IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

SANDRA C. TORRES, individually and as Mother and Representative of the Estate of Decedent, E.T., and as Next Friend of E.S.T., Minor Child ; Eli Torres, Jr., and Justice Torres	§	**Civil Action No. 2:22-cv-00059**
Plaintiffs,	§	
v.	§	
DANIEL DEFENSE, LLC, et al.	§	
Defendants.	§	

DEFENDANTS BETANOURT, MALDONADO, & KINDELL'S UNOPPOSED MOTION FOR LEAVE TO FILE THEIR RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT OUT OF TIME

Defendants Joel Betancourt, Juan Maldonado, and Christopher Kindell (Texas Department of Public Safety or "DPS Defendants") file this unopposed motion for leave to file their response to Plaintiffs' motion for leave to amend their complaint out of time.

Plaintiffs filed their original complaint on November 28, 2022. ECF No. 1. On February 23, 2023, Plaintiffs filed their First Amended Complaint, the current live pleading in this case. ECF No. 26. The DPS Defendants filed their motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 12(b)(7), on May 12, 2023. *See* ECF No. 81. Plaintiffs responded and the DPS Defendants replied. *See* ECF Nos. 107, 109. Plaintiffs now seek to amend their complaint for a second time. *See* ECF No. 146.

The Defendants' response in opposition to Plaintiffs' motion for leave to file a second amended complaint was due Friday, June 29. Undersigned counsel had several other deadlines that

day and regrettably failed to ensure the previously completed responses in both the *Torres* and *Zamora*[1] lawsuits were filed by staff. Late the night of June 29, undersigned counsel realized the responses had not yet been filed and immediately reached out to Plaintiffs' counsel for their position on it being filed out of time. Plaintiffs' counsel indicated they are unopposed to the filing of the response out of time in both cases. No party will be prejudiced by the filing of this response out of time.

Respectfully Submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JAMES LLOYD
Deputy Attorney General for Civil Litigation

SHANNA E. MOLINARE
Division Chief
Law Enforcement Defense Division

/s/ Briana M. Webb
BRIANA M. WEBB
Assistant Attorney General
Texas State Bar No. 24077883
briana.webb@oag.texas.gov

Law Enforcement Defense Division
Office of the Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2080 / Fax (512) 370-9985

ATTORNEYS FOR DEFENDANTS BETANCOURT, MALDONADO, & KINDELL

[1] This case has a sister case in which Plaintiffs are represented by the same counsel who moved for leave to file an amended complaint in both cases. *See Zamora v. Daniel Defense, et al.*, in the United States District Court for the Western District of Texas, Del Rio Division, Cause No. 2:23-cv-00017.

CERTIFICATE OF SERVICE

I, **BRIANA M. WEBB**, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing has been served via electronic mail on all counsel of record on July 1, 2024.

/s/ Briana M. Webb
BRIANA M. WEBB
Assistant Attorney General

CERTIFICATE OF CONFERENCE

I, **BRIANA M. WEBB**, Assistant Attorney General of Texas, do hereby certify that I conferred Laura Keeley, counsel for Plaintiff, on June 30, 2024, and she is unopposed to this motion.

/s/ Briana M. Webb
BRIANA M. WEBB
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
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DEL RIO DIVISION

SANDRA C. TORRES, individually and as Mother and Representative of the Estate of Decedent, E.T., and as Next Friend of E.S.T., Minor Child ; Eli Torres, Jr., and Justice Torres	§	**Civil Action No. 2:22-cv-00059**
Plaintiffs,	§	
v.	§	
DANIEL DEFENSE, LLC, et al.	§	
Defendants.	§	

DEFENDANTS BETANCOURT, MALDONADO, & KINDELL'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND

Defendants DPS Captain Joel Betancourt, DPS Sergeant Juan Maldonado, and DPS Ranger Christopher Kindell file this response in opposition to Plaintiffs' Motion for Leave to File Second Amended Complaint. ECF No. 146.

I. Statement of the Case

Plaintiffs filed their original complaint on November 28, 2022. ECF No. 1. On February 23, 2023, Plaintiffs filed their First Amended Complaint, the current live pleading in this case. ECF No. 26. In their First Amended Complaint, Plaintiffs Sandra Torres individually and as Mother and Representative of the Estate of Decedent, E.T., and as Next Friend of E.S.T., Minor Child; Eli Torres, Jr., and Justice Torres sued Defendants Joel Betancourt, Sergeant Juan Maldonado, and Ranger Christopher Kindell (collectively, Texas Department of Public Safety or "DPS" Defendants) in their individual capacities for the alleged wrongful death of E.T., a minor. *Id.* at 1, 6–7. Plaintiffs sued under 42 U.S.C. § 1983, alleging the DPS Defendants were deliberately indifferent when they unlawfully

seized E.T. and denied her substantive due process under the special relationship and state created danger theories. *Id.* at 73–76.

