IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOANNA CASTRO, *PLAINTIFF*	§	
V.	§	**CIVIL NO. 5:18-CV-00312-JKP**
ALBERT SALINAS, *DEFENDANT*	§	

DEFENDANT SALINAS'
MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES, Defendant, Salinas and presents the following Motion for Summary Judgment on the basis of qualified immunity and would respectfully show the Court the following:

I. NATURE OF THE LAWSUIT

1. Plaintiff JOANNA CASTRO (hereinafter "Castro" and/or "Plaintiff") sued Defendant, Officer Salinas (hereinafter "Salinas" and/or "Defendant Salinas" or "Officer Salinas") for Fourth Amendment excessive force and First Amendment retaliation for filming an arrest of an individual displaying an AR-15 assault rifle in a parking lot in the City of Olmos Park. Earlier that day the same individual terrorized a nearby store clerk and caused fear among other citizens in the community. Upon arrival to the scene where the individual was displaying the assault rifle, Defendant Salinas had to make split second assessments regarding the presence of danger in dimly lighted surroundings, including the presence of Plaintiff in close proximity of the armed individual. Plaintiff contends she was filming the dangerous encounter; however, Defendant Salinas could not presume everyone in the immediate area was engaging in non-threatening conduct. Defendant Salinas immediately instructed Plaintiff to move away from a potentially armed conflict and when

she refused to obey Officer Salinas' orders, Officer Salinas used minimal reasonable force to push her away. At no time was Plaintiff's freedom to move away or to leave the immediate area of the scene restricted. Officer Salinas' interaction with Plaintiff occurred in less than 30 seconds after he arrived at the scene.

2. Plaintiff continues to fail to state a cognizable claim against Defendant Salinas under the First, Fourth, and Fourteenth Amendments and Salinas retains his qualified and/or official immunity from suit. Plaintiff also fails to state a claim for declaratory relief.

II. BACKGROUND FACTS

3. First and Second Amendment activists have recently been protesting in the City of Olmos Park, the City of San Antonio, and various other cities across the State exercising their right to open carry handguns and long rifles and videotaping confrontations with the police. Plaintiff is one such person who also goes by the name of "Back-Up Camera Girl" and video tapes police officers then live streams her videos on her YouTube internet account site for subscribers to view and post comments. **Exhibit "D"[1] (Castro Deposition, 6:2-11, 98:6-25, 99:1-15; Attachment D-5: Plaintiff's Responses to Interrogatories 9, 10 & 11; Attachment D-8: Plaintiff's Video 0:00:01-0:00:05, 0:00:11-0:00:26).** Plaintiff's alleged causes of action against Officer Salinas, arise out of two events occurring on February 20, 2018 and March 27, 2018 as described below:

February 20, 2018

4. On February 20, 2018, at approximately 7:52 p.m., Officer Salinas was dispatched to a Shell station located at 4302 McCullough Avenue based on a 911 call from the store manager, Aamir Khan. Mr. Khan had been arguing with two men, Jack Miller and a companion. The store had a sign posted at the front door prohibiting entering the premises while carrying a gun. The

[1] **Exhibit "D"**, Plaintiff Joanna Castro's Deposition Excerpts and Exhibits.

Affidavit of Colleen Ferruzzi, Dispatch Supervisor for the City of Alamo Heights [**Dkt. 5-1, pp. 1-3, and attached audio calls Exhibit A[2] herein]** verifies two (2) audio recordings in which Aamir Khan, makes 911 calls on February 20, 2018. The first call was made at approximately 7:52 p.m. to the City of Olmos Park with regard to Jack Miller and his companion entering Mr. Khan's store open carrying firearms **[Exhibit A-1].** Miller refused to leave after being asked several times by Mr. Kahn **[Exhibit B-1, Dkt. 5-2, (3)][3].** When Officer Salinas and Detective Hector Ruiz arrived at the scene, Mr. Khan made a statement on what had occurred and agreed to execute a criminal trespass warrant against Miller. **[Exhibit B-1, Dkt. 5-2, p. 3 (5); Exhibit C-7[4], Dkt. 5-3, pp. 14-18, Khan Statement]**. Miller was arrested and taken to Olmos Park Police Department where he was issued a criminal trespass warrant **[Exhibit B-1, Dkt. 5-2, p. 3 (5); Exhibit D Attachment D-8, 0:00:36—0:00:43 Jack Miller on video]** and was later released that day. This first incident was reported as Case Number 18-01784. **[Exhibit B-1, Dkt. 5-2, p. 3 (6)].**

5. The second occurred on the night of February 20, 2018, at approximately 9:11 p.m., Defendant Officer Salinas and Officer Schumacher responded to a call of a man with a rifle on McCullough Avenue across from the Shell Station. The man was later identified as Jack Miller, who was carrying an AR-15 assault rifle slung across his chest and a handgun that later was determined to be loaded. **[Exhibit B-2, Dkt. 5-2, pp. 5-13; Exhibit C-4, Dkt. 5-3 pp. 5-7].** This second incident was orchestrated by Miller in order to lure police officers in a second confrontation as Miller stated, "This is a class I'm going to give them a little education". **[Exhibit D Attachment D-8, 0:01:33-0:01:53]**. Plaintiff was videotaping. **[Exhibit D Attachment D-8, 0:00:01-0:00:05, 0:00:11-0:00:26].** It was Plaintiff's intent to get arrested and handcuffed when police arrived at

