualified immunity. ROA.241–66. On August 22, 2022, the District Court granted Defendants-Appellees' Motion for Summary Judgment, finding that there was probable cause for her arrest for unlicensed operation of a motor vehicle and that this finding of probable cause vitiated all the claims. ROA.1547. Ms. Johnson now appeals to the United States Court of Appeals for the Fifth Circuit.

SUMMARY OF THE ARGUMENT

On February 23, 2020, officers of the Harbor Police Department violated Ms. Johnson's constitutional rights by stopping, detaining, and arresting her without reasonable suspicion or probable cause, in retaliation for her exercise of protected speech. The District Court erred in dismissing Ms. Johnson's First and Fourth Amendment claims and state law claims because there are disputed issues of material fact. This Court should reverse the District Court's Order granting Defendants-Appellees' Motion for Summary Judgment and allow a jury to decide whether Ms. Johnson's rights were violated when she legally stopped to pick up passengers who had requested a Lyft ride.

Point I of this brief argues that the lower court erred when it relied upon the report of one officer to another that a database did not confirm that Ms. Johnson was a licensed driver. While an arresting officer may rely upon this sort of report, in this case, the police conduct was unconstitutional from its inception—before the database report—and further unjustified in its scope and duration. The post-hoc report, in the context of the officers' refusal to attend to readily available exculpatory evidence, cannot cure the violation at issue, and the officers cannot enjoy qualified immunity as they violated a well-established right.

Point I has two Sections. Section A has two subsections. Subsection A.1 argues that it was error not to analyze the Fourth Amendment implications of Ms. Johnson describing how she was seized—prevented from continuing on her way and told she was going to jail by a police officer—although she had done nothing to justify that intrusion. The section concludes that the officers are not entitled to qualified immunity.

Subsection A.2 argues that it was error not to analyze the Fourth Amendment implications of Ms. Johnson's testimony that the police unreasonably extended the scope and duration of her detention by preventing her from showing them her license and handcuffing her. Ms. Johnson's constitutional rights were violated a second time. The section concludes that the officers are not entitled to qualified immunity, and the grant of summary judgment was erroneous.

Section B of Point I argues that the subsequent radio transmission's reporting (incorrectly) that Ms. Johnson was not a licensed driver, cannot cure or justify the police conduct at issue. Each of the intrusions noted above had to be valid at their inception. No seizure or search can be justified by what it later reveals, particularly not when the police prevent a person from displaying readily available exculpatory evidence. The section concludes that the officers are not entitled to qualified immunity, and the grant of summary judgment was erroneous.

Point II argues that it was error to dismiss the retaliatory arrest claim. It has three Sections. Section A argues that the dismissal of the First Amendment claim rests solely on the lower court's finding that there was probable cause for the arrest for unlicensed operation of a vehicle, based on the report of the radio transmission. Because that ruling was in error, as argued in Point I, it was error to dismiss this claim and the officers cannot enjoy qualified immunity because they violated a well-established right.

Section A also argues that Ms. Johnson showed that a properly instructed jury could find that her First Amendment rights had been violated. The First Amendment protects an individual's right to exercise their freedom of speech, including the right to criticize police officers without fear of arrest.

Section B of Point II argues that Ms. Johnson's protected speech must be carefully separated from whether the officers had articulable suspicion or probable

cause based on facts, not hunches or feelings, at the inception of the intrusion. The retaliatory speech claim throws the materiality of the disputed facts into high relief. The material factual disputes go to whether, when, and why the officers seized, held, and arrested Ms. Johnson. Taking the record as a whole and viewing it from Ms. Johnson's perspective as the non-moving party, the disputes go directly to whether the police acted reasonably or unreasonably.

Section C of Point II argues that the officers are not entitled to qualified immunity.

Finally, Point III argues that the district court erred in dismissing Ms. Johnson's state law claims for false arrest and negligent supervision. It has two sections. In each section, the brief argues that as to each state law claim, the dismissal is premised solely on the erroneous finding of probable cause for the arrest for unlicensed operation. As argued above, that was in error, so the state law claims should not have been dismissed.

Crediting Ms. Johnson's testimony, there are disputed issues of material fact as to whether there was probable cause for her arrest. Because a jury could reasonably conclude both that Defendants-Appellees arrested Ms. Johnson without probable cause and that Captain Montroll is liable for negligent supervision, the lower court erred in dismissing those state law claims. Point III concludes that the officers do not enjoy qualified immunity on the state law claims.

For the reasons set forth herein, this Court should reverse the District Court's Order granting Defendants-Appellees' Motion for Summary Judgment in its entirety and remand this case for further proceedings.