The DPS Defendants filed their motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 12(b)(7), on May 12, 2023. *See* ECF No. 81. Plaintiffs responded and the DPS Defendants replied. *See* ECF Nos. 107, 109. Now that the motion to dismiss has been pending for over a year, the Plaintiffs seek to amend their complaint to add futile facts that were available to them at the time of the filing of their first amended complaint. *See* ECF No. 146.

II. Standard of Review

Leave to amend a pleading "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). However, "leave to amend is in no way automatic." *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014). In deciding whether to grant leave under Rule 15(a), district courts consider the following five factors: (1) undue delay; (2) bad faith or dilatory motive on the part of the movant; (3) repeated failures to cure deficiencies by amendments previously allowed; (4) undue prejudice to the opposing party in allowing the amendment; and (5) futility of the amendment. *See Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003).

III. Argument and Authorities

A. The amendment is unduly delayed.

The Court may consider whether Plaintiffs new "or should have known of the facts upon which the proposed amendment is based but fail[ed] to include them in the original complaint." *Wright v. McHugh*, No. 5:13-CV-449-DAE, 2014 WL 3952799 at *7 (W.D. Tex. Aug. 13, 2014) (citing *Udoewa v. Plus4 Credit Union*, No. H–08–3054, 2010 WL 1169963, at *2 (S.D. Tex. March 23, 2010)); *see also Pope v. MCI Telecommunications Corp.*, 937 F.2d 258, 263 (5th Cir.1991) (denying motion for leave to amend in part because plaintiff could have added her proposed amendment years earlier, as it "was not about something recently discovered" but "based upon the same facts as her previous claims").

Plaintiffs' implication that the additional facts in the Second Amended Complaint just recently emerged with the filing of new lawsuits is false. The majority of the facts added against the DPS Defendants were readily available since at least the Senate Special Committee and publishment of the Interim Report in December 2022 and Investigative Report in July 2022. Even if some of the facts were released in the DOJ investigation, that report was released six months ago. Plaintiffs state no good cause for the delay, as the facts have been widely publicized with extensive media coverage. This delay causes prejudices the DPS Defendants as they have already asserted qualified immunity in this case, explained further *infra* at III.C.

B. The additional facts included in the Second Amended Complaint are futile.

"Denying a motion to amend is not an abuse of discretion if allowing an amendment would be futile." *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014). "An amendment is futile if it would fail to survive a Rule 12(b)(6) motion." *Id.* Therefore, to determine futility, a court reviews the proposed amended complaint under "the same standard of legal sufficiency as applies under Rule 12(b)(6)." *Id.* (quoting *Stripling v. Jordan Prod. Co.*, LLC, 234 F.3d 863, 873 (5th Cir. 2000)). To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Plaintiff's additional facts include a irrelevant statement made by DPS Director McCraw at the Texas Senate Special Committee to Protect all Texans, the time Maldonado and Kindell arrived to the scene, that conclusory allegation that Kindell had "de facto supervisory authority of TDPS, UPD, UCISD, and County law enforcement officers," that Kindell did not immediately direct a UPD Sergeant to wait to follow the ALERRT protocols, that Kindell assigned troopers to crowd control, and that Kindell "was within earshot of a dispatcher relaying the message about the student's first 911 call from inside the classroom." ECF No. 146-2 at 52, 56, 68–69, 70. The new facts also make the

threadbare allegation that Kindell was "planning to negotiate with the shooter," but do not allege he did in fact negotiate with the shooter. ECF No. 146-2 at 71.

These facts are inconsequential to the claims made in this case as they do not overcome the DPS Defendants' entitlement to qualified immunity. The facts do not state a claim for unlawful seizure as the facts still allege that Ramos, the shooter, was holding E.T. hostage, and the intended target of the "barricade" was the shooter. Moreover, Plaintiffs cannot allege any facts that change the clearly established law that there is no affirmative duty to protect against private violence, nor can they allege facts that state a cognizable claim under the state-created danger theory, or the special relationship exception based on binding Fifth Circuit precedent. *See* ECF No. 81 (DPS Defendants Motion to Dismiss, incorporated by reference herein).