[2] **Exhibit A:** Affidavit of Colleen Ferruzzi, with attached Aamir Kahn 911 calls, A-1 and A-2.
[3] **Exhibit B:** Affidavit of Salinas Dkt. 5-2, with attachments.
[4] **Exhibit C:** Affidavit of Valenciano Dkt. 5-3, with attachments.

the scene. **[Exhibit D Attachment D-8, 0:03:16—0:03:19].** Miller remarked, "Class is in session," Plaintiff responded, "All right let's go, let's do this." **[Exhibit D Attachment D-8, 02:59—0:03:03].**

6. A woman in a vehicle stopped at the Olmos Park Police Station and spoke with Officer Schumacher to report that she called 911 to report a man with a rifle and admitted that it scared her because she had her son in the car.[5] **[Exhibit B-2, Dkt. 5-2, p. 8, (6) of Incident Report No. 18-01785].** This is the approximate time Aamir Khan made his second 911 call **[Exhibit A-2].** The video and audio from Officer Salinas' and Officer Schumacher's body camera and dash board video respectively **[Exhibits B-5 and C-3],** and Plaintiff's deposition testimony **[Exhibit D and Attached videos D-7 and D-8]** documented this second incident and depict the events below:

7. Schumacher directed Miller to keep his hands up and to not reach for his weapon or he would construe that as a threat and be shot; Miller complied. Officer Salinas was second to arrive at the scene. Joanna Castro was pointing a cell phone camera and a video camera at the officers and was moving forward approaching Salinas to the left of the screen while Salinas was ordering Miller to "Get on the ground now." Salinas shouted at Castro, "You-get back! Step back! Put the camera down and get back! Get back! Despite the warning, Castro continued to disregard Officer Salinas' orders to get back. **[Exhibit C-3, 0:01:20 – 0:01:28].** Salinas continued with his warning, Get back! Get out of the way! We have a man with a gun here! Get back!" Officer Salinas stated, I'm not going to tell you again, then started to push Plaintiff out of the way, Plaintiff began yelling at him "Don't touch me! Why are you touching me?!" **[Exhibit C-3, 01:01:28–01:01:37; Exhibit D Attachment D-7, 0:00:08 – 0:00:23].** Although Plaintiff testified in her deposition that she

[5] A private citizen witness, requested OPPD maintain confidentiality of her information. Her information has been redacted from the incident reports attached to Exhibit B (Salinas Affidavit) and Exhibit C (Valenciano Affidavit).

moved back quickly, **[Exhibit C-3, 0:01:20 – 0:01:28; Exhibit D, pp. 20:20-21, 21:1-4],** she stated that she did not have to move out of the way when Officer Salinas told her to move back, because he is just an officer and does not have the right to tell her to put the camera down or how "far, left, right" she has to move. **[Exhibit D, pp. 32:13-37:3, 42:17-24].**

8. One of Plaintiff's cameras fell to the ground, but she continued to video tape the arrest with her other camera. **[Exhibit D Attachment D-7, 0:00:14 – 0:00:30].** Schumacher told Salinas to forget about Plaintiff and go "hands on."[6] Salinas came to assist Schumacher in handcuffing Miller. Plaintiff did not complain to either Officers Salinas or Schumacher, nor did she report that she was in pain, sustained any injuries, or required medical attention. Plaintiff continued to videotape unhampered until Miller was placed in the patrol car and driven away. **[Exhibit C-3, 00:01:45—0:04:39; and Exhibit D Attachments D-7, 0:00:28 – 0:03:45 and D-8, 0:13:51—0:18:44].** After speaking to the officers involved and review of the deposition video tape, Sergeant Ruiz determined Plaintiff interfered with the duties of the officers during the arrest of Mr. Miller and issued an arrest warrant for Plaintiff. **[See Exhibit E[7]; Exhibit C-6, Dkt. 5-3, pp. 10-13].**

9. Officers Lopez and Schumacher returned to the Shell station and asked Mr. Khan to close the store early. Khan was so frightened that he called his family before police arrived; he was in fear for his life. **[Exhibit C-7, Dkt. 5-3 p. 18].**

March 27, 2018

10. On March 27, 2018, Open Carry Texas held a rally in the City of Olmos Park. Plaintiff was at the scene videotaping police officers. While at the scene, Sergeant Ruiz recognized Plaintiff and placed her under arrest for an active warrant for "Interference with Duties of a Public Servant" for the second incident on February 20, 2018. **[Exhibit E, Ruiz Affidavit].** Plaintiff was held at

