No. 24-1367

United States Court Of Appeals For The Tenth Circuit

ZACH PACKARD; AMANDA BLASINGAME; JOE DERAS; JACQUELYN PARKINS; SARA FITOURI; ELISABETH EPPS; HOLLIS LYMAN; CLAIRE SANNIER; MAYA ROTHLEIN; KELSEY TAYLOR; STANFORD SMITH; ASHLEE WEDGEWORTH,

Plaintiffs–Appellees,

– and –

CIDNEY FISK,

Plaintiff,

v.

CITY AND COUNTY OF DENVER,

Defendant–Appellant,

– and –

CORY BUDAJ; PATRICIO SERRANT; DAVID MCNAMEE; CITY OF AURORA; JONATHAN CHRISTIAN; KEITH VALENTINE; MATTHEW BRUKBACHER; TIMOTHY DREITH; ANTHONY HAMILTON,

Defendants.

On Appeal from the United States District Court for the District of Colorado
(Civ. No. 1:20-cv-01878-RBJ) (The Hon. R. Brooke Jackson)

REPLY BRIEF OF APPELLANT CITY AND COUNTY OF DENVER

Oral Argument Requested

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INTRODUCTION

Plaintiffs' claims impermissibly crossed the line separating municipal from vicarious liability in violation of *Monell*. Plaintiffs' responses to Denver's arguments underscore, rather than refute, that point, and do not erase the instructional and evidentiary errors resulting in excessive, nearly uniform compensatory damages awards for the twelve Plaintiffs. The Court should reverse.

ARGUMENT

I. The district court's instructional errors impermissibly lessened Plaintiffs' burden of proof, were not harmless, and require a new trial.

A. The instructions on each of Plaintiffs' three *Monell* theories omitted the deliberate-indifference element at least in part, meaning Plaintiffs were not required to prove culpability.

1. Denver's challenges to the *Monell* instructions are preserved.

Plaintiffs contend Denver's arguments directed to the failure-to-train and ratification instructions either amount to invited error or are waived. On the failure-to-train instruction, which required proof of deliberate indifference for failures to train but not failures to supervise, they argue (Packard at 51; Fitouri at 62[1]) that Denver's challenge is foreclosed by the invited-error doctrine because Denver "proposed" the instruction. Packard adds (at 51) that Denver "agreed" to the verdict form that fails to distinguish a failure to train from a failure to supervise.

[1] Denver identifies the two answer briefs using the first-listed Plaintiff.

On the ratification instruction, which nowhere mentioned deliberate indifference, Fitouri argues (at 64) Denver "stipulated to" the instruction, thereby inviting error.

Plaintiffs are mistaken. They ignore Denver's objection at the February 23, 2022 trial-preparation conference, where the parties argued jury instructions. At that conference—***after*** the parties submitted proposed instructions—Denver argued deliberate indifference is the required "state of mind for all *Monell* claims," not just failure-to-train theories. App.Vol.14_210:4-5, 212:2-8. The district court disagreed, conclusively ruling, on the record, that deliberate indifference is required only for Plaintiffs' failure-to-train theory. App.Vol.14_212:9-11.

Unlike where a party invites error by challenging an instruction on appeal after stipulating to the instruction and failing to object at the conference, *e.g.*, *United States v. Wells*, 38 F.4th 1246, 1255-56 (10th Cir. 2022), Denver's objection was "on the record" and allowed the court the opportunity to make a ruling—which it did, on the record. *See* Fed. R. Civ. P. 51(c)(1). Denver's arguments are therefore preserved. *Id.*; *Reed v. Landstar Ligon, Inc.*, 314 F.3d 447, 450 n.1 (10th Cir. 2002) (rejecting argument that instructional argument was not preserved where objection was made at instruction conference). Given the district court's conclusive, on-record ruling, Rule 51 did not require Denver to renew its objection when the parties and court later discussed the verdict form, which merely implemented instructions to which Denver had already objected. *See* Fed. R. Civ.

P. 51(c)(2)(A) (objection "is timely" if asserted before jury is instructed and closing arguments are delivered).

2. The district court erroneously declined to apply the deliberate-indifference element to all of Plaintiffs' *Monell* theories.

"Failure to train." Plaintiffs do not dispute that deliberate indifference is a required element of *Monell* claims based on a failure to supervise. *E.g.*, *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1284 (10th Cir. 2019). Yet the elements in the failure-to-train instruction, which applied to both failures to train ***and*** supervise, did not require the jury to find that Denver implemented any policy of deficient supervision with deliberate indifference. *See* App.Vol.11_161. This was error.

Packard and Fitouri contend the instruction required deliberate indifference for both failures to train and failures to supervise such that it sustains the entire verdict—but for different reasons. Fitouri points (at 62-63) to a paragraph defining deliberate indifference, *see* App.Vol.11_161, that appears ***after*** the recitation of the elements required to establish liability. Packard, by contrast, cites (at 51-52) the fourth element of the instruction requiring Plaintiffs to prove "Denver adopted its policy of deficient ***training*** with deliberate indifference," App.Vol.11_161 (emphasis added), which nowhere requires that Denver also adopted a policy of deficient ***supervision*** with deliberate indifference.

