

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

BOMANI BARTON,

*Plaintiff,*

V.

KYU AN, Individually,  
and CITY OF AUSTIN, TEXAS

*Defendants.*

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1-22 00221

CIVIL ACTION NO.: \_\_\_-CV-\_\_\_\_\_

**PLAINTIFF’S ORIGINAL COMPLAINT**

TO THE HONORABLE UNITED STATES DISTRICT COURT:

BOMANI BARTON (hereinafter referred to as “Mr. Barton” or “Plaintiff”) and files his Original Complaint complaining of KYU AN, individually (hereinafter referred to as “Officer Kyu An” or “An”), and the City of Austin, Texas (hereinafter referred to as “Austin, Texas” or “the City”), and respectfully shows this Honorable Court as follows:

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TO THE HONORABLE UNITED STATES DISTRICT COURT:

BOMANI BARTON (hereinafter referred to as “Mr. Barton” or “Plaintiff”) and files his Original Complaint complaining of KYU AN, individually (hereinafter referred to as “Officer Kyu An” or “An”), and the City of Austin, Texas (hereinafter referred to as “Austin, Texas” or “the City”) and respectfully shows this Honorable Court as follows:

**I. NATURE OF THE CASE**

1. This is an excessive force and First Amendment retaliation case, wherein Defendant Kyu An – a police officer with the City of Austin Police Department – used excessive force against Plaintiff, including shooting him with bean bag rounds in the face, elbow, and hip despite the fact that Plaintiff posed no risk to Defendant or anyone else. Defendant An committed these acts in retaliation for Plaintiff exercising his First Amendment rights of free speech and assembly against police brutality.

2. Specifically, this is a civil action arising under the United States Constitution under the provisions of the First and Fourth Amendment to the Constitution of the United States, as applied through the Fourteenth Amendment, and under federal law, particularly the Civil Rights Act, Title 42 of the United States Code § 1983, seeking damages against Defendants for committing acts, under the color of law, with the intent and for the purpose of depriving Mr. Barton of rights secured under the Constitution and law of the United States.<sup>1</sup>

3. Plaintiff also asserts governmental liability (*Monell*) claim against the City of Austin because there exists pattern, practice, or custom of City of Austin Police Officers engaging in excessive force and because the City of Austin—acting through its policy makers—failed to

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<sup>1</sup> Although Plaintiff refers to Defendants collectively at times, specific factual references are made concerning actions or inactions by specific Defendants throughout this Complaint – these are not global allegations. As such, this pleading complies with current federal standards. FED. R. CIV. P. 8.

properly train and supervise Defendant Kyu An and encouraged the use of kinetic projectiles into crowd of unarmed people.

## **II. PARTIES**

4. Plaintiff, BOMANI BARTON, is a citizen of the United States currently residing Bell County, Texas.

5. Defendant, KYU AN, is an individual that was employed by the City of Austin Police Department at the time of the incident that make the basis of this lawsuit and was acting within the scope of his employment and under the color of law, statues, ordinances, rules and regulations, customs and usage of the City of Austin Police Department. At the time of the incident, Officer An assumed his role as a peace officer for the City of Austin. Upon information and belief, Defendant An is still employed by the City of Austin as a police officer. Officer An can be served with processes at the Austin Police Department, 715 E. 8<sup>th</sup> Street, Austin, Texas 78701.

6. Defendant, CITY OF AUSTIN, is a municipality located within the State of Texas. The City of Austin may be served through its Mayor, Steve Adler, or its City Clerk, Jannette Goodall, at 301 W. 2<sup>nd</sup> Street, Austin, Texas 78701.

## **III. JURISDICTION**

7. This action is brought pursuant to 42 U.S.C. § 1983, and the First, Fourth, and Fourteenth Amendments to the United States Constitution. The Court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1343.

## **IV. VENUE**

8. Venue is proper in this district under 28 U.S.C. § 1391(b) because the acts, events, or omissions giving rise to this claim occurred in Travis County, Texas, which falls within the United District Court for the Western District of Texas, Austin Division.

**V. CONDITIONS PRECEDENT**

9. All conditions precedent have been performed or have occurred.

**VI. FACTUAL BACKGROUND**

10. On Saturday, May 30, 2020, the Austin Police Department responded to a peaceful protest of police brutality with further police brutality.

11. Bomani Ray Barton, his girlfriend, and another friend attended a civil rights protest near the Austin Police Department Headquarters in Austin, Texas.