[6] The term "go hands on" means, in this instance, to assist Schumacher in handcuffing Miller.
[7] **Exhibit E**, Affidavit of Sergeant Hector Ruiz.

the Olmos Park Police Department, until she was transported by Officer Salinas and Officer Adrian Viera to the Bexar County Jail. Defendant's expert, Jerry Staton, opined that Salinas' actions in his treatment of Plaintiff during her transport to the county jail was not in violation of the City of Olmos Park's police department policies. **[Exhibit F, Staton Affidavit p. 6, 9].**

III. PROCEDURAL BACKGROUND

11. Plaintiff filed an Original First and Second Amended Complaints **[Dkt. 1, 4, 17].**

12. Defendant filed his 12(b)(6) Motion to Dismiss or, in the Alternative, Motion for Reply under Rule 7(a) Plaintiff's Original Complaint **[Dkt. 3].** As an alternative to filing a Response, Plaintiff elected to file her First Amended Complaint. **[Dkt. 4].**

13. Defendant Salinas filed his 12(b)(6) Motion to Dismiss Plaintiff's First Amended Complaint **[Dkt. 5],** which the Court denied without prejudice, subject to refiling as a Motion for Summary Judgment after discovery has been completed by both parties. **[Dkt. 13, pp. 4-5]**.

14. On December 20, 2018, Plaintiff filed her Second Amended Complaint to include Police Chief Rene Valenciano ("Valenciano") and the City of Olmos Park ("City") as additional party defendants. **[Dkt. 17]**. Defendants filed its Motion to Dismiss Valenciano and the City **[Dkt. 22]**, which the Court granted **[Dkt. 32].**

15. Pursuant to the Court's current order in place, the parties' discovery deadline of September 14, 2019, has passed. **[Dkt. 35].**

IV. ARGUMENTS AND AUTHORITIES

A. Summary Judgment Standard

16. "A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim." *Fed. R. Civ. Proc. 56(b).* A summary judgment movant may either submit evidence that negates the existence of a material element of

the opponent's claim on which the opponent has the burden of proof or may demonstrate that there is insufficient or no evidence in the record that supports such claim. *Bourdeaux v. Swift Transp. Co. Inc.*, 402 F.3d 536, 540 (5th Cir. 2005); *Lincoln General Ins. Co. v. Reyna,* 401 F.3d 347, 349 (5th Cir. 2005). An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Anderson* at 247-48. When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a motion for summary judgment by resting on the allegations of its pleadings. It must identify record evidence that support each element of its claim. *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force,* 379 F.3d 293, 305 (5th Cir. 2004). Rule 56 mandates the entry of summary judgment against a party who fails to, in response to a motion for summary judgment, establish the existence of an essential element of that party's case. *Beard v. Banks,* 126 S. Ct. 2572, 2578 (2006). But "[s]ummary judgment may not be thwarted by conclusional allegations, unsupported assertions, or presentation of only a scintilla of evidence." *McFaul v. Valenzuela*, 684 F.3d 564, 571 (5th Cir. 2012) (citing *Hathaway v. Bazany*, 507 F.3d 312, 319 (5th Cir. 2007)).

17. "Further, although courts view evidence in the light most favorable to the nonmoving party, they give greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene." *Valderas v. City of Lubbock,* 937 F. 3d 384, 388 (5th Cir. 2019), reissued 774 Fed. Appx. 173, 176 citing, Griggs *v. Brewer*, 841 F.3d 308, 312 (5th Cir. 2016) (citing *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011)). "Although we view the evidence in the light most favorable to the nonmoving party, the plaintiff bears the burden of

demonstrating that a defendant is not entitled to qualified immunity." *Valderas* at 388, citing, *Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015) (citing *Kovacic v. Villarreal*, 628 F.3d 209, 211 (5th Cir. 2010)).

B. Qualified Immunity

18. Qualified immunity protects public officers from suit if their conduct does not violate any "clearly established statutory or constitutional rights of which a reasonable person would have known." *Bishop v. Arcuri,* 674 F.3d 456, 460 (5th Cir. 2012) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Defendant invokes his qualified immunity from Plaintiff's claims. **[Dkt. 31, Defendant's First Amended Answer pp. 6-12]**. Once the qualified immunity defense is raised, the plaintiff possesses the burden of showing that the facts alleged demonstrate that the officer violated a constitutional right, and that the right was clearly established at the time of the violation. *Pearson v. Callahan,* 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (discussing the modified inquiry under *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). This is a fact-specific inquiry to be made from the perspective of an objectively reasonable officer at the scene, rather than in hindsight. *Graham v. Connor,* 490 U.S. 386, 109 S. Ct. 1865, 1871, 104 L.Ed.2d 443 (1989).

19. In light of the Supreme Court's decision in *Pearson v. Callahan*, the courts are permitted to consider the question of whether a defendant is entitled to qualified immunity without first determining whether or not the plaintiff's constitutional rights were violated. *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 821, 172 L. Ed. 2d 565 (2009). The Court can determine whether the Plaintiff has alleged the violation of a constitutional right. *Hale v. Townley*, 45 F.2d 914, 917 (5th Cir. 1995). The Court is to decide if the conduct was objectively reasonable in light of clearly established law at the time. *Id.* at 751.