That Plaintiffs cannot find common ground (even though they coordinated other arguments, *e.g.*, Fitouri at 61) highlights the problem. The instructions allowed the jury to find Denver liable for failure to supervise without making the required finding of culpability, presenting a clear risk of a legally erroneous verdict. Packard downplays that risk (at 52), claiming it is mere "speculation" that the jury returned a verdict in Plaintiffs' favor on this theory without having found deliberate indifference. But certainty is not required. This court "must reverse … if there is even a ***slight possibility*** of an effect on the verdict." *Advanced Recovery Sys. v. Am. Agencies*, 923 F.3d 819, 827 (10th Cir. 2019) (emphasis added). And "instructions outlining the appropriate burdens of proof are almost always crucial to the outcome of the trial." *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1155 (10th Cir. 2012) (citation omitted).

Fitouri contends (at 63-64) this error was harmless on the basis that the jury also found in Plaintiffs' favor on the "official policy, practice, or custom" and "ratification" theories. But, as explained below, those theories similarly lacked the required culpability element and are unsupported by sufficient evidence.

"Official policy, practice, or custom" and "ratification." This Court has stated unequivocally that "state of mind," *i.e.*, deliberate indifference, is an element of claims for municipal liability. *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769 (10th Cir. 2013); *id.* at 771 n.5 ("Since the decision in *City of*

Canton [adopted deliberate indifference for training claims], deliberate indifference has become the prevailing standard for other types of municipal liability claims as well." (quoting Martin A. Schwartz, *Section 1983 Litigation Claims & Defenses* § 6.02[C] (2013))); *see also* Op. Br. 16-17 (collecting cases). Despite that precedent, the district court refused to instruct the jury that deliberate indifference is a required element of each of Plaintiffs' *Monell* theories. Plaintiffs' efforts to justify this error lack merit.

First, Plaintiffs contend (Packard at 52-53; Fitouri at 65-66) that proof of deliberate indifference is required "only" in claims based on some failure to act. While some of Plaintiffs' cases acknowledge the element is required to prove inaction-based theories, *e.g.*, *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (failure to train); *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 411 (1997) (inadequate screening in hiring), none holds that the element is not required to prove other theories. Such a holding would be impossible to square with *Schneider*'s acknowledgment that "deliberate indifference has become the prevailing standard" for other claims, 717 F.3d at 771 n.5 (quoting Schwartz,

§ 6.02 [C]); this Court's many other cases reciting deliberate indifference as an element of other *Monell* claims;[2] and the law of other circuits.[3]

Second, Plaintiffs attempt to distinguish this Court's cases reciting deliberate indifference as an element of all *Monell* claims (Packard at 53; Fitouri at 67-68) by saying the cases cite other cases applying the element only to inaction-based theories or involve Eighth Amendment claims applying a different deliberate-indifference standard altogether. But the former argument ignores *Schneider* and this Court's continued recitation of deliberate indifference as an element for claims not based on some failure to act. The latter argument overlooks that, in *Monell* cases involving an underlying Eighth Amendment violation, this Court has recited deliberate indifference as an element of ***both*** the underlying violation ***and*** the *Monell* claim for municipal liability. *Crowson v. Wash. Cnty.*, 983 F.3d 1166, 1178, 1184 (10th Cir. 2020). Fitouri's further argument (at 67 n.12) that certain of these cases involved only failures to train misreads those cases.

[2] *E.g.*, *Finch v. Rapp*, 38 F.4th 1234, 1244 (10th Cir. 2022) (informal policy and a practice); *Arnold v. City of Olathe*, 35 F.4th 778, 794-95 (10th Cir. 2022) (formal policy); *Hinkle v. Beckham Cnty. Bd. of Cnty. Comm'rs*, 962 F.3d 1204, 1240-42 (10th Cir. 2020) (same).

[3] *E.g.*, *Liggins v. Duncanville*, 52 F.4th 953, 955-57 (5th Cir. 2022) (decision of policymaker); *Stanley v. City of Pittsburgh*, 467 F. App'x 132 (3d Cir. 2012) (formal policy).

Third, Fitouri contends (at 68-70) that, under *Monell*, the mere existence of a policy or an act of a final policymaker is categorically dispositive of a municipality's culpability. Not so. "In *Monell* itself, it was undisputed that there had been an official policy requiring city employees to take actions that were unconstitutional …." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988). "[W]hen an official municipal policy itself violates federal law, issues of ***culpability*** and causation are straightforward; simply proving the existence of the unlawful policy puts an end to the question." *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998) (emphasis added). But Plaintiffs never claimed any facially unconstitutional municipal policy or action. Plaintiffs therefore had to prove culpability. *Hinkle*, 962 F.3d at 1240-42 (applying the deliberate-indifference element to a policy-based *Monell* claim and noting the plaintiff can "satisfy his burden" to prove "the causation and state-of-mind elements" for his claim by showing the policy "is facially unlawful").

