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, *Plaintiffs* v. DANIEL DEFENSE, LLC, et al. *Defendants*	Case No. 2:22-cv-00059-AM-VRG

DEFENDANTS MENDOZA'S, DORFLINGER'S, CORONADO'S, AND PARGAS' REPLY SUPPORTING DEFENDANTS' MOTION TO DISMISS

Defendants, Uvalde police officers Justin Mendoza, Max Dorflinger, Uvalde police sergeant Telesforo Coronado, and Uvalde police lieutenant Mariano Pargas (collectively herein "Movants") reply to Docket No. 91-1, Plaintiff's response to Movants' motion to dismiss the claims asserted against them (Docket No. 66).

I. Plaintiffs Eli Torres, Jr., Justice Torres, and E.S.T. abandon their claims under the Texas wrongful death and survival statutes so those claims should be dismissed.

1. "A plaintiff abandons claims when it fails to address the claims or oppose a motion challenging those claims." *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.,* 22 F.4th 450, 459 (5th Cir. 2022). Plaintiffs Eli Torres, Jr., Justice Torres, and E.S.T., as siblings of decedent E.T. do not even argue a basis for standing or capacity to bring a claim under the Texas wrongful death statute. *Compare Aguillard v. McGowen*, 207 F.3d 226, 231 (5th Cir. 2000); TEX. CIV. PRAC. & REM. CODE §71.004; TEX. CIV. PRAC. & REM. CODE §71.021.; *See also Rodgers v. Lancaster Police & Fire Dep't*, 819 F.3d 205, 212 (5th Cir. 2016). Accordingly, Eli Torres, Jr.'s, Justice Torres', and E.S.T.'s, claims should be dismissed for lack of standing.

2. As to claims under the Texas survival statute, Plaintiffs Eli Torres, Jr., Justice Torres, and E.S.T. assert they may "maintain a survival claim without first probating the estate" improperly parsing a portion of the Texas Supreme Court's opinion in *Shepard v. Ledford*, 962 S.W.2d 28 (Tex. 1998). [Doc. 91-1, at FN. 2]. Plaintiffs' argument misses the mark. The *Shepard* court held "[h]eirs at law can maintain a survival suit…**if they allege and prove** that there is no administration pending and none necessary," **requisite** facts which are absent from Plaintiffs' Eli Torres, Jr.'s, Justice Torres,' and E.S.T.'s complaint. *Id.* Under *Shepherd*, the Court should dismiss Plaintiffs Eli Torres, Jr.'s, Justice Torres', and E.S.T.'s survival action as well.

3. Moreover, Plaintiffs Eli Torres, Jr., Justice Torres, and E.S.T. cannot reconcile their purported status as sole beneficiaries with Plaintiff Sandra Torres' claim as representative of E.T.'s estate–facts which are "tightly bound up with whether" Texas law authorizes Plaintiffs Eli Torres, Jr., Justice Torres, and E.S.T. to maintain a survival action as E.T.'s legal heirs at all. Compare, *Rodgers*, 819 F.3d at 212.

4. Lastly, all Plaintiffs fail to address, and thus abandon any argument against, the Movants' statutory immunity from Plaintiffs' survival claims and claims of alleged wrongful death brought under Texas. Law as provided under TEX. CIV. PRAC. & REM. CODE § 101.106(a) and (f). *See also*, *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 658-59 (2008).

II. Plaintiffs also abandon claims against Lieutenant Pargas of a failure to supervise.

5. Plaintiffs do not address, much less defend against, Lt. Pargas' challenge to the Plaintiffs' failure to state a claim of supervisory liability so this Court should also dismiss that claim. *Cf., Terry Black's Barbecue, L.L.C.,* 22 F.4th at 459. Further, Plaintiffs allege no facts supporting a claim of supervisory liability under § 1983. Plaintiffs allege Lt. Pargas was present at the scene of the incident during the incident response, but Plaintiffs fail to allege facts to show Lt. Pargas failed to supervise subordinate officers, the identify of such officers, and that Lt. Pargas failed to provide

those officers received **any supervision** whatsoever, as necessary to state such a claim. *Compare Peña v. City of Rio Grande City*, 879 F.3d 613, 623 (5th Cir. 2018); *Brown v. Bryan County*, 219 F.3d 450, 462 (5th Cir. 2000).