20. "When properly applied, it [*qualified immunity*] protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, ---, 131 S. Ct. 2074, 2085, 179 L.Ed.2d 1149 (2011). Once a defendant invokes qualified immunity, the burden shifts to the plaintiff to demonstrate the inapplicability of the defense. *McCreary v. Richardson*, 738 F.3d 651, 655 (5th Cir. 2013).

V. PLAINTIFF CONTINUES TO FAIL TO ALLEGE THE VIOLATION OF A FOURTH AMENDMENT CONSTITUTIONAL RIGHT

21. Plaintiff has failed to provide facts to support a Fourth Amendment violation. To bring a § 1983 excessive force claim under the Fourth Amendment, a plaintiff must first show that she was seized. *Graham v. Connor,* 490 U.S. at 388. Next, the Plaintiff must show that she suffered (1) an injury that (2) resulted directly and only from the use of force that was excessive to the need and that (3) the force used was objectively unreasonable. *Flores v. City of Palacios*, 381 F. 3d 391, 396 (5th Cir. 2004) citing *Goodson v. City of Corpus Christi,* 202 F.3d 730, 740 (5th Cir. 2000).

A. Plaintiff Was Not Seized By Defendant Salinas

22. Without waiving the above, Defendant continues with the following arguments. "We adhere to the view that a person is **"seized"** only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." *U.S. v. Mendenhall,* 446 U.S. 544, 553 (1980) (Emphasis added). As the Supreme Court held in *Graham,* "[a] 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, by means of physical force or show of authority ... in some way restrained the liberty of a citizen." *Palmer v. William*, 717 F. Supp. 1218 (W. D. Tex. June 15, 1989) (remand from *Palmer v. City of San Antonio* 810 F. 2d 514, Feb. 23, 1987) citing *Graham v. Connor,* 109 S. Ct. at 1871 n. 10

(quoting *Terry v. Ohio,* 392 U.S. 1, 19 n. 16, 88 S. Ct. 1868, 18 n. 16, 20 L.Ed. 2d 889 (1968)). Plaintiff was only ordered to move away from the arrest scene and remained free to leave. Plaintiff plead in her Second Amended Complaint and testified in her deposition that Salinas did not detain her the night of February 20, 2018. **[Exhibit D, 62:19-25, 63:1-25, 64:1-6; Dkt. No. 17 ¶¶ 13,15, 15 j.; Exhibit C-3, 00:01:45—0:04:39; and Exhibit D Attachment D-7, 0:00:28 – 0:03:45 and Attachment D-8, 0:13:51—0:18:44].** Accepting Plaintiff's allegations as true, she does not allege that Officer Salinas detained her or restrained her in any way.

23. The actions of Defendant as alleged by Plaintiff are not the type of force required to be present to constitute a "seizure." *Ashton v. City of Uniontown*, 459 Fed. Appx. 185, 189 (3rd Cir. (Pa.), Jan. 25, 2012).[8] "Yet, as noted, before a court can consider whether the forced used was excessive, "a plaintiff must first show that she was seized." *Pena v. Givens*, 637 Fed. Appx. 775 (5th Cir. 2015) citing *Flores* at 396. Qualified immunity thus attaches unless the law is clearly established that the defendant's conduct amounted to a seizure. *Flores* at 400. Defendant's Expert, Jerry Ray Staton, opined in his expert report that, "Castro was not seized or arrested." **[Exhibit F, p. 4 ¶2)]**. Plaintiff has not provided sufficient facts that a "seizure" occurred. Therefore, Plaintiff's Excessive Force claim must fail.

B. Plaintiff's Alleged Injuries Were "*De Minimis*"

24. Plaintiff asserts that she received a bruise to her left breast as a result of her contact with Officer Salinas. **[Exhibit D, 71:4-10; Dkt. 17, ¶15]**. However, Defendant's Expert, Jerry Staton, opined that after his review of the documents in this case, that Castro complained of soreness but not an injury. **[Exhibit F, p. 4 ¶2); Dkt. 17, ¶15 i.]**[9]. There is no report that Plaintiff sustained

[8] Comparing *Abraham v. Raso,* 183 F.3d 279, 288 (3d Cir. 1999) (finding the plaintiff was "seized" after being shot); *Gottlieb v. Laurel Highlands Sch. Dist.,* 272 F.3d 168, 172 (3d Cir. 2001) (finding a student was not seized after a public school teacher allegedly pushed the student into a doorknob).

[9] (i.) " … But, he hit my upper left side. After this, I was sore and tender where he hit me for about a week and a half."

any injuries.