Fourth, Fitouri separately argues (at 64) that ratification does not require deliberate indifference because acts of a final policymaker are attributable to the municipality. But the only case Fitouri cites for that proposition, *Praprotnik*, 485 U.S. 112, nowhere disclaims a deliberate-indifference requirement; that issue was not before the Court. Fitouri's further suggestion (at 64-65) that the ratification instruction's requirement that Plaintiffs prove a Denver policymaker "made a

deliberate choice" satisfied the element likewise misses the mark. Deliberate indifference requires more than just making a decision; a municipality must "consciously or deliberately choose[] to disregard the risk of harm" where it has "actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation." *Schneider*, 717 F.3d at 771 (quoting *Barney*, 143 F.3d at 1307). The ratification instruction here failed to require Plaintiffs to make this showing.

B. The district court impermissibly reduced the burden of proof by refusing to instruct the jury that an officer's decision to take action against a plaintiff must be "substantially motivated" by protected First Amendment activity.

Over Denver's objection, the district court instructed the jury that, on their First Amendment claims, Plaintiffs must prove their participation in protected activity was only ***a*** "substantial ***or*** motivating" factor—and not a "substantially motivating" factor—in an officer's decision to take action against them. App.Vol.14_181:7-18, 183:6-10, 188:24-189:5; App.Vol.11_159. Yet Plaintiffs do not dispute, and Fitouri acknowledges (at 71), that First Amendment retaliation claims require proof of but-for causation, meaning the officer would not have taken action against the plaintiff absent a retaliatory motive. *Nieves v. Bartlett*, 587 U.S. 391, 398-99 (2019) ("Specifically, it must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive."). This concession is fatal to Plaintiffs' efforts to defend the instruction,

which did not require but-for causation and so lessened Plaintiffs' burden of proof. *Advanced Recovery Sys.*, 923 F.3d at 827. Plaintiffs' arguments to the contrary, and their assertion of harmless error, lack merit.

First, Plaintiffs assert (Fitouri at 70-72; Packard at 54-55) that *Nieves* requires only that participation in protected activity be a "substantial or motivating" factor in the decision to take adverse action in all First Amendment claims. But *Nieves* makes clear the standard is ***but-for causation***, 587 U.S. 398-99—a standard the instruction here failed to articulate. *Nieves* did not adopt Plaintiffs' less-stringent causation test for all First Amendment retaliation claims, and its emphasis on the but-for causation standard strongly suggests that the Court rejects any less stringent standard. *See* Op. Br. 19-20. In any event, even after *Nieves*, this Court has repeated that non-employee plaintiffs must prove the adverse action was "substantially motivated" by participation in protected activity. *Pryor v. Sch. Dist. No. 1*, 99 F.4th 1243, 1250 n.2 (10th Cir. 2024). Fitouri overlooks this point, and Packard suggests (at 55 n.7) it is inconsequential because *Pryor* discussed the "substantially motivated" causation element in a footnote and relied on a pre-*Nieves* case. But that is meaningless, because *Nieves* did not abolish the but-for causation requirement that Plaintiffs seek to avoid.

Second, Plaintiffs point out (Fitouri at 72; Packard at 55-56) that other circuits have mentioned a "substantial or motivating" factor or a "motivating"

factor element when reciting the elements of a First Amendment retaliation claim outside the employment or retaliatory arrest contexts. But none of those cases involved jury instructions or purported to negate the but-for causation requirement reaffirmed in *Nieves*, 587 U.S. at 398-99. To the contrary, a number of them recognize that stringent causation standard. *E.g.*, *Gattineri v. Town of Lynnfield*, 58 F.4th 512, 515 (1st Cir. 2023) (quoting the above-referenced language from *Nieves*); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996) (noting the "burden is high" to prove "the ultimate question" of "whether events would have transpired differently absent the retaliatory motive"). In any event, ***this*** Court's precedent is relevant here. That precedent required the district court to apply a "substantially motivating" causation standard. *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000).

Third, Plaintiffs argue any instructional error was harmless. They point (Packard at 57; Fitouri at 72-73) to *Hedquist v. Beamer*, 763 F. App'x 705, 712 (10th Cir. 2019), which held "there is no meaningful difference in the quantum of motivation required to prove causation" under the "substantial or motivating" test and the "substantially motivated" test. In *Hedquist*, however, the plaintiffs failed to produce ***any*** evidence showing that protected speech motivated the alleged adverse action against them, meaning they could not satisfy even the less stringent "substantial or motivating" causation test. 763 F. App'x at 710, 713. It therefore

was unimportant whether the more stringent standard actually was applied. In this case, by contrast, the evidence admitted at trial shows that certain Plaintiffs were exposed to less-lethal munitions while standing among crowds that were throwing objects at police officers or buildings or behind barricades erected across a multi-lane street to defy the curfew.[4] *See* Op. Br. 20. The distinction between this Court's "substantially motivated" test and Plaintiffs' less stringent "substantially or motivated" test therefore is potentially dispositive here.

