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

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| 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. | § | Case No. 2:22-cv-00059-AM |
| DANIEL DEFENSE, LLC, et al., ***Defendants***. | § | |

**UVALDE COUNTY OFFICERS' REPLY IN SUPPORT OF THE MOTION TO DISMISS**

TO THE HONORABLE CHIEF DISTRICT COURT JUDGE ALIA MOSES:

The Uvalde County Officers, as sued in their individual capacity, file this Reply in Support of their Rule 12(b)(6) Motion to Dismiss:

## I. ARGUMENT & AUTHORITIES

### A. Qualified Immunity is binding Supreme Court precedent, and Plaintiffs' wild reliance on a law professor's article for its abolition is of no moment.

1. "Qualified immunity is important to 'society as a whole'…".[1] The United States Supreme Court penned those exact words *per curiam* in 2017 as it expressed frustration at how frequently it had to summarily reverse lower "federal courts in qualified immunity cases" for not applying the doctrine correctly.[2] The High Court has long extolled the doctrine's importance as the careful "balance between the evils inevitable in any available alternative" so that the "fear of being sued" does not "dampen the ardor of all but the most resolute, or the most irresponsible" of public officials.[3]

2. Yet despite precedent of more than a half-century,[4] the doctrine is constantly maligned by those who wish it were not such a sturdy shield for first responders. Instead, they would insist that police officers be "charged with predicting the future course of constitutional law"[5] and suffer "liability for civil damages"[6] if they guess wrongly. Today, Plaintiffs make a wild existential challenge[7] to the doctrine based on a law review article that garnered attention in a concurring opinion written by Judge Willett in *Rogers v. Jarrett*.[8] But as Judge Willett concedes, "only [the Supreme] Court" can "grapple" with the Qualified Immunity doctrine.[9]

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[1] *White v. Pauly*, 580 U.S. 73, 79 (2017).
[2] *Id*.
[3] *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (establishing "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").
[4] *See Pierson v. Ray*, 386 U.S. 547 (1967).
[5] *Id*.
[6] *Joseph v. Lopinto*, No. 21-30672, 2023 WL 4198884, at *2 (5th Cir. June 27, 2023).
[7] Pl. Resp. to Uvalde County Officers' Mot. to Dismiss, pgs. 11 – 12, Dkt. # 92.
[8] *Rogers v. Jarrett*, 63 F.4th 971, 980 (5th Cir. 2023) (Willett J concurring).
[9] *Id*.

3. Accordingly, Plaintiffs' claim that qualified immunity does not exist—due to ***their*** statutory interpretation of language allegedly impermissibly removed by the first Revisor of Federal Statutes—is wholly meritless.[10] The Supreme Court denied certiorari and upheld a qualified immunity dismissal merely two weeks ago.[11] What Plaintiffs mean to say is that they ***think*** the doctrine should not exist, but that does not excuse them from having to save their suit under the ***current*** qualified immunity doctrine. On that score, Plaintiffs have wholly failed to state a claim "that defeat[s] a qualified immunity defense"—making dismissal appropriate even at the motion to dismiss stage.[12]

**B. Qualified Immunity Legal Standard at the Rule 12(b)(6) stage.**

4. The "fair notice" standard that Plaintiffs advanced in their Response is antiquated and does not appropriately underscore the burden they must meet to survive dismissal. In order to survive a motion to dismiss that invokes qualified immunity, two things must occur. First, Plaintiffs must plead facts of a constitutional violation "that would satisfy *Twombly* and *Iqbal*."[13] Namely, by alleging facts that are "plausible on its face."[14] Second, if the Court determines that a constitutional violation has been plausibly pleaded, the Court next proceeds to a qualified immunity analysis.[15] This requires the Court to determine if the plaintiffs also pleaded facts that establish it is "beyond debate"[16] that prior relevant case law clearly established by that the officer's challenged "conduct at issue violated constitutional rights."[17]

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[10] Pl. Resp. to Uvalde County Officers' Mot. to Dismiss, pg. 6, Dkt. # 92.
[11] *N. S., only child of decedent Stokes v. Kansas City Bd. of Police Commissioners*, No. 22-556, 2023 WL 4278468 (U.S. June 30, 2023).
[12] *Arnold v. Williams*, 979 F.3d 262, 266 (5th Cir. 2020).
[13] *Id*.
[14] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
[15] *Pena v. City of Rio Grande City*, 879 F.3d 613, 618 (5th Cir. 2018).
[16] *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019).
[17] *Anderson v. Valdez*, 845 F.3d 580, 600 (5th Cir. 2016).