STANDARD OF REVIEW

This Court reviews grants of summary judgment *de novo*, "applying the same standards as the district court." *Cloud v. Stone*, 993 F.3d 379, 383 (5th Cir. 2021) (quoting *Arenas v. Calhoun*, 922 F.3d 616, 620 (5th Cir. 2019)). To rebut the Defendants-Appellees' qualified immunity defense, Ms. Johnson "must point to summary judgment evidence '(1) that [the Defendants-Appellees] violated a federal statutory or constitutional right and (2) that the unlawfulness of the conduct was clearly established at the time.'" *Id.* (quoting *Rich v. Palko*, 920 F.3d 288, 294 (5th Cir. 2019)). Nonetheless, this Court "still draw[s] all inferences in the plaintiff's favor." *Id.*

ARGUMENT

The District Court's granting of Defendants-Appellees' Motion for Summary Judgment was erroneous. To prevail on a motion for summary judgment, the moving party bears the burden of demonstrating that there is no genuine issue of material fact. *See Peel & Co. v. Rug Mkt.*, 238 F.3d 391, 394 (5th Cir. 2001). "In reviewing all the evidence, the court must disregard all evidence favorable to the moving party that the jury is not required to believe, and should give credence to the

evidence favoring the nonmoving party . . . ." *Id.* Here, there are two material disputes ripe for jury determination. By mistakenly deeming these disputes "minor issues," and proceeding to find that there were no material facts in dispute, the District Court erred in granting summary judgment for the Defendants-Appellees. ROA.1547. We urge this Court to reverse that ruling in its entirety.

I. The Grant of Summary Judgment Must Be Reversed Because Post-Hoc Probable Cause Cannot Cure the Initial Wrongful Detention or the Illegal Expansion of the Scope and Duration of that Detention

The lower court failed to analyze the Fourth Amendment implications of two key parts of Ms. Johnson's testimony about her detention: its initiation and the expansion of its scope and duration. Instead, the lower court misapplied this Court's governing Fourth Amendment precedent, and, in doing so, effectively took sides on material issues of fact presented by the depositions. Because there are material disputes as to whether Defendants-Appellees' had adequate justification for their initial detention of Ms. Johnson, as well as to whether they unjustifiably prolonged the scope and length of that detention, Defendants-Appellees are not entitled to qualified immunity at this stage. The Order below should be reversed; a jury must decide whom to credit because an illegal seizure is not justified by its tainted fruit. *See Club Retro, LLC v. Hilton*, 568 F.3d 181, 204 (5th Cir. 2009).

The lower court denied Ms. Johnson her right to have a jury decide these two material factual disputes by erroneously applying the rule that an officer may properly rely on the oral statement of another officer to establish probable cause. *See* ROA.1545–47. But even if the reliance was proper, a post-hoc finding of probable cause does not cure an earlier Fourth Amendment violation. This case does not turn on whether Lieutenant Turner properly relied upon Officer Mercadel's oral statement.

Rather, this case turns on whom the jury believes. Was Ms. Johnson seized at the outset for no articulable legal reason while trying to comply with the police or was she non-compliant? Was she prevented from showing her driver's license, or did she say, at the outset, that she had no license? Was Ms. Johnson handcuffed for an extended period while the officers manufactured probable cause, or did they have probable cause when they arrested her? Those are the questions at the heart of this case; only the jury may answer them.

A. The District Court Erred in Failing to Credit Ms. Johnson's Testimony Regarding Two Disputed Issues of Material Fact

The District Court erred in finding that there were no disputed issues of material fact regarding the constitutionality of the officers' conduct. At summary judgment, a court should "only 'give credence to the evidence favoring the nonmovant.'" *Orr v. Copeland*, 844 F.3d 484 (5th Cir. 2016) (quoting *Reeves v.*

Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150–51 (2000)). However, the lower court's Order only referenced Ms. Johnson's testimony twice. *See* ROA.1540 (describing Ms. Johnson's testimony but not analyzing it under the Fourth Amendment); ROA.1545 (noting that Ms. Johnson's version was contradicted by the officers' testimony). Had the lower court properly credited Ms. Johnson's testimony, it would have found that she described two clearly established, independent violations of core Fourth Amendment protections.

First, the lower court ignored the clear Fourth Amendment significance of Ms. Johnson's testimony that Lieutenant Turner reached into her car, turned off the ignition, and told her she "was going to jail," without any legal justification and before he asked to see her license. ROA.462–64; *compare* ROA.1540 (describing Ms. Johnson's testimony but not analyzing it under the Fourth Amendment) *with* ROA.1543–45 (describing events from the police officers' point of view and basing Fourth Amendment analysis on that version).

A jury could reasonably find that, from the outset, Lieutenant Turner's conduct was a paradigmatic Fourth Amendment intrusion—an unjustified assertion of official authority. *See United States v. Mendenhall*, 446 U.S. 544, 553 (1980) ("[A] person is 'seized' . . . when, by means of physical force or a show of authority, [their] freedom of movement is restrained."); *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005) (emphasizing that to comply with the Fourth

Amendment, an officer must "point to specific and articulable facts which . . . reasonably warrant" a search and seizure); *United States v. Rosales-Giron*, 592 F. App'x 246, 250 (5th Cir. 2014) (noting that a Fourth Amendment analysis "requires a balancing of the public interest with an individual's right to be free from arbitrary intrusions by law enforcement" (quoting *United States v. Brigham*, 382 F.3d 500, 507 (5th Cir. 2004))).

Second, the lower court ignored the material factual dispute as to whether the officers illegally prolonged Ms. Johnson's detention by preventing her from displaying her valid driver's license. Again, the Order recited but dismissed Ms. Johnson's testimony, omitting any analysis of the Fourth Amendment implications of her testimony about being precluded from showing her license. ROA.1540–41 (describing Ms. Johnson's testimony but not analyzing it under the Fourth Amendment). A properly instructed jury could find that the police unlawfully prolonged and extended the scope of her detention by ignoring readily available exculpatory evidence and seeking reasons to justify and immunize their conduct retroactively. *See Rodriguez v. United States*, 575 U.S. 348, 354 (2015); *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988).