12. When they arrived, they noticed Austin Police Department officers in what appeared to be riot gear in a formation of numerous rows of officers.

13. These officers used bicycles to barricade and corral individuals into certain areas and to split up groups.

14. Mr. Barton and his friends protested peacefully for several hours; however, the police began to get agitated with the crowd, began pushing protestors, and used OC spray (commonly referred to as “pepper spray”) to silence the crowd.

15. Mr. Barton witnessed an officer push a female protestor off of a retaining wall, which caused her to hit her head on the ground.

16. As the police became more violent, the protesters migrated and made their way towards the Capitol. Officers continually used OC spray on unarmed individuals who did not pose a threat.

17. The protesters continued marching the streets of Austin and eventually found their way back to Austin Police Department Headquarters.

18. By this time, Austin police officers resorted to wantonly spraying OC spray into crowds. After seeing this tactic, Mr. Barton and his friends decided to stay towards the back of the protest — away from the violent officers.

19. The protesters again started to march down the highway and Mr. Barton eventually ended up towards the front of the march.

20. Officer Kyu An eventually blocked off Mr. Barton and a handful of other protestors from marching by aiming a weapon at Mr. Barton without ordering a command to Mr. Barton or the other protestors.

21. Officer Kyu An was approximately 20 feet away from Mr. Barton as Mr. Barton slowly raised his hands in a surrendering position. Mr. Barton begged Officer Kyu An not to shoot him; however, Officer Kyu An stared down Mr. Barton. Fearing for his life, Mr. Barton began to slowly back away from Officer Kyu An with his arms still in the surrender position.

22. Inexplicably, Officer Kyu An shot Mr. Barton in the right hip despite it being obvious that Mr. Barton posed no threat to Officer Kyu An or anyone else.

23. Mr. Barton staggered back in pain before Officer Kyu An immediately shot him in the right elbow.

24. Officer Kyu An then approached a stunned, immobile, and helpless Mr. Barton. This is when Officer Kyu An deploys his *coup de grâce* — a close-range, point-blank, bean bag round to Mr. Barton's face.

25. Mr. Barton, dazed and feeling like he was hit in the jaw with a metal bat, stumbled a few steps before falling to his knees as blood sputtered from his mouth. Two of his teeth broke off from his mouth and fell to the pavement.

26. Officer Kyu An, apparently pleased with his brutal assault of a peaceful protester, observed the carnage he inflicted and carelessly walked away.

27. Bystanders then assisted Mr. Barton to EMS as it was clear he needed emergency medical care. EMS informed Mr. Barton that getting to the hospital was a matter of life and death. Mr.

Barton, who was now dizzy from blood loss, was put on a stretcher and loaded into the ambulance.

28. The ambulance only made it a few feet before it had to stop and pick up another victim of Austin Police brutality. This time, EMS rescued a young, pregnant woman who suffered from asthma and had been sprayed with OC spay. She was also taken to the ER with Mr. Barton.

29. Mr. Barton underwent emergency surgery on his shattered jaw and was in and out of consciousness as he recovered the next day. Additionally, his right elbow and hip were severally bruised and could not function properly.

30. Mr. Barton has currently undergone seven (7) surgeries on his face, but unfortunately, the damage caused by Officer Kyu An is permanent.

31. Officer Kyu An and 18 other officers have been indicated for assaulting Mr. Barton and numerous other innocent civilians protesting police brutality. Several officers have stated through their attorney that the highest levels of APD command authorized and ordered the use of bean bags on the unarmed protesters that day.<sup>2</sup>

32. Mr. Barton has never been arrested nor charged with a crime related to this protest.

## **VII. CAUSES OF ACTION**

### **A. § 1983 – Excessive-Force Claims Against Kyu An in his Individual Capacity**

33. Plaintiff hereby adopts, incorporates, restates, and re-alleges paragraphs 1 through 32, inclusive, with regard to all causes of action.

34. As a direct and proximate result of the above-referenced unlawful and malicious physical abuses of Plaintiff by Officer Kyu An that were committed under the color of law and under his authority as a City of Austin Police Officer, Plaintiff suffered grievous bodily harm and was deprived of his right to be secure in his person against unreasonable seizure of his person, in

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<sup>2</sup> <https://www.texastribune.org/2022/02/21/austin-police-indictment-protests/>

violation of the Fourth Amendment of the Constitution of the United State of America.

35. Plaintiff specifically pleads that Officer Kyu An used excessive force and/or deadly force in the course of an illegal assault and battery of the Plaintiff, a free citizen, in violation of the Fourth Amendment and its “reasonableness” standard.