**C. In *Fisher*, the Fifth Circuit explicitly refuted every argument that Plaintiffs made regarding the State Created Danger doctrine. The Uvalde Officers are accordingly entitled to Qualified Immunity.**

5. Plaintiffs have made the disappointing choice to ignore the defense's briefing on the case of *Fisher v. Moore*—as it appears ***nowhere*** in their 28-page Response.[18] Yet this intentional omission is unsurprising, because *Fisher* is dispositive of every argument that Plaintiffs make to advance their theory that the Uvalde County officers could be liable under the state-created danger doctrine because: **(a)** the *Fisher* Court explicitly held that out-of-circuit adoption of the state created danger doctrine was "insufficient" to render it clearly established in the Fifth Circuit; **(b)** the *Fisher* Court reversed and rendered a District Court's failure to grant a 12(b)(6) qualified immunity motion, preventing any pre-trial discovery on the case; and **(c)** even if the Fifth Circuit were to expressly adopt a version of the state-created danger theory on appeal in this case—this claim would still require dismissal because this area of constitutional law was not previously "clearly established."[19]

**a. Plaintiffs' argument that the state-created danger doctrine has been clearly established by out-of-circuit precedent in the Fifth Circuit is simply wrong.**

6. "[W]e have held time and again, the right to be free from state-created danger is not clearly established in this circuit."[20] The Fifth Circuit wrote that ***this year*** in *Fisher*—a published opinion. This completely disposes of Plaintiffs' untethered argument that the Fifth Circuit has somehow "recognized" the doctrine sufficiently to render it clearly established within its own jurisprudence.[21] The undersigned will now turn to Plaintiffs' arguments that out-of-circuit precedent has rendered this state-created danger theory as clearly established.

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[18] Pl. Resp. to Uvalde County Officers' Mot. to Dismiss, pgs. 1 – 28, Dkt. # 92.
[19] *Fisher v. Moore*, 62 F.4th 912, 917 (5th Cir. 2023).
[20] *Id*.
[21] Pl. Resp. to Uvalde County Officers' Mot. to Dismiss, pg. 13, Dkt. # 92.

7. In *Fisher*, the plaintiff argued—as the Plaintiffs in this case do—that the out-of-circuit "robust consensus of persuasive authority" was sufficient to clearly establish the state-created danger theory.[22] The Fifth Circuit disagreed, writing "[t]he problem for [plaintiff] is that the Fifth Circuit has never recognized the state-created danger exception"[23] to the Supreme Court's general rule in *DeShaney* that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[24] The *Fisher* Court acknowledged that "a majority of our sister circuits" have adopted "the state-created danger theory of liability in one form or another."[25]

8. But the *Fisher* Court slammed the door shut on this argument when it held, "the mere fact that a large number of courts [have] recognized the existence of a right to be free from state-created danger in some circumstances is insufficient to clearly establish the theory of liability in our circuit. We [have] reasoned that, despite widespread acceptance of the state-created danger doctrine in other circuits, the circuits were not unanimous in the doctrine's contours or its application". Thus, the Fifth Circuit rejected the "argument that out-of-circuit precedent clearly established her substantive due process right to be free from state-created danger."[26] This Court is bound to do likewise and dismiss all of Plaintiffs' state-created danger claims.

**b. Plaintiffs' state-created danger claims cannot survive this 12(b)(6) challenge by arguing they need to develop evidence in discovery and at trial. This is purely a question of law.**

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[22] *Id.* at pg. 16 (Plaintiffs arguing that the ten different circuits adopting the theory is "plainly a "robust consensus of persuasive authority"); *contra Fisher*, 62 F.4th at 917 ("[A]s [plaintiff points out, sometimes a robust consensus of persuasive authority may suffice to clearly establish a constitutional right.").
[23] *Fisher*, 62 F.4th at 916.
[24] *DeShaney v. Winnebago Cnty, Dep't of Soc. Services*, 489 U.S. 189, 197 (1989).
[25] *Fisher*, 62 F.4th at fn. 17 (collecting cases).
[26] *Id*. at 917.