Because that Fourth Amendment intrusion cannot be cured by what it later revealed, it was error to grant summary judgment in reliance on the subsequent, erroneous data base report, as argued below in Section B. *See Sibron v. New York*,

392 U.S. 40, 62–63 (1968) (noting that "[i]t is axiomatic" that findings of a search may not "serve as part of [an arrest's] justification").

1. The Officer Reached in, Turned Off the Ignition, and Told Ms. Johnson She Was "Going to Jail," Even Though She Had Been Complying with His Instructions and There Were No Facts Indicating She Was Violating Any Law

Ms. Johnson's testimony supports a finding that Lieutenant Turner acted without any articulable suspicion, thus exceeding the permissible scope of the Fourth Amendment seizure. A person is seized under the Fourth Amendment when, "by means of physical force or a show of authority, his freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (holding that when agents approached a person on a public airport concourse and asked to speak with them, the person was not seized for Fourth Amendment purposes because a reasonable person would not have felt their liberty was restrained).

In the context of a traffic stop, this Court has adopted the two-part *Terry* reasonable suspicion inquiry, which asks whether the officer's action in seizing a driver was: (1) "justified at its inception"; and (2) "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968). To satisfy the first prong, an officer must have an objectively reasonable suspicion that "some sort of illegal activity, such as a traffic violation, occurred, or is about to occur, before stopping the vehicle." *United*

States v. Lopez-Moreno, 420 F.3d 420, 430 (5th Cir. 2005) (citing *United States v. Breeland*, 53 F.3d 100, 102 (5th Cir. 1995)); *United States v. Rosales-Giron*, 592 F. App'x 246, 250 (5th Cir. 2014). In making this determination, a court must look to the "totality of the circumstances" that justified the stop when evaluating the reasonableness of a seizure. *Rosales-Giron*, 592 F. App'x at 250 (citing *Terry*, 392 U.S. at 19–20). Neither a hunch nor a generalized suspicion of wrongdoing is adequate. *See Lincoln v. Turner*, 874 F.3d 833, 843 (5th Cir. 2017) (noting there must be a particularized and objective basis for an investigative detention).

To satisfy *Terry*'s second prong, a police officer's detention of a suspect "must be temporary and last no longer than is necessary to effectuate the purpose of a stop . . . ." *United States v. Brigham*, 382 F.3d 500, 507 (5th Cir. 2004). The officer also must use the least intrusive investigative measures from the start. *See Rivera v. City of Pasadena*, 555 F. Supp. 3d 443, 455 (S.D. Tex. 2021) (citing *Florida v. Royer*, 460 U.S. 491, 500 (1983)) (noting that a thirty-second interaction in which the police officer physically separated the plaintiff from others to ask him a question qualified as the least intrusive investigative measure under the circumstances); *see also Darden v. City of Fort Worth*, 880 F.3d 722, 732 (5th Cir. 2018) (emphasizing the fact-intensive nature of Fourth Amendment reasonableness determinations and partially reversing the grant of summary judgment because the lower court

erroneously held there was no material dispute of facts on a claim of excessive force).

There is a material factual dispute about what occurred after Ms. Johnson was told to move her car. ROA.958–61. Lieutenant Turner claims that Ms. Johnson made no effort to comply for the five minutes that he tried to assist by holding back traffic. ROA.351–52. Only then, after a significant interval in which Lieutenant Turner says he observed her make no effort to pull out, did he claim to approach her car and immediately ask for her license. ROA.357.

Ms. Johnson gave a very different account. She stated that she turned her steering wheel and tried to pull out for thirty seconds, while gesturing to Lieutenant Turner for assistance to no avail. ROA.461. He returned to her vehicle, reached into her car, turned off the ignition, and told her that she was "going to jail." ROA.462–63. The two then had an exchange about whether she had done anything wrong. ROA.463–64. Only after she again questioned the appropriateness of his conduct did he ask for her license and registration. ROA.464. The record also contains disputed evidence that would support an inference about why the officer acted that way—in particular, whether Lieutenant Turner was retaliating against Ms. Johnson for her comments to him when the two first interacted. ROA.452

Lieutenant Turner seized Ms. Johnson under *Mendenhall* without reasonable articulable suspicion, as required by the first prong of *Terry*. There are no facts

showing she "committed, or was in the process of committing, an offense," in violation of the Fourth Amendment. *Rosales-Giron*, 592 F. App'x at 250. The circumstances gave rise to no "particularized and objective basis for suspected legal wrongdoing," which is essential to sustain a finding of reasonable suspicion. *United States v. Pack*, 612 F.3d 341, 352 (5th Cir. 2010), *modified on denial of reh'g*, 622 F.3d 383 (5th Cir. 2010). This stop was not justified at its inception and fails the first prong of *Terry*.

Furthermore, Lieutenant Turner's actions in seizing Ms. Johnson were not reasonably related in scope to the circumstances, implicating the second prong of *Terry*. Even if he had an articulable suspicion that Ms. Johnson had committed a traffic violation, he had no basis for reaching into her car, turning off the ignition, and telling her she was "going to jail." ROA.462. There is no suggestion that Ms. Johnson posed a physical danger, threatened to flee from the scene, or was otherwise committing a crime. *See Terry*, 392 U.S. at 27 (finding that an officer's reasonable belief about whether an individual is "armed and dangerous" is relevant to this analysis).