6. Further, Plaintiffs have not alleged facts to show Lt. Pargas "disregarded a known or obvious consequence of his action" to constitute deliberate indifference or moving force causation. *Valle v. City of Houston*, 613 F.3d 536, 547 (5th Cir. 2010) (citation omitted). To the contrary, Plaintiffs allege Lt. Pargas took action, four minutes after dispatch informed Lt. Pargas of the 911 call, to "get further details about the radio message concerning a classroom that was 'full of victims']…."[1] The Court should dismissed Plaintiffs' claims of supervisory liability against Lt. Pargas.

III. Highlighting their "threadbare recitals" Plaintiffs improperly attempt to interject new factual allegations in Plaintiffs' opposition brief, but even those fail to identify any individual Movant's personal involvement in unconstitutional conduct.

a. The Court may not consider factual assertions that are not allegations in the complaint.[2]

7. A "complaint may not be amended by the briefs in opposition to a motion to dismiss." *Energy Coal S.P.A. v. Citgo Petroleum Corp.,* 836 F.3d 457, 462 n.4 (5th Cir. 2016). "Because the

[1] Doc. 26, at ¶¶166-168.

[2] The following factual allegations are not in the live complaint: Doc. 91-1, at pp.8-9; "The UPD Defendants are responsible for a significant portion of this ordeal. Faced with the chance to save the lives of several fourth-grade children, the UPD Defendants chose—and instructed others—to do the opposite." at p.10; "Pargas received a direct communication from a radio dispatch 'that one of the classrooms was 'full of victims.'" at p.11 inaccurately citing or now rewording¶ 166 in Doc. 26; "despite having received official confirmation that children were still alive in the classrooms, Pargas and the other UPD Defendants" *Id*; "Unswayed by the fact that there were eight or nine children that he could still save by breaching the classroom, Pargas responded" at p11 inaccurately citing or now rewording ¶ 168 in Doc. 26; "Pargas knew that his decision could resulted in many deaths including additional deaths of "eight or nine" children, yet Pargas" *Id*; "at 11:38 a.m., "[Coronado] *instructed* other officers" at p. 12 emphasis added; "At one point, the shooter shot at the officers, again reinforcing the indisputable fact that he was an active shooter—yet, in retreating and exiting the building through the south door, Coronado still…" at p.12; "acknowledging not only the deaths that already resulted from his decision to barricade the children in the classrooms, but also the deaths to come of those still alive" at p.13.

court reviews only the well-pleaded facts in the complaint, it may not consider new factual allegations made outside the complaint." *Dorsey v. Portfolio Equities, Inc*, 540 F.3d 333, 338 (5th Cir. 2008). "New factual allegations in briefs [as Plaintiffs seek to interject in their response] are not appropriately considered on a motion to dismiss…[the Court's] focus is on the allegations and materials referred to in the complaint itself." *Wilhite v. Harvey*, 861 F. App'x. 588, 591 n.5 (5th Cir. 2021) (citing, *Inclusive Cmtys. Project v. Lincoln Prop. Co.*, 920 F.3d 890, 900 (5th Cir. 2019).

b. Plaintiffs' effort to add new allegations does nothing to state a claim.

8. The Court should decide Movants' motion based on the pleading allegations alone but, even if, *arguendo,* the Court were not so constrained by controlling precedent, Plaintiffs' new and equally conclusory statements do not save Plaintiffs' claims from dismissal. Tacitly admitting their glaring pleading failures, Plaintiffs do no more in their response brief than list the name of each Movant in a misguided hope that merely inserting a Defendant's name may cure Plaintiffs' facially deficient pleading. This is obviously not enough under the Fifth Circuit's oft cited holding in *Meadours v. Ermel*, 483 F.3d 417, 421 (5th Cir. 2007), "that each defendant's actions in a § 1983 case must be considered individually." (citation omitted). "Instead, direct, personal involvement [by each defendant] in the constitutional deprivations must be alleged in order to state a § 1983 claim." *Cherry v. Geo Grp.,* Civil Action No. DR-19-CV-051-AM-VRG, 2020 U.S. Dist. LEXIS 253063, at *19 (W.D. Tex. 2020) (Moses, J.).