9. Plaintiffs argue that because the Fifth Circuit has not expressly rejected the state-created danger theory that they should be allowed to "develop evidence" in "discovery and at trial."[27] Again, the *Fisher* decision reversed and rendered a district court's decision to deny a qualified immunity 12(b)(6) motion to dismiss.[28] Moreover, the Fifth Circuit went beyond declining to adopt the state-created danger doctrine, expressing deep hesitancy to "expand substantive due process doctrine given the Supreme Court's recent forceful pronouncements signaling unease with implied rights not deeply rooted in our Nation's history and tradition."[29]

10. The *Fisher* Court, on the heels of the Supreme Court's recent decision in *Dobbs*,[30] recognized that any expansion of the substantive due process clause—as a matter of law—would require the Fifth Circuit to grapple with a deep analysis of whether the state-created danger doctrine was deeply rooted in the nation's history. Plaintiffs, as the advocates for this doctrine's adoption, have completely failed to provide any briefing on "how the state-created doctrine meets the reinvigorated [historical] test" as a matter of law.[31] No amount of discovery will permit Plaintiffs to overcome this hurdle, and dismissal is required.

**c. Finally, even if Plaintiffs convince the Fifth Circuit to adopt the state-created danger doctrine on appeal, this future adoption of the doctrine would not bar the Uvalde County officers' qualified immunity in the case at bar.**

11. "A claim that [the Fifth Circuit has] expressly not recognized is the antithesis of a clearly established one" and therefore the Uvalde County officers are entitled to qualified immunity on the state-created danger doctrine claims.[32] Even if the doctrine did exist in some form or fashion,

[27] Pl. Resp. to Uvalde County Officers' Mot. to Dismiss, pgs. 16 – 17, Dkt. # 92.
[28] *Fisher*, 62 F.4th at 915.
[29] *Id*. at 913.
[30] *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545 (June 24, 2022).
[31] *Fisher*, 62 F.4th at 915.
[32] *Fisher*, 62 F.4th at 919.

Plaintiffs have still failed to carry their burden, because they have failed to brief existing precedent in the other circuits that "squarely governs" the specific facts at issue.[33] They have merely cited out of circuit precedent at a "high level of generality."[34]

12. "[Q]ualified immunity turns on the legal rules that were clearly established ***at the time*** the official action was taken."[35] Accordingly, a future holding from the Fifth Circuit affirming the existence of the state-created danger doctrine would not strip the Uvalde County officers of their immunity in this case. For all of these reasons, these defendants are entitled to qualified immunity, and dismissal of these claims.

**D. The Uvalde County officers never "involuntarily" incarcerated any school children against their will to create a special relationship with them. Plaintiffs' arguments to the contrary are paltry.**

13. Plaintiffs' entire argument to support a custodial "special relationship" between the Uvalde County defendants and the children rests on their reliance on one sentence from a panel opinion in *Walton* that was ***explicitly overruled*** on rehearing en banc.[36] Despite conceding that the Uvalde defendants are generally correct that there is no custodial relationship for public school children—they argue that the language from the *Walton* panel left the door open for a "special relationship" and that this Court should walk through that door because "this is no ordinary case."[37] But, yet again, Plaintiffs are simply wrong on the case law.

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[33] *Morrow*, 917 F.3d at 876 (citing *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018)).
[34] *Salazar v. Molina*, 37 F.4th 278, 285 (5th Cir. 2022), cert. denied, 143 S. Ct. 1781 (2023).
[35] *Id*. (cleaned up) (emphasis added).
[36] *Walton v. Alexander*, 20 F.3d 1350, 1354 (5th Cir. 1994), on reh'g en banc, 44 F.3d 1297 (5th Cir. 1995) (the overruled panel wrote that the "cases leave open the possibility that the duty owed by a state to prisoners and the institutionalized might also be owed to other categories of persons in custody by means of similar restraints of personal liberty.").
[37] Pl. Resp. to Uvalde County Officers' Mot. to Dismiss, pg. 19, Dkt. # 92.