Lieutenant Turner did not use the least intrusive and most common means of beginning an investigatory traffic stop: requesting Ms. Johnson's license. Instead, in an excessive display of official authority, he controlled her vehicle and told her she was "going to jail." ROA.462. While "an officer's inquiry may be wide-

ranging," Lieutenant Turner took no steps to uncover any suspected wrongdoing. *Lopez-Moreno*, 420 F.3d at 431. His conduct was not justified under the second prong of *Terry,* as it exceeded the scope necessitated by the circumstances.

The record presents two legally relevant, specific, comprehensible, and divergent accounts of Ms. Johnson's initial seizure. The lower court chose one version and waved away Ms. Johnson's testimony without proper analysis. But, crediting Ms. Johnson's testimony, a properly instructed jury could find that when she was seized, she was complying with Lieutenant Turner's instructions, and offered no articulable reason to suspect she was violating the law. She was not blocking or impeding traffic and was trying to pull out. ROA.454–56. This was a prosaic, low-level encounter between an officer and a driver. Nothing justified threatening and physically restraining Ms. Johnson at the outset. ROA.1369 (making clear that Corporal Tillery did not "fear[] for [his] life or anything"). As such, Lieutenant Turner's actions were unreasonable.

Lieutenant Turner is not entitled to qualified immunity. The two-step test for evaluating qualified immunity is whether (1) the facts alleged show the officer's conduct violated a constitutional right; and (2) whether the right was clearly established. *Keller v. Fleming*, 952 F.3d 216, 221 (5th Cir. 2020) (quoting *Trammell v. Fruge*, 868 F.3d 332, 339 (5th Cir. 2017)). Giving Ms. Johnson all credibility

determinations and all inferences as the non-moving party on summary judgment, a jury could find that Lieutenant Turner's conduct violated the Fourth Amendment.

Well-established precedent clearly shows that no reasonable officer could believe that the law permits him to reach in, turn off the car ignition, and tell someone they are going to jail after the person had tried to obey the officer for less than a minute and before the officer had asked for their license or taken any other investigative steps. *See e.g., Terry*, 392 U.S. at 20; *Mendenhall*, 446 U.S. at 553; *Lincoln*, 874 F.3d at 843. Given the clarity of the law, no reasonable officer could believe that this stop or seizure was valid at the inception or justified in its scope.

2. The Officers Refused to Permit Ms. Johnson to Display Her License and Handcuffed Her, Prolonging Her Illegal Detention and Increasing Its Scope, Again Violating Her Constitutional Rights

In addition to lacking any basis for the seizure at its inception, the officers committed a second, independent Fourth Amendment violation by unreasonably prolonging Ms. Johnson's detention despite readily available exculpatory evidence. Taking Ms. Johnson's testimony as true, a reasonable jury could also find that the police officers unreasonably and improperly refused to permit Ms. Johnson to display her driver's license and handcuffed her without justification. Those actions violated her Fourth Amendment rights by illegally prolonging her detention and unreasonably expanding its scope. *See Bigford v. Taylor*, 834 F.2d 1213, 1218–19 (5th Cir. 1988) (finding a Fourth Amendment violation where failure to conduct

"[m]inimal further investigation," which would have revealed exculpatory facts, negating purported probable cause).

As noted above, the scope and duration of a Fourth Amendment intrusion must not exceed that necessitated by the circumstances. *See Terry*, 392 U.S. at 20. In *Bigford v. Taylor*, the police ignored readily available exculpatory evidence. 834 F.2d at 1218. By failing to conduct a minimal inquiry into the alleged underlying criminal activity, the police officers in *Bigford* acted unreasonably by subsequently seizing the suspect's vehicle. *Id.* at 1220 ("[C]onsidering the contradictory set of facts available to the officers at the time, the seizure of the truck without further inquiry was unreasonable.").

Furthermore, a seizure for purposes of a traffic violation cannot last any longer than is necessary to address the infraction that is the purpose of the stop. *See Rodriguez v. United States*, 575 U.S. 348, 354 (2015); *United States v. Valadez*, 267 F. 3d 395 (5th Cir. 2001). Indeed, a traffic-related stop should end when "tasks tied to the traffic infraction [we]re—or reasonably should have been—completed." *Rodriguez,* 575 U.S. at 354.

This Court's opinion in *Valadez* illustrates this point well. Unlike here, in *Valadez*, the justification for the police officer's initial stop—a potentially invalid registration sticker and overly tinted windows—was not disputed. *Compare* Argument I.A.1 *with* 267 F. 3d at 398. However, as a computer check was in

progress on Valadez's license, the police officer determined that Valadez's registration and tinted windows were in fact legal. *See id.* at 396. At this point, with the computer check still in progress, the legal basis for the stop had ended, and even though the results came back just minutes later, the detention for those extra minutes was no longer legal. *See id.* at 398. Post-hoc probable cause did not cure the illegal prolonging of the initial detention. *See id.* at 398–99; *see also Emesowum v. Cruz*, 756 F. App'x 374, 379–80 (5th Cir. 2018) (reversing erroneous issuance of summary judgment on qualified immunity grounds because "no reasonable officer could have concluded that the Fourth Amendment permitted detaining a person in handcuffs in the back of a police cruiser after the officer's previously reasonable suspicion had been dispelled, especially when the detention was extended to give time for a search of the person's car that was . . . itself unlawful").