25. Plaintiff testified in her deposition that she did not receive any treatment for her bruise; that she did not inform Officers Salinas or Schumacher that she was injured and needed medical attention; that she suffered for no other alleged injury; that her bruise was tender for about a week and a half; that she had no medical records for any injuries she is claiming; that she did not see a doctor for her alleged physical or alleged mental injuries; that she was not prescribed any medications by any doctors; that she has not seen a counselor for any of her alleged incidents of mental anguish; and had not taken any medication for her alleged mental anguish. **[Exhibit D, pp. 71:4-25—76:1-10]**. No one observed any injuries except Plaintiff. Plaintiff testified in her deposition that her breast was tender for about a week and a half and plead that fact in her Second Amended Complaint. **[Exhibit D, p. 71:21-24; Dkt. 17, ¶15 i.]**.

26. Even accepting Plaintiff's allegations as true that she received a bruise and had soreness, Plaintiff's excessive force claim fails because it is well-settled in the Fifth Circuit that in order to state a claim for excessive force, the plaintiff's alleged injury, though not required to be significant, must be more than *de minimus*." *Martinez v. Nueces County,* 2015 U.S. Dist. LEXIS 470, *10,*11 (S.D. Tex. Jan 5, 2015, no pet.), citing *Williams v. United States,* 2009 U.S. Dist. LEXIS 100154, 2009 WL 3459873, *12, *13 (S.D. Tex. 2009) ("Short-term pain alone is insufficient to constitute more than *de minimis* injury for purposes of an excessive force claim.") (". . . claim of 'severe bruising and scrapes upon his body' and 'extreme pain from being kicked and sprayed in the eyes with pepper spray' were *de minimis"*), ("While the shoving and kicking, as alleged by the plaintiff, may have been unnecessary and inappropriate, the minor injury inflicted support the conclusion that the harm sustained was no more than *de minimis."*); *Grandpre v. Gusman*, 2018 WL 3632364, * 5 (E.D. La 2018).

27. Plaintiff fails to allege or provide sufficient evidence that she suffered more than a *de minimis* injury. As the summary judgment evidence supports, there were no ascertainable injuries on Plaintiff at the time or after the arrest of Jack Miller. Plaintiff has not provided any medical records to prove that she had injuries resulting from the alleged excessive force used by Officer Salinas. Plaintiff's response to Defendant's Requests for Production revealed no medical records at all:

> "REQUEST FOR PRODUCTION NO. 9: Produce all records and/or bills for any services rendered by any medical or psychological health care provider having seen, examined, treated or provided services to Plaintiff for damages and injuries resulting from claims you allege in this lawsuit. If you do not have this, please sign the HIP AA Release Form attached.
> RESPONSE: None."

Even taking Plaintiff's alleged injury as true, the bruise from her encounter with Salinas, was *"de minimis"* and her alleged *"de minimis"* injury was not for an extended time. From Plaintiff's pleading and deposition testimony, she handled any injuries she may have incurred as "*de minimis.*"

28. Plaintiff has not produced any evidence of her alleged mental anguish, emotional injuries, humiliation, or indignity as plead in her Second Amended Complaint. **[Dkt. 17 ¶ 32]**. Plaintiff's video on February 20, 2018, after Jack Miller was taken away from the scene, did not show that Plaintiff was suffering from any mental suffering at all. **[Exhibit C-3, 00:01:45—0:04:39; Exhibit D, Attachments D-7, 0:00:28 – 0:03:45 and D-8, 0:13:51—0:18:44].** At the time of her arrest on March 27, 2018, Plaintiff did not display any signs of mental anguish, emotional injuries, humiliation or indignity when she was transported and booked at the Olmos Park Police Department. **[Exhibit E, Ruiz Affidavit]**. Prior to transport to the Bexar County Jail, Officer Salinas cautioned Plaintiff that since no one has been in his vehicle, if drugs were found, they would be hers. Plaintiff expressed unfounded subjective fear that Defendant and his fellow officer

Adrian Viera were going to attempt to hurt or frame her. **[Dkt. 17, p. 7, ¶15 o-r].**

29. Allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146-47 (2013); *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). Plaintiff only alleges a subjective apprehension, which is produced by fear. As such, Plaintiff has failed to establish the requisite element of an emotional injury on February 20, 2018, March 27, 2018, and early morning of March 28, 2018, and in the absence of an injury, Plaintiff's claim that her Fourth Amendment right to be free from excessive force fails. ("[A] *de minimis* use of force will rarely suffice to state a constitutional claim. *Regels v. Giardono* 113 F. Supp 3d 574, 599 (N.D.N.Y. 2015).