9. Consistent with, and indeed relying upon, the Fifth Circuit's holding in *Meadours,* this Court has repeatedly recognized the propriety of dismissal where, as here, plaintiffs fail allege "specific factual support identifying which Officers" did what. *Shaw v. Hardberger*, Civil Action No. SA-06-CA-751-XR, 2007 U.S. Dist. LEXIS 28907, at *14 (W.D. Tex. 2007) (Rodriguez, J.). See also, *Brittany B. v. Martinez*, 494 F. Supp. 2d 534, 543 (W.D. Tex. 2007) (Rodriguez, J.);

Bonnet v. Ward Cty., No. P-12-CV-085, 2012 U.S. Dist. LEXIS 189057, at *29 (W.D. Tex. 2012) (Junell, J.).

IV. Plaintiffs cannot show a seizure based on Plaintiffs' hypothetical effort to imagine E.T.'s *subjective* thoughts.

10. Plaintiffs ask this court to apply an incorrect legal standard to find a Fourth Amendment seizure based solely on what Plaintiffs hypothesize about – no more. Such pure conjecture is not based on *facts* and never could be. Yet, the Court need not even address such *theoretical* assertion because, even it could be proven accurate – how could it be? – it does not meet the constitutional test. "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of **all of the circumstances** surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (emphasis added). On the resolution of this question "[t]he reasonable-person test is **objective** and ensures 'that the scope of Fourth Amendment protection **does not vary with the state of mind of the particular individual**' claiming a violation." *McLin v. Ard*, 866 F.3d 682, 691 (5th Cir. 2017) (emphasis added) (citing Michigan *v. Chesternut*, 486 U.S. 567, 574 (1988).

11. Lastly, even if the Court followed Plaintiffs' imagination of what E.T. might have been thinking, and the Court could disregard the well-settled law that rejects such a subjective test of a seizure, Plaintiffs fair no better because Plaintiffs still fail to allege facts to show, the seizure Plaintiffs' imagine their decedent may have subjectively perceived, was a seizure under a "show of authority" by any, let alone, all of these Movants who were—as Plaintiffs' pleadings admit—but a few of dozens of officers present at the school. *Compare Brower v. Cty. of Inyo*, 489 U.S. 593, 599 (1989); *Garcia v. City of McAllen*, No. 7:19-cv-00068, 2020 U.S. Dist. LEXIS 56942, at *10-11 (S.D. Tex. 2020) (Alvarez, J.).

V. Plaintiffs concede there is no basis for Plaintiffs' Fourteenth Amendment claim.

12. The Court should deny Plaintiffs' invitation to create a claim where none exists. "The Due Process Clause of the Fourteenth Amendment does not, as a general matter, require the government to protect its citizens from the acts of private actors." *McKinney v. Irving Indep. Sch. Dist.,* 309 F.3d 308, 312 (5th Cir. 2002) (citing *DeShaney v. Winnebago County Dep't of Soc. Servs*., 489 U.S. 189, 195 (1989). *See also, Castle Rock v. Gonzales*, 545 U.S. 748 (2005). Of course, even if this Court chose to rule contrary to this well-settled and important distinction, a judicial creation of such a cause of action *ex post facto* would still require dismissal of such a claim against these Movants because the clearly established law through today is that the Constitution does not create this cause of action.

A. No Movant's conduct created any "special relationship" with Plaintiff E.T.

13. "*DeShaney* stands for the proposition that the state creates a 'special relationship' with a person **only** when the person is involuntarily taken into state custody and held against his will **through the affirmative power of the state**; otherwise, the state has no duty arising under the Constitution to protect its citizens against harm by private actors." *Walton v. Alexander,* 44 F.3d 1297, 1304 (5th Cir. 1995) (en banc) (emphasis added).[3] Plaintiffs' legal theories contrary to Supreme Court authority, asserting *ipse dixit,* a special relationship based on a "restraint of personal liberty" is flawed from the outset and the Fifth Circuit's opinion in *Walton* reinforces the propriety of dismissal of this claim.