Ms. Johnson recounted that when she reached for her phone, Lieutenant Turner prevented her from doing so without explanation, despite her telling him that her license was on the LA Wallet app. ROA.464. Then, after she exited her vehicle, Corporal Tillery again requested that she show her license. ROA.472. She again explained it was on her phone and, as she was complying with Corporal Tillery's instruction to get her phone, she turned to Lieutenant Turner and told him that "he was going to be held accountable for . . . harassing [her]." ROA.472–73. Lieutenant Turner immediately ordered Corporal Tillery to "cuff her." ROA.472–73. Thus, a

reasonable juror could find that Ms. Johnson was prevented from displaying her license—readily available exculpatory evidence that would have minimized the scope and duration of the Fourth Amendment intrusion—in direct contravention of *Bigford*. 834 F.2d 1213 (5th Cir. 1988).

The officers failed to conduct what should have been a simple investigative task—allowing Ms. Johnson to present her driver's license—when she was stopped. Had the officers simply let Ms. Johnson show her license, they would have quickly discovered that Ms. Johnson was complying with the law. This would have minimized the Fourth Amendment intrusion. Instead, Lieutenant Turner chose to have her handcuffed for no legitimate reason associated with the investigation at hand; the record supports the inference that she was physically restrained because she questioned his attitude. But whatever his motive, the officers acted unreasonably in "prolong[ing] [the traffic stop] beyond the time reasonably required to" resolve the issue. *Illinois v. Caballes*, 543 U.S. 405, 407–08 (2005).

As in *Bigford*, the officers here refused to conduct a minimal inquiry to determine if their seizure was reasonable. As a result, a reasonable jury could find that Lieutenant Turner was not "diligently pursu[ing]" whether Ms. Johnson in fact had a driver's license. *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (noting that in determining the reasonable duration of a stop, "it [is] appropriate to examine whether the police diligently pursued [the] investigation"). Instead, the officers here

"disregard[ed] facts tending to dissipate probable cause." *Bigford*, 834 F.2d at 1218. Thus, the resultant seizure constitutes a plain constitutional violation under this Court's precedent.

The District Court erred in its analysis of the record, which—if construed in the light most favorable to Ms. Johnson—provides a basis for concluding that Ms. Johnson *tried* to produce her valid driver's license to the officers on two separate occasions but was *prevented* on each attempt by Lieutenant Turner. The officers offered differing accounts from Ms. Johnson and each other. Indeed, the District Court noted that Ms. Johnson's testimony regarding accessing her phone was "contradicted by the deposition testimony of [two officers]." ROA.1545. It was error to ignore that dispute, which is material.

Specifically, the District Court erred in finding that Lieutenant Turner and Officer Mercadel complied with Louisiana law. The lower court found that the officers did indeed "make every practical attempt based on identifying information provided by the person to confirm that the person has been issued a valid driver's license." ROA 1546. This finding of fact, however, is contradicted by Ms. Johnson's testimony that she was handcuffed as she was complying with their instruction to retrieve her phone and was prevented from displaying her driver's license to end the encounter. ROA.473.

The District Court simply states that "both Officers Tillery and Mercadel also asked Plaintiff to provide evidence of a driver's license" without crediting—or even acknowledging—Ms. Johnson's testimony detailing how the officers asked for and subsequently prevented her from presenting the requested exculpatory evidence. ROA.1546. The lower court erred in deciding a genuine issue of material fact on a summary judgment motion. Here, a properly instructed jury could find that the officers acted unreasonably in prohibiting Ms. Johnson from showing them her license and in handcuffing her.

The Defendants-Appellees are not entitled to qualified immunity. The two-step test for evaluating qualified immunity is whether (1) the facts alleged show the officer's conduct violated a constitutional right; and (2) whether the right was clearly established. *Keller*, 952 F.3d at 221. As explained above, Lieutenant Turner violated Ms. Johnson's Fourth Amendment rights by unnecessarily prolonging her detention despite the presence of exculpatory evidence.

The well-established precedents of both the Supreme Court and this Court dictate that an officer may not unreasonably prolong a seizure when readily available exculpatory evidence exists or could be discovered through minimal investigation. *Valadez*, 267 F. 3d at 398; *see also Emesowum*, 756 F. App'x at 379 (reversing a grant of qualified immunity because "no reasonable officer could have concluded that the Fourth Amendment permitted detaining a person in handcuffs in the back of

a police cruiser after the officer's previously reasonable suspicion had been dispelled").

B. A Post-Hoc Finding of Probable Cause Cannot Cure the Taint of the Preceding Constitutional Violations

In addition to ignoring the issue of Ms. Johnson's invalid initial detention, the District Court erred in relying on a post-hoc database search to conclude that the officers had probable cause to arrest Ms. Johnson. This was an erroneous conclusion because Ms. Johnson was unlawfully seized under *Mendenhall* when Lieutenant Turner turned off the ignition and told her she was going to jail. That unlawful seizure was unjustified at its inception. The subsequent database search cannot justify the seizure that occurred at the outset.