C. Officer Salinas' Actions Were Objectively Reasonable and His Use Of Force Was Not Excessive To The Need

30. Plaintiff has provided insufficient facts to support her claim that Defendant acted unreasonably. Even if the official's conduct violated a clearly established constitutional right, (which Castro still has not shown) the official is nonetheless entitled to qualified immunity if his conduct was objectively reasonable. *Lukan v. N. Forest Indep. Sch. Dist.*, 183 F.3d 342, 346 (5th Cir. 1999); *Pfannstiel v. City of Marion*, 918, F.2d 1178, 1183 (5th Cir. 1990). Accordingly, reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

31. Recognizing that "police officers are often 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," *Graham v. Connor*, 490 U.S. at 397, the Supreme Court has warned against "second guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn v. Huff*, 565 U.S. 469, 477 (2012). Prior to arriving at the second incident on February 20, 2019, Officer Salinas was aware of multiple phone calls

into dispatch of a male carrying a long rifle in the area of the Shell Station **[Exhibit B-2, Incident Report p. 3]**, and that a woman drove up to Officers Schumacher and himself to advise them about seeing a man with a long rifle and/or gun in the area of the city circle. **[Exhibit B-2, Incident Report p. 3]**. Officer Salinas exercised caution when he approached Jack Miller, at the time an unknown suspect, "(We approached in a tactical manner and with greater caution, more so than normal, because there was a mass shooting in a restaurant in San Antonio and several persons were injured/killed this weekend and on February 14, 2018 less than a week ago over 16 children were killed in Florida with a person with a rifle.)" **[Exhibit B-2, Incident Report p. 3 (2)]**. As a result of the nature of the call, Officer Salinas existed his patrol vehicle with the department issued A-15 patrol rifle. **[Exhibit B-4, Supp. Incident Report p. 1 (1)]**.

32. Upon his advancement toward Miller, Officer Salinas noticed Plaintiff to the side with something in her hand. Due to limited light, Salinas was not certain that Plaintiff was holding a camera in her hand. Salinas told her to get back because they were dealing with a man with a gun. **[Exhibit B-4, Supp. Report p. 1 (1)]**. Plaintiff was not responding to Officer Salinas' repeated demands to get back in order to get her out of the vicinity of danger. As Salinas got within contact distance of Plaintiff, she extended the camera in her hand toward Salinas and he redirected the item away from his face and pushed Plaintiff back to get her to move away. **[Exhibit B-4, Supp. Incident Report p. 1 (2); Exhibit B-1; Exhibit D, Attachments D-7 and D-8]**.

33. The police response in the late night, under poorly lighted conditions on the premises where Plaintiff stood **[Exhibit D, pp. 30:20-25, 31:1-3]**, required immediate action to secure the scene to evaluate the level of danger to the public and the responding officers. In *Wilkins v. Gaddy,* 559 U.S. 34, 559 U.S. 34, 130 S.Ct. 1175, 175 L.Ed.2d 995 (2010), the Court explained that the "core judicial inquiry" in analyzing an excessive-force claim is "not whether a certain quantum of injury

was sustained, but rather whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.* at 1178. Defendant's Expert opined that Salinas actions were proportionately proper, "Following the typical use of force continuum, the first step in gaining control is officer presence. Next comes verbal direction. When safe to do so, both should be used prior to using any physical force, as Salinas did in this case." **[Exhibit F, pg. 3, fn. 1]**.

34. Officer Salinas only used the force necessary to push Plaintiff out of the way, to drive Plaintiff[10] back from an arrest in progress of an individual brandishing deadly weapons, an AR-15 assault rifle and a holstered hand gun. *Holcomb v. McCraw,* 262 F. Supp 3d 437, 488 (W.D. Tex. 2017) (forcible arrest of Open Carry activist did not violate Fourth Amendment where heckling onlookers affiliated with arrestee rendered force used by officer objectively reasonable). Miller himself instructed Plaintiff to get back. **[Exhibit C-3, 9:25:07—9:25:12]**. The totality of the circumstances in this case do not support a finding that Officer Salinas' use of force was objectively unreasonable. Moreover, *de minimis* injury can serve as conclusive evidence that *de minimis* force was used.") *Regels* at 599.

35. Defendant's Expert, Jerry Staton opined that, "Any reasonable police officer faced with this situation would likely respond in a similar manner and attempt to remove any bystanders that were in harm's way. Salinas attempted to do so using verbal commands. When that failed, he used minimal reasonable force to accomplish the task." **[Exhibit F, p. 5)]**.

36. Plaintiff's close proximity to the individual displaying an AR-15 assault rifle authorized Defendant Salinas' reaction to approach Plaintiff to assess any presence of danger in the area that would impose an immediate threat to Plaintiff, the officers and others, and authorize his decision

[10] Cooperative or not.

to force Plaintiff to back away from the vicinity of danger. **[Exhibit B-5; Exhibit C-3]**.

37. Defendant's Expert, Jerry Staton opined that Officer Salinas' actions were objectively reasonable. "In conclusion, it is my opinion Salinas only did what any professional police officer might have done faced with the circumstances facing Salinas when he encountered Castro". **[Exhibit F, p. 6, 9)]**.