Fitouri's separate assertions of harmlessness are similarly unavailing. First, Fitouri contends (at 73-74) that Denver introduced no evidence that Plaintiffs were doing anything other than peacefully protesting, meaning "Plaintiffs proved but-for causation at trial." Fitouri misapprehends but-for causation, which looks to whether "the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Nieves*, 587 U.S. at 399. A properly instructed jury would have been required to consider whether officers used less-lethal munitions against Plaintiffs solely because Plaintiffs were peacefully protesting, or at least in part because Plaintiffs stood in riotous crowds that were lobbing objects at officers.

[4] Fitouri's separate assertion (at 73-74) that Plaintiffs were peacefully protesting is inconsequential, given that officers were also responding to violent behavior among the same crowd.

Next, Fitouri argues (at 74) that any error was harmless because the jury returned a verdict in Plaintiffs' favor on their Fourth Amendment claims, which verdict Denver does not challenge on appeal. This argument fails because, as Packard concedes (at 67), the jury awarded different damages for First Amendment violations and Fourth Amendment violations, yet the verdict does not distinguish between the damages awarded for those constitutional violations. *E.g.*, *Ondrisek v. Hoffman*, 698 F.3d 1020, 1026 (8th Cir. 2012) (noting that an alternative theory sustains the damages award despite the erroneous submission of another theory only "where the damages are the same under [the] properly submitted theory"). Further, Fitouri overlooks that one Plaintiff (Wedgeworth) did not prove her Fourth Amendment claim, so no alternative theory independently supports the judgment in her favor. App.Vol.11_174.

II. The district court's admission of evidence from the Office of the Independent Monitor violated Rules 702, 407, and 403, and the errors were not harmless.

Tellingly, Plaintiffs make no effort to defend the district court's reasons for overruling Denver's objections to Mitchell's testimony about the OIM investigation under Rules 701, 407, and 403. Nowhere do they attempt to justify the ruling that Mitchell's testimony was admissible because the jurors pay taxes and deserve to hear it, App.Vol.23_11:11-12:8, or that his opinions are admissible because they were "fully disclosed" in the OIM's report, App.Vol.23_54:25-55:2,

even though Plaintiffs never disclosed ***him*** as an expert and his testimony was not subjected to the protections of Rule 702. Nor do Plaintiffs acknowledge that they held Mitchell's testimony out as unique at trial. As Plaintiffs emphasized, Mitchell concluded as a Denver official—indeed, "***the*** government official … tasked with investigating the police," App.Vol.15_22:15-16 (emphasis added)—that there were failures in Denver's response to the protest. Further, he reached those conclusions only after he "spent months with a team of experts looking at everything," giving the jury "the full picture." App.Vol.29_51:25-52:2. Mitchell's testimony was erroneously admitted, and, despite Plaintiffs' efforts to downplay it now, certainly influenced the verdict.

A. Denver's evidentiary objections are preserved.

Fitouri contends (at 75 n.15) that "[a]ny Rule 702 argument is waived" because Denver never objected at trial that "Mitchell's opinions were ***inadmissible*** under Rule 702." This misapprehends both Denver's trial objection and its argument on appeal. At trial, before Mitchell took the stand, Denver asserted objections that, among other things, Mitchell could provide only lay opinion testimony under Rule 701 because he never was disclosed as an expert and his knowledge of the protest was based only on his after-the-fact investigation. App.Vol.23_4:13-5:4. The district court overruled Denver's objections on the irrelevant basis that "these taxpayers sitting in the jury box are entitled to hear

about" the OIM's "public report, paid for by the taxpayers." App.Vol.23_11:11-12:8. It further ordered that Mitchell's testimony was to be "restricted to the opinions that he expressed at the time" of his report and that, because Plaintiffs "didn't endorse him as an expert," he could not offer "new opinions," App.Vol.23_54:5-10—as if Mitchell ***had*** properly been disclosed as an expert to testify under Rule 702. Denver's argument on appeal is based on its objections at trial and on the district court's own on-record justifications for its erroneous ruling. The issue is preserved.

Plaintiffs separately assert (Packard at 59; Fitouri at 74), without claiming lack of preservation or offering any authority in support, that Denver did not object to the opinion testimony that it now contests on appeal. This too ignores the record. Before Mitchell took the stand, Denver objected to Mitchell's testimony because, among other reasons, Mitchell lacked personal knowledge about the subject matter of his testimony, the entirety of his testimony amounted to opinions, and Plaintiffs could have but did not endorse him as an expert. App.Vol.23_54:13-24. The district court overruled the objection, ruling that "the opinions that [Mitchell] expressed and that were fully disclosed in his report are fair game, but any new opinions would not be." App.Vol.23_54:25-55:2. The issue is preserved.

B. Mitchell's opinions regarding the Department's protest response exceeded Rule 701 and were not, but should have been, subjected to the protections of Rule 702.