Nor does the database search justify the prolonged detention that resulted from the officers' refusal to permit Ms. Johnson to show them her license. But for Ms. Johnson's unlawful seizure, illegal detention, and the illegal prolonging of her detention, the database search information would never have come to light. Accordingly, this post-hoc determination does not cure the taint of preceding constitutional violations by the officers and, thus, cannot serve as the basis for probable cause.

Whether an officer has reasonable suspicion or probable cause is determined by examining the "totality of the facts and circumstances within a police officer's

knowledge" at the "inception" of a stop, *Terry*, 392 U.S. at 19–20 and at the "moment of arrest." *Glenn v. City of Tyler*, 242 F.3d 307, 313 (5th Cir. 2001). The circumstances must be such that a reasonable person would conclude that the suspect "had committed or was committing an offense." *Id.* (quoting *Spiller v. Texas City*, 130 F.3d 162, 165 (5th Cir. 1997)) (internal quotations omitted). "Post-hoc justifications based on facts later learned" cannot justify an earlier arrest. *Club Retro, LLC v. Hilton*, 568 F.3d 181, 204 (5th Cir. 2009); *Allemang v. Louisiana Through Dep't of Pub. Safety*, No. 21-30360, 2022 WL 3226620, at *2 (5th Cir. Aug. 10, 2022); *see also Henry v. United States*, 361 U.S. 98, 103 (1959) ("An arrest is not justified by what the subsequent search discloses.").

The impermissibility of a post-hoc justification for a prior unlawful intrusion is a settled Fourth Amendment principle. *See, e.g.*, *Johnson v. United States*, 333 U.S. 10, 16 (1948) (finding no probable cause where officers based an arrest on knowledge "gained only after, and wholly by reason of," their unlawful entry into defendant's home); *United States v. Martinez-Fuerte*, 428 U.S. 543, 565 (1976) (noting the importance of "prevent[ing] hindsight from coloring the evaluation of the reasonableness of a search or seizure").

Under these principles, the District Court erred in granting qualified immunity because the officers' post-hoc determination of probable cause resulting from the database report cannot cure the taint of their preceding constitutional violations

against Ms. Johnson, namely (1) her unlawful seizure and detention and (2) the illegal prolonging of her detention by their refusal to allow Ms. Johnson to produce her driver's license. Here, Lieutenant Turner unreasonably seized Ms. Johnson by turning off the ignition and telling her she was going to jail. ROA.463–64. The officers then unreasonably prolonged and expanded the scope of her detention. ROA.464, 470, 472. By the time the database results were known, Ms. Johnson had already suffered significant violations of her Fourth Amendment rights. ROA.475–76.

As argued above, Lieutenant Turner is not entitled to qualified immunity based on the post-hoc justification for Ms. Johnson's initial and prolonged detention. Applying the two-part test of *Keller*, 952 F.3d at 221, and drawing all inferences in Ms. Johnson's favor as the non-moving party, the record shows that (1) Lieutenant Turner violated Ms. Johnson's clearly established right to be free from unlawful searches and seizures and (2) Ms. Johnson's right was clearly established. It is well-settled that post-hoc justifications for detention based on information gained solely from an unlawful seizure cannot cure the preceding constitutional violations. *Club Retro*, 568 F.3d at 204.

Drawing all reasonable inferences and resolving all issues of material fact in Ms. Johnson's favor, this Court should reverse the District Court's finding that the officers acted reasonably in relying on the database report because the report

constituted a post-hoc justification that cannot cure the taint of the preceding constitutional violations.

II. THE DISTRICT COURT ERRED IN DISMISSING MS. JOHNSON'S FIRST AMENDMENT CLAIM

A. The Lower Court Erred in Basing Its Dismissal of the First Amendment Claim on the Finding that There Was Probable Cause for the Arrest

The District Court erred in basing its dismissal of Ms. Johnson's retaliatory arrest claim on the finding that there was probable cause for her arrest. As discussed above, the existence of probable cause is materially disputed. *See supra* Argument I. As in *Mesa v. Prejean*, her retaliatory arrest claim "hinges on probable cause for her arrest—a fact question for the jury." 543 F.3d 264, 273 (5th Cir. 2008).

This Court has held that summary judgment is inappropriate when, as here, there is a dispute of material fact about the existence of probable cause for the challenged arrest. *See id.* (reversing a grant of summary judgment on qualified immunity grounds where the parties disputed whether the plaintiff was arrested because she refused to leave or because she commented that the officer would be treating her differently if he "didn't have a badge"); *see also Massey v. Wharton*, 477 F. App'x 256, 264 (5th Cir. 2012) (refusing to resolve a First Amendment claim

on summary judgment where issues of material fact existed as to whether the officer had probable cause to arrest the plaintiff).

The First Amendment shields the fundamental right to be free from government retaliation for protected speech. *See Nieves v. Bartlett,* 139 S. Ct. 1715, 1722 (2019) (citing *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). A plaintiff claiming that she was arrested in retaliation for engaging in protected speech must show that (1) she engaged in protected speech, (2) the arrest caused her "to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that" speech, and (3) the Defendants-Appellees' retaliation was "substantially motivated against [her] exercise of constitutionally protected conduct." *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). To satisfy the third prong, the plaintiff must make a threshold showing of the absence of probable cause. *Nieves*, 139 S. Ct. at 1724.