14. Additionally, even if Plaintiffs' *theory* could be construed as the clearly established law at the time of the incident which forms the basis of this suit, Movants are still entitled to dismissal

[3] Intentionally or unintentionally, Plaintiffs' citation to the **panel opinion** in *Walton v. Alexander,* 20 F.3d 1360 (5th Cir. 1994), is clearly misleading since that opinion was superseded by the Fifth Circuit's *en banc* opinion in that case one year later in 1995.

because Plaintiffs fail to allege facts to show any individual Movant created the necessary "special relationship" with Plaintiffs' decedent, let alone facts to show any such Movant was deliberately indifferent to E.T.'s rights. "Demonstrating that the State acted with deliberate indifference is 'a significantly high burden for plaintiffs to overcome.'" *Compare, M.D. v. Abbott*, 907 F.3d 237, 251 (5th Cir. 2018) (internal citations omitted). "Stated differently, 'the [State] must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [it] must also draw that inference." *Id* at 252. Plaintiffs have failed to allege such necessary facts.

B. There is no "State Created Danger" theory of liability in this Circuit and Plaintiffs fail to establish facts which show the elements of this claim even if it existed.

15. Denying over 30-years of binding precedent, Plaintiffs claim the Fifth Circuit has "recognized" the state-created danger claim simply because Plaintiffs assert the Fifth Circuit has not "expressly rejected" this non-existent theory of liability. Not only is Plaintiffs' logic flawed "[t]h[e] [Fifth Circuit] has consistently refused to recognize a 'state-created danger' theory of § 1983 liability even where the question of the theory's viability has been squarely presented." *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004). At most, the Fifth Circuit has merely "suggested what elements any such theory would include—should [the Fifth Circuit] ever adopt it." *Fisher v. Moore*, 62 F.4th 912, 916 (5th Cir. 2023).

VI. Qualified immunity exists and it applies: Full stop.

16. "If we want to stop mass shootings, we should stop punishing police officers [as Plaintiffs seek to do here] who put their lives on the line to prevent them." *Winzer v. Kaufman Cty.*, 940 F.3d 900, 901 (5th Cir. 2019) (Ho, J. dissenting).

17. In yet the farthest stretch to avoid the dismissal mandated by substantial controlling precedent, Plaintiffs ask this Court to not just boldly ignore—but to itself *reverse* a constitutional immunity so deeply rooted in our nation's history and merely *reinforced* under a litany of United

States Supreme Court cases since *Pierson v. Ray*, 386 U.S. 547, 555 (1967). *See also Doe v. McMillan*, 412 U.S. 306, 319 (1973)**;** *Scheuer v. Rhodes*, 416 U.S. 232, 245 (1974); *Gomez v. Toledo*, 446 U.S. 635, 639 (1980)*; Harlow v. Fitzgerald*, 457 U.S. 731 (1982); *United States v. Hensley*, 469 U.S. 221, 232 (1985); *Wyatt v. Cole*, 504 U.S. 158, 168 (1992); *Ashcroft v. Al-Kidd*, 131 S.Ct. 2074 (2011); *Filarsky v. Delia*, 566 U.S. 377 (2012); *District of Columbia v. Wesby,* 138 S.Ct. 577 (2018); *See also* Hon. Andrew S. Oldham*, Official Immunity at the Founding,* 46 Harv. J.L. & Pub. Pol'y 106 (2023).

18. Plaintiffs' reliance on Judge Willett's concurring opinion in *Rogers v. Jarrett*, 63 F.4th 971, at 979-81 (5th Cir. 2023) is far too parsed. As Judge Willett rightly concedes in the same opinion, his learned position on the issue is no more than just that. Since Judge Willette himself points out *in the very same opinion* what Plaintiffs ignore, that the Fifth Circuit "cannot overrule the Supreme Court" and "upholding qualified immunity [as this Court must do here] is **compelled** by our **controlling precedent**," *Rogers*, 63 F.4th at 981 (emphasis added). There is no reason for this Court to indulge Plaintiffs' desire to change the law. As of today, in all federal circuits, "[o]nce an officer invokes the qualified immunity defense, the plaintiff must rebut it by establishing (1) that [each] officer violated a federal statutory or constitutional right and (2) that the unlawfulness of the conduct was 'clearly established at the time.'"[4] *Rich v. Palko*, 920 F.3d 288, 294 (5th Cir. 2019) (internal citations omitted).