Ignoring almost entirely Mitchell's opinions about the Denver Police Department's (the Department) response to the protest, *see* Op. Br. 24-25, Plaintiffs contend (Packard at 58-61; Fitouri at 74) that Mitchell testified only to factual matters within his personal knowledge under Rule 602. They argue in the alternative (Packard at 61-62; Fitouri at 74) that any opinions were proper lay opinions under Rule 701(a). Fitouri adds (at 74-75), inconsistently, that the district court's rulings were correct in part because Mitchell's opinions "were timely disclosed in his report." To be sure, not all of Mitchell's testimony was opinion testimony. But Plaintiffs' argument that he gave, at most, proper lay opinion testimony is mistaken.

First, Packard (at 60-61) contends that Mitchell's conclusions about the Department's response to the protest merely repeated what the OIM stated in its post-investigation report, meaning that his conclusions were factual and satisfy Rule 602. Under that logic, ***any*** statement contained in a document memorializing an earlier investigation—whether couched as a fact (*e.g.*, Officer Smith provided this statement about the Department's leadership) or an opinion (*e.g.*, the Department gave insufficient training on proper crowd-control techniques) could be admitted through a witness with knowledge of the investigation under the low

bar of Rule 602, *see United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1132 (10th Cir. 2014), rendering Rule 701 meaningless. No doubt that is why Packard cannot cite any authority for this argument.

Second, and perhaps recognizing the weakness of the first argument, Packard (at 61-62) asserts alternatively that any opinion testimony was admissible under Rule 701. Not so. Permissible lay opinions, which are those "observations [that] are common enough and require … a limited amount of expertise, if any," *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1214 (10th Cir. 2011), are confined to those that are "rationally based on the witness's perception" and based on "first-hand knowledge or observation," Fed. R. Evid. 701(a) & advisory committee's note (1972 Proposed Rules). Recall that Mitchell, a lawyer who has never worked as a police officer, App.Vol.23_118:24-119:3, offered opinions from his after-the-fact investigation that, among other things, the Department had (1) "deficient internal controls on officer use of force"; (2) a "gap" in body-worn camera footage recorded by its officers; and (3) deficient use of mutual-aid partners, including a lack of joint training. *See* Op. Br. 24-25.

None of the authorities Packard cites in support of his assertion (at 61-62) that lay witnesses may provide opinions based on facts gathered during investigations endorses opinions like those Mitchell gave. In *Vincent v. Nelson*, 51 F.4th 1200, 1214-15, 1219 (10th Cir. 2022), three non-retained experts opined on

where a truck collision occurred, with two basing their lay opinions on their familiarity with the site from having actually visited it and the third basing his expert opinion on GPS data collected from a truck. *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1219 (10th Cir. 2007), involved an in-court identification based in part on audio and video recordings and contains minimal discussion of Rule 701, presumably because such identifications require only "minimal familiarity." (Quoting *United States v. Bush*, 405 F.3d 909, 919 (10th Cir. 2005).) In *United States v. Marquez*, 898 F.3d 1036, 1048-50 (10th Cir. 2018), the law-enforcement agent whose lay opinion testimony was at issue testified to things that she personally observed while surveilling the defendant. And *United States v. Cooper*, 375 F.3d 1041 (10th Cir. 2004), has no meaningful discussion of the first-hand-knowledge requirements of Rules 602 and 701 or the parameters of permissible lay opinion testimony. In any event, the witnesses in that case, unlike Mitchell, testified either about matters they observed firsthand or, as to one witness, documents the witness prepared or had access to as a records custodian, which were admitted as trial exhibits. *Id.* at 1044-46.

C. Mitchell's "conclusions" were inherently remedial, violating Rule 407.

Plaintiffs do not—and cannot—dispute that Mitchell's testimony and conclusions were based entirely on his after-the-fact investigation of the Department's response to the George Floyd protest. Yet they contend (Packard at

63-64; Fitouri at 75) that his testimony did not violate Rule 407 because it did not address any measures that the Department implemented as a result of the OIM's report or have an inherently remedial effect.

Plaintiffs are mistaken. The "correct procedure" when introducing evidence of a post-incident investigation, this Court has explained, "is to refer to the results of [the investigation] without referring to [its] post-event timeframe," because emphasizing that an investigation was performed after an event has "the effect of characterizing" it as remedial. *Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron*, 805 F.2d 907, 919 (10th Cir. 1986). Mitchell's testimony, which was replete with "conclusions" that necessarily implied what recommendations the OIM made, had exactly that effect. *See* Op. Br. 31.[5] Packard asks (at 64) how "the typical post-incident investigation"—which this certainly was not—"could ever comply" with the procedure articulated in *Rocky Mountain Helicopters*. The answer is simple: The proponent must introduce only factual information learned from the investigation and refrain from offering "conclusions" that necessarily imply any remedial suggestion. Here, had Plaintiffs wished to avoid running afoul of Rule 407, they could have asked Mitchell only about the

[5] Packard's assertion (at 64) that "Denver nowhere contends that the OIM investigation itself had an inherently remedial effect" overlooks Denver's argument that Mitchell's testimony had exactly that effect. Op. Br. 31.

factual information he learned during the OIM's investigation and not delved into his "conclusions."