14. Sitting en banc, the Fifth Circuit stated in no uncertain terms in *Walton* 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."[38] The en banc Court accordingly repudiated the panel opinion that found a special relationship exploring what other cases had "left open." This Court should similarly repudiate Plaintiffs' identical argument here.

15. Moreover, Plaintiffs' Response makes no attempt to find any case law within the Fifth Circuit where it or the Supreme Court has held that a special relationship can be created under *Walton* via wild allegations that ***the State*** took children ***involuntarily into custody and held them against their will*** when they staged around a school in an effort to ***save*** the children from the private violence of a maniac. Plaintiffs' failure to find such case law was inevitable—because no such holding has ever been rendered by either the Fifth Circuit or the Supreme Court.

16. Instead, as of 2023, the Fifth Circuit has identified ***only three scenarios*** where they have previously held that a special relationship is created. Those scenarios are "(1) when the state ***incarcerates a prisoner***, (2) involuntarily commits someone to an institution, or (3) places a child in foster care."[39] The Robb elementary school students fit none of those categories, and Plaintiffs never plead otherwise. Plaintiffs are essentially asking this Court to create a fourth category and hold that the school children were the "quasi-prisoners" of the State because of the methods the

[38] *Walton v. Alexander*, 44 F.3d 1297, 1304 (5th Cir. 1995) (emphasis added).
[39] *Doe v. Bridge City Indep. Sch. Dist.*, No. 20-40596, 2021 WL 4900296, at *2 (5th Cir. Oct. 20, 2021) (emphasis added) (citing *Doe ex rel. Magee v. Covington Cnty, Sch Dist. ex rel. Keys*, 675 F.3d 849, 856 (5th Cir. 2012)).

State chose in its attempts to effectuate their rescue "from harm at the hands of a private actor."[40] This Court should emphatically decline this invitation as barred by the case law. Regardless, because Plaintiffs have failed to brief binding law that places this issue "beyond debate" the Uvalde County officers are still entitled to qualified immunity regardless.[41]

**E. The Uvalde County officers never seized any of the children under the Fourth Amendment.**

17. "A seizure requires the use of force *with intent to restrain*. Accidental force will not qualify."[42] The Supreme Court of the United States in *Torres* made it abundantly clear that an officer cannot accidentally seize a citizen under the Fourth Amendment. When no physical force is used, a show of authority may suffice to affect a seizure. However, "a seizure occurs" only "when an officer *objectively* manifests an ***intent*** to restrain the liberty of an individual through either use of physical force or a show of authority.[43]

18. First, Plaintiffs have not and cannot make a non-frivolous pleading that the Uvalde County officers manifested an objective intent to restrain the liberty of the ***children***—as opposed the murderous Ramos—with any of the actions they took on the day of the Robb Elementary School shooting. Instead, Plaintiffs have artfully pleaded that the "effect"[44] of the officers staging around the Robb Elementary school to restrain the shooter had the side-effect of also "trap[ping]" the students in the classroom with Ramos. This is tantamount to pleading that the Uvalde County officers "accidentally" seized the students while they were attempting to *intentionally* seize Ramos.

[40] *Id*. (holding that state does not "have a special relationship with a student that would require the school to protect the student from harm at the hands of a private actor.").
[41] *Morrow*, 917 F.3d at 874.
[42] *Torres v. Madrid*, 141 S.Ct. 989, 998 (2021).
[43] *United States v. Wright*, 57 F.4th 524, 530 (5th Cir. 2023).
[44] Pl. 1st Am. Compl., pg. 49, Dkt. # 26.

This is insufficient as a matter of law to amount to a Fourth Amendment seizure, and Plaintiffs claims must be dismissed accordingly.

19. **Second**, this claim also requires dismissal upon analysis of the next legal inquiry, whether the Uvalde County officers' show of authority was such that "in the light of all of the circumstances surrounding the incident, a ***reasonable*** person would have believed that [they] were not free to leave."[45] This objective test is designed to ensure that the Fourth Amendment's protections do not vary "with the state of mind of the particular individual claiming a violation."[46] Here, Plaintiffs claim that they have peered into their crystal ball and determined that the presence of the officers "caused E.T. to believe she could not leave the classroom."[47] This argument merely posits something that E.T.—a child—might have subjectively believed, but it does not save this claim from dismissal under the applicable objective test.