VI. NO FIRST AMENDMENT RETALIATORY ARREST WHERE OFFICERS HAD PROBABLE CAUSE

38. To state a retaliation claim under the First Amendment, the plaintiff must allege that: "(1) they were engaged in the constitutionally protected activity, (2) the defendant's actions caused plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendant's adverse actions were substantially motivated against the plaintiff's exercise of constitutionally protected conduct." *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). However not all retaliatory acts are actionable as a violation of the First Amendment. Some are simply "too trivial or minor" notwithstanding any chilling effect. *Id.*

39. Plaintiff alleges her First Amendment rights were violated by Defendant Salinas for causing her to be arrested in retaliation for her filming police in public by ordering her to stop filming, shoving her to stop filming, and slapping her camera, **[Dkt. 17 ¶ 32.]**. However, Plaintiff admittedly testified in her deposition that Officer Salinas did not order her to stop filming and she continued filming after her encounter with Officer Salinas. **[Exhibit D, p. 66:13-20]**[11]**.** Plaintiff was not stopped from engaging in the constitutionally protected activity of filming police officers. Therefore, her retaliation claim fails.

40. Governmental retaliation against a private citizen for exercise of First Amendment rights

[11] See **Exhibit C-3, 00:01:45—0:04:39; and Exhibits D-7 0:00:28 – 0:03:45; and D-8 0:13:51—0:18:44**.

can be objectively reasonable when law enforcement officers may have a motive to retaliate but there is also a ground to charge criminal conduct against the citizen. The objectives of law-enforcement take primacy over the citizen's right to avoid retaliation. *Keenan* at 261-262. In those circumstances, qualified immunity largely depends on the existence of probable cause. *Id.*

41. The First Amendment prohibits government officials from subjecting an individual to retaliatory prosecution for engaging in protected speech. *Crawford-El v. Britton,* 523 U.S. 574, 592, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998). Nonetheless, the Supreme Court's decision in *Hartman v. Moore,* held that a plaintiff who sued law enforcement officers claiming he was prosecuted, because of his protected speech, had to allege and prove the absence of probable cause as part of his claim. *Hartman v. Moore,* 126 S.Ct. 1695 (2006). "If no reasonable police officer could have believed that probable cause exists for the law enforcement actions of Tejeda and Martinez against the plaintiff, then a retaliation violated clearly established law in the circuit." *Keenan* at 262. Here, plaintiff was charged with Interference with Duties of a Public Servant.

42. Sergeant Ruiz reviewed the reports **[Exhibits B-2, B-3, B-4, and C-4]** and video of the February 20, 2018 incident and determined that there was sufficient probable cause to initiated and submit the affidavit in support of an arrest warrant against Plaintiff for Interference with the Duties of a Public Servant. **[Exhibit E]**. Defendant, Salinas did not request nor did he initiate the request, nor did he make the decision to issue an arrest warrant for Joanna Castro **[Exhibit B; Exhibit E].** On March 22, 2018, an arrest warrant for Plaintiff was issued by Bexar County Magistrate Judge, Michael Ramos, for Plaintiff's interference with the duties of a public servant on the night of February 20, 2018.[12] **[Exhibit C-6; Exhibit E]**. On March 27, 2018, Sergeant Ruiz arrested Plaintiff for an active warrant. **[Exhibit C-8; Exhibit E]**.

[12] The Affidavit within the Arrest Warrant contains a clerical error; mistakenly referencing the incident date as February 10, 2018, instead of February 20, 2018.

43. Sgt. Ruiz determined that he had probable cause in his submittal of an affidavit in support of an arrest warrant for Plaintiff's arrest. **[Exhibit C-6; Exhibit E]**. Therefore, no liability for retaliatory prosecution can be proved and qualified immunity applies. In *Mesa v. Prejean,* 543 F.3d 264 (5th Cir. 2008), the Fifth Circuit held that when there is probable cause to arrest, a court must reject plaintiff's argument that the arrestee's protected speech, "as opposed to her criminal conduct," was the motivation for the arrest, no matter how clearly that speech may be protected by the First Amendment. *Mesa* at 273. In the instant case, the existence of probable cause was found by the Magistrate's review of the charge and the issuance of the arrest warrant. Therefore, Plaintiff cannot show an absence of probable cause. When there is a probable cause finding by a magistrate judge before a no-bill, a plaintiff cannot predicate his Fourth Amendment claim on a grand jury's determination. *Tittle v. Raines*, 231 F. Supp. 2d 537, 554-555 (N.D. Tex. 2002). Whether a charge is later dropped or a defendant is found not guilty is immaterial to the probable cause analysis. *Buehler v City of Austin v. Austin Police Dep't*, No. A-13-CV-1100-ML, 2015 WL 737031, at *12 (W.D. Tex. Feb. 20, 2015); see *Baker v. McCollan*, 443 U.S. 137, 145 (1979).

44. More importantly, Plaintiff has no cause of action for retaliation against Defendant Salinas because Salinas did not arrest Plaintiff. Defendant's only involvement was to transport Plaintiff to the Bexar County Jail in the early morning of March 28, 2018, with Officer Adrian Viera.

45. At no point did Officer Salinas violate Plaintiff's First Amendment rights. Officer Salinas did not order Plaintiff to stop filming and at no point did Plaintiff stop filming. Plaintiff was filming with a cell phone and a video camera. Plaintiff continued to live stream from her cell phone when her video camera fell on the ground. **[Exhibit D-7, 0:00:14 – 0:00:30]**.