D. Plaintiffs fail to address either of Denver's arguments under Rule 403.

Denver asserts that the dangers of unfair prejudice and confusing and misleading the jury substantially outweighed the relevance of Mitchell's testimony, if any, for two reasons. First, Mitchell's testimony was cloaked in unique authority by virtue of his service as Denver's Independent Monitor, which fact Plaintiffs repeatedly emphasized at trial. Op. Br. 32-33. Second, Mitchell, who disclaimed having analyzed any particular incident, gave only general criticisms about the Department's protest response—an issue the jury was not called to determine in resolving whether Plaintiffs proved that Denver caused ***their*** injuries. *Id.* at 33-34.

Plaintiffs do not respond to either argument. Packard argues (at 65) only generally that Mitchell's testimony about the Department's policies, customs, and training was highly probative and not unfairly prejudicial. Fitouri states (at 75) only that "the probative value of Mitchell's testimony was not substantially outweighed by its risk of unfair prejudice under Rule 403." Plaintiffs' lack of a response is telling. Having made Mitchell a centerpiece of their case and held his testimony out as uniquely important at trial, they cannot credibly argue now that the highly critical testimony from "the government official … tasked with investigating the police" who "spent months with a team of experts looking at

everything," App.Vol.15_22:15-16; App.Vol.29_51:25-52:2, did not influence the verdict.

E. The district court's errors were not harmless.

Plaintiffs contend (Packard at 65-66; Fitouri at 75) that any error was harmless because Mitchell's testimony was unnecessary to sustain the verdict or was cumulative of other witnesses' testimony.[6] That is not so, and Plaintiffs ignore the other reason why the erroneous admission of Mitchell's testimony was not harmless. Mitchell's testimony, as Plaintiffs repeatedly told the jury, was unique. Unlike any other witness, Mitchell was "***the*** government official from the city of Denver tasked with investigating the police." App.Vol.15_22:15-16 (emphasis added). And unlike Plaintiffs' other two experts, only Mitchell had the ability to interview current and former members of the Department and recount their statements to the jury; only he "spent months with a team of experts looking at everything"; and only he could give the jury "the full picture." App.Vol.29_51:25-52:2. Plaintiffs used all of those points to their advantage, introducing through

[6] Fitouri separately asserts (at 75) that Denver elicited testimony about subsequent remedial measures from its own witnesses. That is incorrect. None of the testimony Fitouri cites—much of which actually was elicited by Plaintiffs' counsel—states that Denver implemented remedial measures as a result of the protest at the OIM's recommendation or otherwise. The testimony discusses that the Department implemented new tactics during the protest or has learned lessons with the benefit of hindsight. Mitchell's opinions, however, were that Denver's policies, training, and protest response were deficient ***from the outset*** of the protest.

Mitchell criticisms of the Department's leadership that were far afield from any official policy, practice, or custom or training deficiency that was implicated by Plaintiffs' *Monell* claims. *See* Op. Br. 26.

Further, Mitchell's testimony was uniquely damaging. It called into question why, if the Denver official responsible for investigating the police already had concluded the Department's protest response was deficient, Denver denied liability to Plaintiffs. Permitting Mitchell to recite his conclusions merely invited the jury to punish Denver for exercising its right to defend itself at trial. It cannot be said that Mitchell's testimony did not influence the verdict.

III. Plaintiffs' purportedly "overwhelming" evidence fails to establish Denver's liability.

"Where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability." *Brown*, 520 U.S. at 415. The evidence that Plaintiffs argue supports the verdict on their three *Monell* theories is a powerful reminder of this cautionary principle.

A. Denver's arguments are preserved.

Plaintiffs argue (Packard at 36; Fitouri at 49) that Denver waived its argument regarding whether any discretionary policies caused violations of Plaintiffs' constitutional rights. Fitouri further asserts (at 49-50) that Denver waived any challenge to the sufficiency of the evidence that its policies on body-

worn cameras and use-of-force reports, or that Commander Phelan's decisions, caused any constitutional violation.

Plaintiffs are mistaken. Denver's Rule 50(a) motion argued that Plaintiffs failed to prove causation across the board on its "official policy, practice, or custom" theory. App.Vol.25_38:20-22, 39:1-54:12. Plaintiffs responded that there was sufficient evidence of causation for the body-worn-camera and use-of-force policies, discretionary policies, and Commander Phelan's actions, among other policies. App.Vol.25_52:20-54:7, 56:3-23. The district court cited those policies when it denied the motion. App.Vol.25_60:8-17, 61:5-10. Denver renewed its motion after trial, App.Vol.11_187, Plaintiffs responded by pointing to the same policies, App.Vol.12_4-5, and the court cited those policies again in its order denying the motion, App.Vol.12_84-85.

B. "Official policy, practice, or custom."

Plaintiffs fail to show that the policies, practices, and customs they rely on can give rise to liability or are supported by sufficient evidence of causation.