As discussed above, Ms. Johnson and the officers offered disparate accounts of the events surrounding her detention and arrest. *See supra* Argument I.A. In addition to describing the officers' unreasonable conduct for Fourth Amendment purposes, Ms. Johnson's testimony also presents a solid basis for a properly instructed jury to find that she engaged in protected speech when she criticized the police officer and said she would file a complaint. She described the speech-chilling injury she suffered—a multi-hour detention, with all the attendant coercive and

liberty restricting incidents. ROA.482, 489. Finally, her testimony further supports the inference that the police conduct was retaliation motivated substantially by her protected speech, not the result of articulable suspicion, probable cause, or lawful investigation. Crediting her testimony, Ms. Johnson's First Amendment rights were violated.

B. Ms. Johnson's Protected Speech Cannot Buttress Probable Cause

The right to criticize the police without fear of arrest "is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 463 (1987). The First Amendment protects Ms. Johnson's repeated criticism and threats to hold Lieutenant Turner accountable. *See Seals v. McBee*, 898 F.3d 587, 597 (5th Cir. 2018) (recognizing that threats to sue an arresting officer are protected by the First Amendment). Those protections do not end simply because Ms. Johnson used harsh language in response to Lieutenant Turner's hostility, ROA.1372–73, 1486–87, or because she "lectur[ed] Lt. Turner on what it is to be a man." ROA.260. To the contrary, "[s]peech does not lose its protected character . . . simply because it may embarrass others." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982); *see also Lewis v. City of New Orleans*, 415 U.S. 130, 132–34 (1974) (striking down a city ordinance that made it unlawful "for any person wantonly to curse or revile or to use obscene or

opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty").

In this case, it is particularly important to separate Ms. Johnson's protected speech from the question of whether the officers had articulable suspicion or probable cause to believe she was committing an offense. The law protects her critical speech, yet, she was told that if she wanted to "deescalate" the situation, she would have to stop saying that she was going to hold Lieutenant Turner accountable. ROA.495. The police may not condition lawful treatment upon the surrender of the right to free speech. *See Keenan v. Tejeda*, 290 F.3d 252, 260 (5th Cir. 2002) (finding that plaintiffs do not have to "cease criticizing . . . government officials altogether in order to have a claim for retaliation").

Viewing the evidence in the light most favorable to Ms. Johnson, the record provides a comprehensible, plausible narrative in which retaliation for her protected speech explains the events as well as, or better than, the officers' differing versions of whether she complied with their lawful orders, when and why she was handcuffed, whether she simply admitted to not having a license, whether she was prohibited from showing them her license, and other disputed material facts. A jury would have support for the finding that each time Ms. Johnson criticized Lieutenant Turner, a retaliatory action ensued, despite his obligation to "exercise restraint when

confronted with a citizen's anger over police action." *Mesa v. Prejean*, 543 F.3d 264, 273 (5th Cir. 2008).

This record provides ample support for a jury finding that, from the outset, Lieutenant Turner was hostile to Ms. Johnson and very quickly escalated the incident because of her protected speech. He screamed at her to move her car and told her she was going to jail when all he knew was that she had criticized him and said she was going to report him. ROA.450, 452. He ordered her handcuffed after she again expressed her intention to report him and without any indication that physical coercion was necessary. ROA.473. The temporal proximity between each of Ms. Johnson's criticisms of Lieutenant Turner and his unreasonable, retaliatory responses lend support for Ms. Johnson's claim that she was arrested in retaliation for her protected speech. *Strong v. Univ. Healthcare Sys., LLC*, 482 F.3d 802, 808 (5th Cir. 2007) ("[T]emporal proximity alone, when very close, can . . . establish a prima facie case of retaliation.").

Similarly, viewed through the First Amendment lens, the dispute about whether the officers prolonged and extended the scope of the intrusion is also thrown into sharp relief. They disagree about what she did with respect to showing them her license and she describes a coherent, plausible narrative of retaliation. *Compare supra* Facts I.G. *with* Argument II.B. Ms. Johnson has shown that there are material

factual disputes that go to the heart of this action and should not have been ignored or dismissed by the lower court.

C. Lieutenant Turner Is Not Entitled to Qualified Immunity on the Retaliatory Arrest Claim

Drawing all reasonable conclusions in the light most favorable to Ms. Johnson, Lieutenant Turner violated Ms. Johnson's clearly established rights. No reasonable officer could believe that he was justified in arresting her without probable cause or permitted to factor in her protected speech when weighing whether the facts justified the Fourth Amendment intrusion.

III. THE DISTRICT COURT ERRED IN DISMISSING MS. JOHNSON'S STATE LAW CLAIMS

A. State False Arrest Claim

The dismissal of Ms. Johnson's state law false arrest claim rests solely on the finding that there was probable cause for her arrest for driving without a driver's license. As argued above, the lower court erred in finding that Ms. Johnson's arrest was supported by probable cause. This Court applies the same analysis to both Fourth Amendment claims and state law false arrest claims. *See O'Dwyer v. Nelson*, 310 F. App'x 741, 745 n.4 (5th Cir. 2009) (finding that the Fourth Amendment inquiry was applicable to both federal and state law claims because the Fourth Amendment principles underpin Louisiana law relating to false arrests) (citing *Harrison v. State Through Dept. of Pub. Safety and Corr.*, 721 So. 2d 458,

462–63 (La. 1998)). For this reason, the false arrest claim was improperly dismissed. Defendants-Appellees are also not entitled to qualified immunity with respect to Ms. Johnson's false arrest claim. Under Fifth Circuit law, an individual has a clearly established constitutional right not to be arrested by the police without probable cause. *Club Retro, LLC v. Hilton*, 568 F.3d 181, 206 (5th Cir. 2009).