VII. COMMON LAW ASSAULT CLAIM IS BARRED UNDER STATE LAW

46. Under Texas law, tort claims brought against any governmental employee based on actions

within the scope of his or her employment must be dismissed. Specifically, Texas Civil Practice and Remedies Code §101.106(f) states:

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

This provision applies to all torts not just to those torts to which the state has waived sovereign immunity. *Franka v. Velasquez,* 332 S.W.3d 361, 381 (Tex. 2011).

47. Plaintiff's claim for common law assault against Defendant Salinas for conduct within the general scope of his employment must be dismissed pursuant to section 101.106(f). Plaintiff cannot proceed with an intentional tort claim against the City of Olmos Park, even if substituted under section 101.106, because the City is immune from such an intentional tort claim, *Tex.* Civ. Prac. & Rem. Code §101.057(2) (excluding waiver of immunity for claims "arising out of assault, battery, false imprisonment, or any other intentional tort") and was dismissed from this case. Consequently, Defendant requests the assault claim be dismissed.

VIII. PLAINTIFF CONTINUES TO FAILTO ALLEGE THE VIOLATION OF A FOURTEENTH AMENDMENT CONSTITUTIONAL RIGHT

48. Plaintiff contends that Defendant, in his individual capacity, acted under color of law, to deprived Plaintiff of her Fourteenth Amendment rights under the United States Constitution. However, Plaintiff only mentions a violation of her Fourteenth Amendment rights in passing only once in her Second Amended Complaint. **[Dkt. 17, pp. 1-2]**. It is the Fourth Amendment that provides the standard for evaluation of Plaintiff's alleged excessive force claim and not the Fourteenth Amendment. *Baker v. McCollan*, 443 U.S. 137, 144, 99 S. Ct. 2689, 2694, 61 L. Ed. 2d 433 (1979). When the general due process rights guaranteed by the Fourteenth Amendment

are congruous with rights guaranteed by another more explicit right, such as the Fourth Amendment's protection against the excessive use of force in an arrest, the more explicit right supersedes "the more generalized notion of substantive due process." *Graham v. Connor,* 490 U.S. 395, "[A]ll claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach.") *Id.* at 395. Plaintiff cannot repackage a Fourth Amendment claim as a Fourteenth Amendment due process violation. *Albright v. Oliver*, 510 U.S. 266, 273, 114 S. Ct. 807, 812-13, 127 L. Ed. 2d 114 (1994). Therefore, Plaintiff has not provided the grounds for her Fourteenth Amendment cause of action that entitles her to any relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). As such, Plaintiff has no conceivable 14th Amendment excessive force claim.

IX. DISMISSAL OF DECLARATORY JUDGMENT ACTION IS WARRANTED

49. Plaintiff is seeking declaratory relief pursuant to 28 U.S.C. §2201 that Defendant violated Plaintiff's First and Fourth Amendment rights arising under the Constitution. **[Dkt. 17 pp. 2 & 11, ¶36]**. The Declaratory Judgment Act is an enabling act that confirms discretion on the courts rather than an absolute right on a litigant. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995). The act confers on federal courts discretion in deciding whether to declare the rights of litigants. *Id.* at 286. The fact that a Court can enter a declaratory judgment does not mean that it should. *Hewitt v. Helms*, 482 U.S. 755, 762 (1987). The act provides no independent basis for jurisdiction. *Medtronic Inc. v Mirowski Family Ventures L.L.C.*, 134 S.Ct. 843, 848 (2014).

50. The Fifth Circuit has held that to demonstrate that a case or controversy exists to meet the Article III standing requirement when a plaintiff is seeking injunctive or declaratory relief, the

plaintiff must allege facts from which it appears that she will suffer injury in the future. *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003). In the case at bar, Plaintiff has not sufficiently plead nor has she provided sufficient evidence of any ongoing injury or any threat of a likely or imminent future injury. Accordingly, Defendant seeks dismissal of plaintiff's declaratory judgment action.

51. Assuming, arguendo, that Plaintiff established a constitutional violation, Officer Salinas' conduct was objectively reasonable in light of clearly established law at the time and the information available at the time. *Glenn v. City of Tyler*, 242 F.3d 307, 312 (5th Cir. 2001). Therefore, Officer Salinas is entitled to qualified immunity to all of Plaintiff's claims.

WHEREFORE, PREMISES CONSIDERED, Defendants Officer Salinas prays that his Motion for Summary Judgment be granted and that all of Plaintiff's claims against him be dismissed. Alternatively, Defendant prays for such other and further relief to which they are justly entitled.

Signed this 11th day of October, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 11, 2019, a complete and correct copy of the foregoing ***Defendant, Officer Alejandro Salinas' Motion for Summary Judgment*** was filed electronically with the United States District Court for the Western District of Texas, San Antonio Division, with notice of case activity to be generated and sent electronically by the Clerk of the Court with ECF notice being sent to the following counsel of record:

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E-NOTIFICATION
& CMRRR # 9489 0090 0027 6103 9506 99

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