C. The amendment is unduly prejudicial to the DPS Defendants.

The new facts as alleged by Plaintiffs are futile because they do not cure the defects of their First Amended Complaint and are premised on legal theories which have been explicitly rejected by the Fifth Circuit. The undue delay of adding these facts after this lawsuit has been pending over a year and half continues to subject the DPS Defendants to the undue burdens of litigation when they are entitled to qualified immunity. The burden on DPS Defendants of allowing an amendment must be given heightened consideration because of their presumptive entitlement to qualified immunity for all claims asserted against them in their individual capacities. Qualified immunity is an "immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). One of the primary purposes of qualified immunity is to shield government employees from the "burdens of litigation." *Id.*; *see also Helton v. Clements*, 787 F.2d 1016, 1017 (5th Cir. 1986) (holding that those who are entitled to qualified immunity should be "free from suit and the burden of avoidable pretrial matters"). Thus, the Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991); *see also*

Carswell v. Camp, 54 F. 4th 307, 312 (5th Cir. 2022) ("The rule is that a defendant's entitlement to qualified immunity should be determined at the earliest possible stage of the litigation—full stop.") (internal quotation omitted).

With this concern in mind, the Fifth Circuit has held that, where qualified immunity is at play, civil rights plaintiffs should not be "allowed to continue to amend or supplement their pleading until they stumble upon a formula that carries them over the threshold." *Jones v. Greninger*, 188 F.3d 322, 326 (5th Cir. 1999) (per curiam) (quoting *Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986)). By granting Plaintiffs' motion to file their Second Amended Complaint, the Court would be allowing Plaintiff to do just that. Even with the extra facts, Plaitniffs fail to establish a clearly established constitutional violation by the DPS Defendants, as such those claims are barred by qualified immunity. *See Hernandez ex rel Hernandez v. Tex. Dep't of Prot. & Reg. Servs.*, 380 F.3d 872, 879 (5th Cir. 2004) (explaining that qualified immunity attaches if the plaintiff's allegations, if true, fail to establish a constitutional violation). Therefore, if Plaintiffs' Second Amended Complaint became operative, it would subject DPS Defendants to avoidable burdens of litigation—the very thing against which their qualified immunity is meant to protect. *See*, *e.g.*, *Luna v. Granados*, No. 6:21-cv-17, 2023 WL 6221785, at *14 (S.D. Tex. Sept. 24, 2023) ("Allowing leave to amend at this late date would only further protract this lawsuit and would unfairly prejudice the Defendants, who have asserted qualified immunity from suit.").

V. Conclusion

The DPS Defendants respectfully request that this Court deny Plaintiffs' motion for leave to file a second amended complaint.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
Deputy Attorney General

JAMES LLOYD
Deputy Attorney General for Civil Litigation

SHANNA E. MOLINARE
Division Chief
Law Enforcement Defense Division

/s/ Briana M. Webb
BRIANA M. WEBB
Assistant Attorney General
Law Enforcement Defense Division
State Bar No. 24077883

Office of the Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080 / (512) 936-2109 Fax No.
Briana.Webb@oag.texas.gov

ATTORNEYS FOR DEFENDANTS BETANCOURT, KINDELL, & MALDONADO

NOTICE OF ELECTRONIC FILING

I, **BRIANA M. WEBB,** Assistant Attorney General of Texas, do hereby certify that I have electronically submitted for filing a true and correct copy of the above and foregoing in accordance with the Electronic Case Files System of the Western District of Texas, Del Rio Division on July 1, 2024.

/s/ Briana M. Webb
BRIANA M. WEBB
Assistant Attorney General

CERTIFICATE OF SERVICE

I, **BRIANA M. WEBB**, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing has been served via electronic mail on July 1, 2024, to all counsel of record.

/s/ Briana M. Webb
BRIANA M. WEBB
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ORDER

After consideration of Defendants Betancourt, Maldonado, & Kindell's Motion File their Response in Opposition to Plaintiffs' Motion for Leave to Amend Complaint Out of Time, this Court is of the opinion that it should be **GRANTED.**

Defendants Motion for Leave to File out of Time is deemed filed on July 1, 2024, and Plaintiffs' reply is due in 14 days.

Signed on this _____ day of _____, 2024.

_____
CHIEF JUDGE ALIA MOSES
UNITED STATES DISTRICT JUDGE