Commander Phelan's actions and discretionary policies. Commander Phelan authorized—but did not require—the use of less-lethal munitions. The same is true of Denver's policy allowing its officers discretion as to when to deploy less-lethal munitions. Officers on the ground decided whether and how to deploy them. The authorizations and discretionary policies were not "a deliberate choice to

follow a course of action," *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986), so Plaintiffs' assertion (Fitouri at 51-52, 56-57; Packard at 34-37) that they can create liability or prove moving-force cause is misplaced.

Body-worn cameras and use-of-force reports. Plaintiffs assert (Fitouri at 58; Packard at 37-38) that not requiring officers to activate body-worn cameras and promptly complete of use-of-force reports caused constitutional violations. But neither of these policies can be characterized as the moving-force cause of any violation. And if Plaintiff's argument is accepted, it would result in a mandate for the particular policies that Plaintiffs endorse. But § 1983 "does not provide plaintiffs or courts *carte blanche* to micromanage local governments." *Connick v. Thompson*, 563 U.S. 51, 68 (2011).

Mutual-aid officers. Plaintiffs do not dispute that one of them sued both Denver ***and*** a municipal-aid jurisdiction for the same injury. This defeats the argument that Denver's policy allowing mutual-aid officers to follow their jurisdictions' policies could be a moving-force cause. Yet Plaintiffs repeat their argument (Fitouri at 58-59; Packard at 38-39) that mutual-aid officers were Denver's "agents." The testimony they cite does not show a mutual, subjective intent or agreement that the legal consequences of agency attach to any relationship, *see* Op. Br. 45 n.6, and is not sufficient to establish an agency relationship as a matter of law. Further, the practical implications of Plaintiffs'

agency theory would severely undermine collaboration among law-enforcement agencies.

Custom. Plaintiffs cite no binding authority that evidence of constitutional violations at a single event can amount to a widespread custom proving the existence of a municipal policy to violate constitutional rights. Packard points only (at 41) to one prior incident, in 2012, that he characterizes as an excessive use of force against protesters, but Packard nowhere cites evidence proving anyone's constitutional rights were violated. That Plaintiffs' claims are based alleged violations of their rights at the unprecedented George Floyd protest does not mean ***Denver***'s policy is to violate constitutional rights.

C. "Failure to train."

The Supreme Court is skeptical of failure-to-train claims because they pose a danger of "engag[ing] the federal courts in an endless exercise of second-guessing municipal employee-training programs"—a task courts "are ill suited to undertake" and that "implicate[s] serious questions of federalism." *Harris*, 489 U.S. at 392. It therefore does not "suffice to prove that an injury or accident could have been avoided if an officer had had better or more training." *Id.* at 391. But the evidence Plaintiffs offer to show deliberate indifference amounts to just that.

The need for better training to prepare officers for the George Floyd protest was not obvious. Expert testimony that there could have been ***more*** or ***different***

training (Packard at 44), and a witness's statement criticizing training and videos depicting officer misconduct ***during*** the protest (Packard at 45), do not show that a need for better training was obvious to Denver at the time. Further, there is no evidence that untrained or uncertified officers used pepper-ball guns or grenades at the protest (Fitouri at 54) with a policymaker's knowledge or approval. Plaintiffs retreat, citing evidence (Packard at 46; Fitouri at 55) that Denver had seen large protests before. But there was no evidence that the 2008 DNC or any sporting event was attended by widespread destruction and violence such that any deficiency in Denver's training program was obvious in 2020.

Nor was Denver on notice that its training was substantially certain to result in constitutional violations. There is no evidence that any policymaker knew of Mitchell's recommendation that the Department assess its tactics after a "clash" at the 2012 Occupy protest (*see* Packard at 46-47; Fitouri at 54). And testimony that the Department's leadership did not sufficiently prioritize or support crowd-control training (Packard at 47-48; Fitouri at 54) merely challenges the quantum of training and therefore cannot establish Denver's liability. *See Harris*, 489 U.S. at 391.

D. "Ratification."

General commendation is not ratification; instead, a final policymaker must ratify both "an employee's ***specific*** unconstitutional actions" and "the ***basis*** for

[them]." *Bryson v. City of Oklahoma City*, 627 F.3d 784, 790 (10th Cir. 2010) ("Where the City was not even aware of [the employee's] unconstitutional actions with respect to Plaintiff, it cannot be found liable under a ratification theory."). Plaintiffs cite ***no*** evidence that any final policymaker knew of any "specific" action violating ***Plaintiffs'*** constitutional rights or the "basis" for that action. Their failure to do so is dispositive.

The meager evidence that Plaintiffs do cite (Packard at 48-50; Fitouri at 59-60), and Plaintiffs' inability to find any authority endorsing the type of evidence they offer, serves only to prove the insufficiency of the evidence. The testimony of Commander Phelan, who monitored the protest remotely from the command post, that he was unaware of any force that violated policy or training neither shows nor permits an inference that he knew and approved of any violation of ***Plaintiffs'*** rights or the basis of such a violation. The same is true of the laudatory remarks made by the Mayor and Chief of Police at the May 29 press conference. Nor could those remarks, contrary to Packard's suggestion (at 49-50), have ratified "future violations." As Fitouri rightly notes (at 60), "ratification occurs ***after*** the conduct at issue." *Cordova v. Aragon*, 569 F.3d 1183, 1194 (10th Cir. 2009).