36. To establish Officer Kyu An violated his constitutional rights to be free from excessive force, Plaintiff must show:

- a. An injury;
- b. Which resulted from the use of force that was clearly excessive to the need; and
- c. The excessiveness of which was objectively unreasonable.<sup>3</sup>

37. Officer Kyu An’s use of unreasonable, unnecessary, and excessive force violated Plaintiff’s clearly established constitutional rights and was not objectively reasonable in light of the circumstances.

38. Specifically, Officer Kyu An used unreasonable, excessive, and unnecessary force by shooting Mr. Barton with a bean bag gun three times, including one in the face at close range.

39. Mr. Barton was not posing a threat to Officer Kyu An nor any other member of the public. Mr. Barton did not disobey any lawful commands issued by Officer Kyu An. Mr. Barton was not arrested nor charged with any crimes in relation to his presence at the protest.

40. Plaintiff suffered multiple injuries as a direct result of Officer Kyu An’s actions. As a result of his encounter with Officer Kyu An, Mr. Barton was shot in the elbow, hip, and jaw with bean bags, which resulted in a shattered jaw, numerous corrective surgeries, and permanent damage.

41. Officer Kyu An’s actions and/or omissions were “objectively unreasonable” in light of the facts and circumstances confronting the officer without regard to his underlying intention or

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<sup>3</sup> See *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012); *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011).



motivation. Clearly, the facts and circumstances of this particular incident demonstrate the unreasonableness of said actions, including that Plaintiff was unarmed, had not committed a crime, was not attempting to flee, and posed no immediate threat or danger to the police. For these reasons, it was objectively unreasonable for Officer Kyu An to shoot Plaintiff three times with a bean bag gun.

42. Officer Kyu An's actions were clearly excessive to the need.

43. The acts of Officer Kyu An as set forth above were intentional, wanton, malicious, and oppressive, or were with reckless disregard of Plaintiff's established constitutional rights; therefore, Plaintiff is entitled to an award of punitive damages.

**B. § 1983 – First Amendment Retaliation Claims Against Kyu An in his Individual Capacity**

44. Plaintiff hereby adopts, incorporates, restates, and re-alleges paragraphs 1 through 43, inclusive, with regard to all causes of action.

45. To assert a claim for First Amendment retaliation under § 1983, Plaintiff must show:

- a. He was engaged in a constitutionally protected activity;
- b. The defendants' actions caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and
- c. The defendants' adverse actions were substantially motivated against Plaintiff's exercise of constitutionally protected conduct.<sup>4</sup>

46. Here, Plaintiff was engaged in the constitutionally protected activity of voicing his free speech and freedom to peaceably assemble in an attempt to redress grievances related to police brutality across the nation.

47. Defendant Kyu An shattered Mr. Barton's jaw in an effort to both literally and figuratively take away his ability to speak on police brutality and to instill fear in all that assembled on the

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<sup>4</sup> *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002)

matter. Such a public, brutal, and devastating injury not only chills a person of ordinary firmness from continuing to engage in the activity, it also makes them physically unable to engage.

48. Plaintiff was peacefully protesting, was not armed, and had his hands raised in a surrendering position at the time Officer Kyu An shot him with the bean bag gun the first time. Officer Kyu An then proceeded to repeatedly shoot Mr. Barton in what can only be described as a simulated overkill. Officer Kyu An never gave Plaintiff a lawful order, never suspected Plaintiff of committing a crime, never attempted to arrest Plaintiff, and never attempted to render aid after the assault – he simply walked away. Further, Plaintiff was never charged with a crime related to the protest. The totality of the circumstances show that Officer Kyu An’s substantial motivation was to infringe on those protesting police brutality by inflicting police brutality.

49. The acts of Officer Kyu An as set forth above were intentional, wanton, malicious, and oppressive, or were with reckless disregard of Plaintiff’s established constitutional rights; therefore, Plaintiff is entitled to an award of punitive damages.

**C. Qualified Immunity Under § 1983**

50. Plaintiff hereby adopts, incorporates, restates and re-alleges paragraphs 1 through 49, inclusive, with regard to all causes of action.

51. Officer Kyu An was carrying out a governmental function in employing the excessive use of force against Plaintiff. Government actors can be entitled to qualified immunity to their individual liability, but this immunity is waived if the complainant shows that:

- a. the individual's acts deprived the party of constitutional rights under color of law;
- b. the deprived rights were clearly established and constitutional rights which existed at the time of the acts; and
- c. such acts were not objectively reasonable under the circumstances, that is, no reasonable official could have believed at the time that the conduct was lawful.