20. The test requires weighing all of the objective circumstances and determining whether those circumstance would make a reasonable person think they were not free to leave, which differs from a desire not to leave "for reasons unrelated to the police presence…".[48] Imagine no police ever arrived on the scene—for whatever reason. Would the children have felt free to leave the classroom? No, because Ramos, a murderer with a high-powered rifle, would shoot them if they tried. Now reverse the hypothetical. Imagine that Ramos was no longer in the classroom—but that numerous police officers were just outside. Would the children have felt free to leave the classroom? The answer is obvious—yes. For that commonsense reason, this claim also requires dismissal.[49]

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[45] *Wright*, 57 F.4th at 531.
[46] *McLin v. Ard*, 866 F.3d 682, 691 (5th Cir. 2017).
[47] Pl. Resp. to Uvalde County Officers' Mot. to Dismiss, pg. 22, Dkt. # 92.
[48] *Wright*, 57 F.4th at 531.
[49] The claim also requires dismissal because Plaintiffs have again completely failed to brief case law that overcomes Qualified Immunity by placing the alleged unconstitutional conduct as clearly established and "beyond debate." *Morrow*, 917 F.3d at 874.

**F. Plaintiffs are not entitled to amend their suit or to proceed with Discovery.**

21. "The Supreme Court has now made clear that a plaintiff asserting constitutional claims against an officer claiming [qualified immunity] must survive the motion to dismiss without any discovery."[50] Furthermore, here "even the most sympathetic reading of plaintiff's pleadings uncovers no theory and no facts that would subject the present defendants to liability."[51] This Court would not abuse its discretion in denying Plaintiffs their request to replead their lawsuit for a second time.[52] Plaintiffs claim that undisclosed facts from newspapers and unreleased body-cameras might alter the legal landscape in their favor. Yet all of their purported upcoming facts merely flavor what they have already alleged. They do not change the fact that their constitutional claims are fundamentally flawed under current Fifth Circuit precedent, and the Uvalde County officers are entitled to qualified immunity.

## II. PRAYER

22. WHEREFORE, PREMISES CONSIDERED, the Uvalde County Officers respectfully request that this Court dismiss all claims against them in their individual capacities, and for all other relief to which they may be entitled, whether in law or in equity.

Respectfully submitted,

**LAW OFFICES OF CHARLES S. FRIGERIO**
A Professional Corporation
Riverview Towers
111 Soledad, Suite 465
San Antonio, Texas 78205
(210) 271-7877
(210) 271-0602 Telefax
Email: Firm@FrigerioLawFirm.com

[50] *Carswell v. Camp*, 54 F.4th 307, 311 (5th Cir. 2022).
[51] *Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986).
[52] *Trujillo v. Hobbs*, 173 Fed. Appx. 663, 664 (5th Cir. 2005) (plaintiff's cannot be allowed to continue to amend or supplement their pleading until they stumble upon a [winning] formula…").

CHARLES S. FRIGERIO
State Bar No. 07477500
**LEAD COUNSEL**

**- AND -**

**WRIGHT & GREENHILL, P.C.**
4700 Mueller Blvd., Suite 200
Austin, Texas 78723
(512) 476-4600
(512) 476-5382 – Fax

By: /s/ Stephen B. Barron
Blair J. Leake
State Bar No. 24081630
bleake@w-g.com
Stephen B. Barron
State Bar No. 24109619
sbarron@w-g.com

**ATTORNEYS FOR DEFENDANTS UVALDE COUNTY, UVALDE COUNTY SHERIFF RUBEN NOLASCO, UVALDE COUNTY CONSTABLE EMMANUEL ZAMORA, AND UVALDE COUNTY CONSTABLE JOHNNY FIELD**

## CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of July, 2023, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service/E-Mail, in accordance with the Federal Rules of Civil Procedure.

/s/ Stephen B. Barron
Stephen B. Barron