B. State Negligent Supervision Claim

The District Court also erred in dismissing Ms. Johnson's negligent supervision claims on the grounds that there was probable cause for Ms. Johnson's arrest and that there was "no evidence in the record that [Captain] Montroll acted with deliberate indifference." ROA.1551. As argued above, the finding of probable cause was in error.

"'A claim against an employer for the torts of an employee based on the employer's alleged direct negligence in . . . supervising the employee generally is governed by the same duty-risk analysis' used in Louisiana for negligence claims." *Gomez v. Galman*, 18 F.4th 769, 780 (5th Cir. 2021) (quoting *Kelley v. Dyson*, 10 So. 3d 283, 287 (La. App. 5th Cir. 2009)). In order to bring a claim for negligent supervision, a plaintiff must prove that:

> (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant failed to conform his conduct to the appropriate standard (the breach of duty element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's

> injuries (the scope of liability or scope of protection element); and,
> (5) actual damages (the damages element).

Roberts v. Benoit, 605 So. 2d 1032, 1051 (La. 1991).

Viewing the evidence in the light most favorable to Ms. Johnson, a jury could reasonably conclude that Captain Montroll is liable for negligent supervision:

First, Captain Montroll, "as the senior police officer present and the person in charge" at the time of Ms. Johnson's arrest, "was under a duty to properly and adequately supervise [her] subordinate[]" officers, including Lieutenant Turner. *London v. Ryan*, 349 So. 2d 1334, 1341 (La. Ct. App.).

Second, Captain Montroll, despite having "ample opportunity to issue instructions and provide supervision" to Lieutenant Turner, made no effort whatsoever to prevent his conduct. *London v. Ryan*, 349 So. 2d 1334, 1341 (La. Ct. App.). Indeed, Ms. Johnson repeatedly asked to speak to a supervisor regarding her wrongful arrest, as is her right, and Captain Montroll refused to communicate, in breach of her supervisor duties. ROA 476, 478–81.

Third, but for Captain Montroll's failure to fulfill her supervisor duties, Lieutenant Turner would not have arrested Ms. Johnson. Had Captain Montroll fulfilled her responsibility to make sure Lieutenant Turner did his job correctly "[b]y going to the scene and seeing what [was] going on," she would have understood that

Lieutenant Turner lacked probable cause to arrest Ms. Johnson and intervened. ROA.1231; *see supra* Argument I.A.

Fourth, there is a straightforward association between the duty of Captain Montroll as a supervising officer and Ms. Johnson's wrongful arrest. Captain Montroll was responsible for ensuring that arrests be supported by probable cause. ROA.1231. Instead, she refused to speak with Ms. Johnson and relied only on Lieutenant Turner's version of events. Captain Montroll was deliberately indifferent to the facts, in violation of her duty to supervise.

Finally, Ms. Johnson suffered injury on account of her being arrested in the absence of probable cause. ROA.482, 489; *see supra* Argument I.A.

Captain Montroll is not entitled to qualified immunity. On this state law claim, qualified immunity is a state law question. *Hassan v. City of Shreveport*, No. 15-2820, 2017 U.S. Dist. LEXIS 197685, at *20 (W.D. La. Nov. 30, 2017) (citing *Brown v. Miller*, 519 F.3d 231, 239 (5th Cir. 2008) (reversed in part on other grounds by *Hassan v. Shaw*, 761 F. App'x 429 (5th Cir. 2019)). Louisiana Revised Statute § 9:2798.1(B) establishes qualified immunity for "policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties." The statute, however, "does not protect against legal fault or *negligent conduct* at the operational level, but only confers immunity for *policy decisions*, *i.e.*,

decisions based on social, economic, or political concerns." *Chaney v. Nat'l R. Passenger Corp.*, 583 So. 2d 926, 929 (La. Ct. App. 1991) (emphasis added).

Captain Montroll's obligation to supervise her subordinate officers was an operational task, not a policy decision. *See London v. Ryan*, 349 So. 2d 1334, 1341 (La. Ct. App. 1977) (noting that state law imposes a duty upon the senior police officer present to "properly and adequately supervise [their] subordinates"). Qualified immunity does not apply to Captain Montroll's failure to perform her supervisory duties.

Because a jury could reasonably conclude that Captain Montroll is liable for negligent supervision, and because Captain Montroll is not entitled to qualified immunity with respect to this claim, the District Court erred in dismissing Ms. Johnson's negligent supervision claim.

CONCLUSION

For the foregoing reasons, the lower court erred in granting Defendants-Appellees' Motion for Summary Judgment. We respectfully urge this Court to reverse the District Court's Order granting summary judgment to the Defendant-Appellees, remand the case for further proceedings, and grant such other and further relief as this Court deems just and proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2022, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All counsel of record are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ *Michael W. Martin*
Michael W. Martin

CERTIFICATE OF COMPLIANCE

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