52. In *Kinney v. Weaver*, the Fifth Circuit explained the “clearly established” prong as follows:

Qualified immunity should not be denied unless the law is clear in the more particularized sense that reasonable officials should be on notice that their conduct is unlawful. The central concept is that of fair warning: The law can clearly be established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.<sup>5</sup>

53. In *Newman v. Guedry*, the Fifth Circuit Court addressed whether the law on the use of Tasers was clearly established at the time of the event that occurred before the encounter between Mr. Barton and Officer Kyu An:

Guedry contends that he had no reasonable warning that tasing Newman multiple times violated Newman’s constitutional rights, because there was then no binding case law on the appropriate use of tasers. Lawfulness of force, however, does not depend on the precise instrument used to apply it. Qualified immunity will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel.<sup>6</sup>

54. In *Bush v. Strain*, the Fifth Circuit held that the law was clearly established that an officer slamming an arrestee’s face into a vehicle when the arrestee was not resisting or attempting to flee was objectively unreasonable.<sup>7</sup>

55. At the time of the encounter between Officer Kyu An and Plaintiff, there was no doubt that Mr. Barton had the clearly established right to be free from harm, including excessive force in the form of improper use of a bean bag gun.

56. Here, Mr. Barton posed no immediate threat to Officer Kyu An or any else, was not disobeying an unlawful command, was not suspected of a crime, was not informed he was under

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<sup>5</sup> See *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (en banc) (internal citations and quotations omitted).

<sup>6</sup> See *Newman v. Guedry*, 703 F.3d 757, 763-64 (5th Cir. 2012).

<sup>7</sup> *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008).

arrest; yet, Officer Kyu An chose to shoot Mr. Barton with his bean bag gun three times and shatter Mr. Barton's jaw before calmly walking away.

57. The actions taken by Officer Kyu An were excessive and unreasonable under clearly established law.

58. The acts of Officer Kyu An violated clearly established statutory or constitutional rights of which a reasonable person would have known, including the constitutional rights afforded by the Due Process Clause, First Amendment and Fourth Amendment of the United States Constitution.

**D. Governmental Liability Under 42 U.S.C. §1983 (*Monell*) and the First and Fourth Amendment to the U.S. Constitution applied through the Fourteenth Amendment.**

59. Plaintiff hereby adopts, incorporates, restates, and re-alleges paragraphs 1 through 58, inclusive, with regard to all causes of action.

60. This cause of action is to redress the deprivation under the color of policy, custom, and practice of rights and privileges secured to Plaintiff by the First and Fourth Amendment to the United States Constitution.

61. The elements of a cause of action under § 1983 against a governmental entity are:

- a. Plaintiff was deprived of rights under the United States Constitution;
- b. Such deprivation was caused by a person acting under color of state law;
- c. The governmental entity adopted, or failed to adopt, a policy statement, ordinance, regulation or decision adopted and promulgated by the governmental entity's lawmaking officers or by an official to whom the law makers delegate law-making authority or a persistent, widespread practice of officials or employees of the governmental entity which, though not authorized or officially adopted and promulgated, the policy is so common and well settled as to constitute a custom that fairly represents policy of the governmental entity; and
- d. The promulgation of the policy by City of Austin was done so with deliberate indifference to known or obvious consequences that violations of constitutional rights would occur, and the unconstitutional policy is the moving force behind the deprivation of the Plaintiff's rights.<sup>8</sup>

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<sup>8</sup> *Zarnow v. City of Wichita Falls*, 614 F.3d 461, 166-67 (5th Cir. 2010); see *Groden v. City of Dallas*, 826 F.3d

62. At all relevant times mentioned here, the City of Austin employed Officer Kyu An as a police officer of the Austin Police Department. The City of Austin provided this employee and agent with an official badge, identification, and uniform, which designated and described its bearers as Austin Police Officers.

63. At all relevant times mentioned here, Officer Kyu An, separately and in concert, acted under the color of law, as well as under the color of policies, practices, and customs of the City of Austin. The Defendants deprived Plaintiff of the rights, privileges, and immunities secured to Plaintiff by the First and Fourth Amendment to the United States Constitution and the laws of the United States.