19. Plaintiffs' claims fail because they fail to identify any precedential case which plausibly shows that any Movant's conduct in the Fifth Circuit was clearly unlawful under established federal law. *See Rivas-Villegas* v. *Cortesluna*, 142 S. Ct. 4, 8 (2021); *Vann v. City of*

[4] Plaintiffs' suggestion, that merely alleging "egregious facts" circumvents Plaintiffs' burden to allege facts which show the purported unlawful conduct was clearly established at the time of the constitutional violation is contrary to the well settled law of immunity. *Compare, Cortesluna*, 142 S. Ct. at 8; *Bond*, 142 S. Ct. at 11.

Southaven, 884 F.3d 307, 310 (5th Cir. 2018). Even assuming—as Plaintiffs argue—that a consensus of opinions outside the Fifth Circuit shows that the state created danger theory of recovery is clearly established in a general sense, that argument still fails to state a claim because governing Supreme Court precedent requires much more particularity to overcome immunity, the robust consensus of authority must be sufficiently specific to place every officer on notice that, beyond debate, each Movant's action was clearly unlawful. *See Plumhoff v. Rickard*, 572 U.S. 765, 779-780 (2014); *Solis v. Serrett*, 31 F.4th 975, 984 (5th Cir. 2022); *Fisher* 62 F.4th at 918. Having failed on their burden of proof on both dispositive elements of immunity, Plaintiffs cannot avoid dismissal based on immunity by asking this Court to pretend, or even rule, that qualified immunity does not exist.

VII. Discovery is precluded, and it would not save Plaintiffs' non-existent claims.

20. In their unwavering pursuit of reversing decades old precedent, Plaintiffs request this Court ignore over 30 years of precedent prohibiting discovery *before* this Court may determine a Movant's immunity at the motion to dismiss stage. [Doc. 91-1, at pp. 28-29]. "The Supreme Court had none of it" and nor should this Court. *see Carswell v. Camp*, 54 F.4th 307, 311 (5th Cir. 2022). Rather, "where the pleadings are insufficient to overcome [Qualified Immunity], the district court *must* grant the motion to dismiss **without** the benefit of pre-dismissal discovery." *Carswell*, at 312. "To get to discovery, [Plaintiffs] must allege sufficient facts in his complaint to state a plausible claim for relief." *Jackson v. City of Hearne*, 959 F.3d 194, 202 (5th Cir. 2020). "[A]ll plaintiffs – even those who want to go fishing in discovery – must plausibly plead every element of their claim to withstand Rule 12(b)(6)." *Ramirez v. Guadarrama*, 2 F.4th 506, 513 (5th Cir. 2021).

VIII. The Court should not allow Plaintiffs to amend again.

21. The Fifth Circuit has repeatedly held that courts should not allow plaintiffs to continuously amend pleadings, particularly in the case of the presumption of individual defendants' immunity

from suit. *Carswell*, 54 F.4th at 311; *In re Paxton,* 60 F.4th 252, at n.2 (5th Cir. 2023); *See, e.g., Anokwuru v. City of Hous*., 990 F.3d 956, 967-68 (5th Cir. 2021); *Jacquez v. Procunier*, 801 F.2d 789, 792-93 (5th Cir. 1986); *Morrison v. City of Baton Rouge*, 761 F.2d 242, 246 (5th Cir. 1985). Such conduct thwarts the purpose of the *presumption* of immunity.

22. Allowing serial amendments so that Plaintiffs may "stumble upon a formula that carries them over the [waiver of immunity] threshold" would subject these Movants to the unnecessary burdens of litigation that immunity avoids. *Procunier*, 801 F.2d at 792-93. *See also*, *Anokwuru*, 990 F.3d at 967-68, *Morrison*, 761 F.2d at 246. Plaintiffs had a fair opportunity to plead a case and have twice failed to do so. Nothing could demonstrate more clearly Plaintiffs' inability to allege facts to state a claim that overcomes every Movants' immunity than from Plaintiffs' last ditch effort to ask the Court to apply some standard other than the Supreme Court's, Fifth Circuit's, and this District's clear and well-settled precedent. Further amendment will not change the law, as Plaintiffs' opposition brief lays bare would be necessary to allow Plaintiffs to avoid these Movants' immunity from suit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court and served upon all counsel of record in accordance with the District's ECF service rules on June 14, 2023.

/s/ William S. Helfand
William S. Helfand