IV. The excessive, largely identical compensatory damages awards reflect abstract punishment rather than careful consideration of the evidence as to each Plaintiff.

After a 15-day trial at which Plaintiffs introduced evidence of vastly differing injuries, the jury returned a verdict awarding $3 million to one Plaintiff, $750,000 to another, and $1 million to the remaining ten. App.Vol.11_169-77. A plaintiff in a § 1983 action cannot recover damages for the abstract value of a deprivation of constitutional rights. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986). But the excessive, largely identical damages awards here suggest that the jury determined damages precisely for that reason and entered awards that went "beyond their compensatory function and turn[ed] punitive." *Bell v. Williams*, 108 F.4th 809, 831 (9th Cir. 2024).

Plaintiffs' arguments why the awards were proper underscore this point. Contending that the jury properly distinguished between Plaintiffs' injuries, Packard (at 67) points to Packard's larger damages award and Wedgeworth's smaller award, explaining that the jury awarded Wedgeworth a lesser amount ($750,000) because it found "only her First Amendment rights were violated." But a plaintiff cannot recover for the abstract value of a constitutional violation, *Stachura*, 477 U.S. at 310, and this explanation suggests that the jury impermissibly awarded the other Plaintiffs (excluding Packard) an additional

$250,000 based only on the violations of their Fourth Amendment rights, not any additional evidence of injury. That is the definition of abstraction.

Plaintiffs also assert (Packard at 67; Fitouri at 77) that they introduced evidence of similar injuries. The record shows otherwise. Compare the testimony of Deras and Parkins, who received $1 million awards. Deras was hit with a pepper ball; other, larger munitions struck his helmet, back, and hand; and a flash-bang grenade caused his ears to ring. App.Vol.20_14:8-15, 24:24-25:12. He visited an emergency room to have his hand examined, was referred to an orthopedic specialist, and wore a brace for months, App.Vol.20_26:7-27:9, and he now sees a mental health professional, App.Vol.20_46:13-21, 47:7-8. Parkins, by contrast, was exposed to chemicals but never was impacted by any less-lethal munition, and the only psychological injury that she testified to is that police now chase her in a recurring dream. App.Vol.23_16:8-15, 32:5-12, 39:22-40:1. She introduced no evidence that she received treatment for any injury. That the jury gave ten identical awards despite Plaintiffs' significantly different injuries suggests that its awards were based on something other than the evidence.

Finally, Packard's four "comparable" cases (at 68) are distinguishable. In *Dolenz v. United States*, 443 F.3d 1320, 1321, 1323 (10th Cir. 2006), the plaintiff was in a car accident and suffered physical injuries that rendered him permanently disabled and psychological injuries that were supported by expert testimony. In

Ibanez v. Velasco, No. 96 C 5990, 2002 WL 731778, at *8-9, 10-11 (N.D. Ill. Apr. 25, 2002), officers repeatedly punched, kicked, and choked the plaintiff, who had an irregular menstrual cycle for years thereafter, and whose physical and psychological injuries were supported by testimony from three treating professionals. In *Porter v. City of Philadelphia*, 337 F. Supp. 3d 530, 537, 552 (E.D. Pa. 2018), deputies tackled the plaintiff, kneed his temple, choked him, handcuffed him, hit him with a stun gun, and dragged him from a room, causing him humiliation and embarrassment—evidence that was corroborated by many witnesses. And in *Jackson v. Tellado*, No. 11-CV-3028, 2018 WL 4043150, at *6-7 (E.D.N.Y. Aug. 24, 2018), the court remitted to $2,750,000 a compensatory award to an officer who was "savagely beaten with batons, forced to the ground, handcuffed, [and] pepper-sprayed" by fellow officers and suffered a fractured hand, depression, nightmares, flashbacks, and anxiety, and whose emotional distress was corroborated by an expert. Those cases bear no resemblance to this one, and do not address the salient point: the evidence of injury here differed widely among Plaintiffs, yet the jury awarded ten of them identical awards.

CONCLUSION

The Court should vacate the judgment for insufficient evidence and enter judgment for Denver; vacate the judgment and remand for a new trial based on instructional and evidentiary errors, with instructions to exclude legally invalid or

unsupported *Monell* theories; or remand with instructions to remit the excessive damages awards.

Dated: April 4, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

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The undersigned hereby certifies that, upon the acceptance of this Reply Brief, any hard copies required to be submitted to the Court will be exact copies of the versions filed electronically.

s/ Frederick R. Yarger

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this **Reply Brief of Appellant City and County of Denver** was served on all counsel of record via the Tenth Circuit Court of Appeals' electronic e-mail system this 4th day of April 2025.

s/ Frederick R. Yarger