64. The facts alleged above are part of the customs, practices, policies, and decisions of the City of Austin, including but not limited to, the following:

- a. Shooting kinetic projectile into crowds where innocent people could be injured;
- b. Using, authorizing, and/or tolerating excessive force against non-violent protestors;
- c. Failing to adequately discipline officers;
- d. Failing to adequately supervise officers;
- e. Failing to adequately train officers concerning de-escalation of force, crowd control, use of force against non-violent protestors, and the use or misuse of kinetic projectiles;
- f. Failing to train officers regarding demonstrators' free speech and assembly rights;
- g. Not intervening to stop constitutional violations, including excessive force;
- h. Failing to train or instruct officers about specific incidents it considers unreasonable, excessive force, or in violation of the constitution; and
- i. Disproportionally using and tolerating excessive force, including deadly force, against unarmed people of color.

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280, 283 (5th Cir. 2016).

65. Former Chief Brian Manly, who was a policymaker for the City of Austin related to law enforcement at the time, had a duty to properly train and supervise his deputies concerning the use of force and to prevent excessive force. Former Chief Brian Manly failed to properly train and supervise Officer Kyu An in not engaging in excessive and the proper use of force.

66. Numerous other citizens have filed complaints and lawsuits against the City of Austin for excessive and unreasonable force stemming from police action in this protest and many other unrelated instances.

67. Further, 19 police officers, include Defendant Officer Kyu An have been indicted on criminal assault charges related to their conduct at this protest, including Officer Kyu An's conduct that makes the basis of this lawsuit.<sup>9</sup> This demonstrates that the City of Austin had a widespread failure to adequately train and/or supervise problem with its officers and/or condoned the use of these projectiles on innocent people at the time of the incident.

68. Each of these customs, practices, and/or policies was actually known, constructively known and/or ratified by the City of Austin, the Austin Police Department, and/or Former Chief Brian Manly, a policymaker for the City of Austin, and were promulgated with deliberate indifference to Plaintiff's rights, as guaranteed by the First and Fourth Amendments to the United States Constitution, and specifically deprived Plaintiff of his First Amendment right to free speech and to assemble and Fourth Amendment right to be free from excessive and unreasonable force. The known and obvious consequence of these policies was that Austin Police Department officers, and specifically Officer Kyu An, would be placed in recurring situations in which the constitutional violations that occurred in this incident would result. Plaintiff alleges that continuation of the above-mentioned practices of improper policies or customs actually caused Officer Kyu An to

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<sup>9</sup> <https://www.texastribune.org/2022/02/21/austin-police-indictment-protests/>

violate Plaintiff's constitutional rights.

69. Former Chief Brian Manly also ratified Officer Kyu An's conduct by failing to discipline Officer Kyu An for his use of excessive and unreasonable force. It took a grand jury indictment from citizens outside of Former Chief Brian Manly's control to bring Officer Kyu An to criminal justice.

### **VIII. DAMAGES**

70. Plaintiff hereby adopts, incorporates, restates and re-alleges paragraphs 1 through 69, inclusive, with regard to all causes of action.

71. As a result of Defendants' statutory and constitutional violations, Plaintiff has suffered serious and substantial damages and injuries, including but not limited:

- a. Past, present, and future medical expenses;
- b. Past, present, and future physical impairment;
- c. Past, present, and future physical pain and suffering;
- d. Emotional distress and mental anguish;
- e. Physical disfigurement; and
- f. Past, present, and future loss of earning capacity.

72. Defendants are *jointly and severally* liable for Plaintiff's damages.

### **IX. ATTORNEY'S FEES AND COSTS**

73. Pursuant to the *Civil Rights Attorney's Fees Award Act*, 42 U.S.C. § 1988, Plaintiff asserts the right to an award of attorney's fees and costs under its 42 U.S.C. § 1983 pleadings if he prevails.

### **X. RELIEF REQUESTED**

74. The preceding factual statements and allegations are incorporated by reference.

75. For these reasons, Plaintiff prays for judgment against Defendants, any or all of them, for

the following:

- a. Actual damages;
- b. Pre-judgment and post-judgment interest;
- c. Statutory attorney's fees and expenses;
- d. Punitive and exemplary damages against the individual Defendant in an amount to be determined and as allowed by the Court;
- e. Costs of court; and
- f. Such other and further relief as the Court deems just and equitable.

**XI. JURY DEMAND**

76. Plaintiff respectfully demands trial by jury and has tendered the appropriate fee for the same.

**XII. PRAYER**

Plaintiff respectfully requests Defendants to be cited to appear and answer herein, and that upon final trial hereof, the Court award the relief sought against Defendants.

Respectfully submitted,

By: /s/ Myles Lenz

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