UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

SANDRA C. TORRES, INDIVIDUALLY AND AS MOTHER AND REPRESENTATIVE OF THE ESTATE OF DECEDENT, E. T., et al. *Plaintiffs,* v. DANIEL DEFENSE, LLC, et al., *Defendants.*	§ § § § § § § § § §	Civil Action No. 2:22-cv-00059-AM

DEFENDANT JESUS "J.J." SUAREZ'S
REPLY TO RESPONSE TO MOTION TO DISMISS

TO THE HONORABLE CHIEF US DISTRICT JUDGE ALIA MOSES

COMES NOW JESUS "J. J." SUAREZ, one of the Defendants in the above referenced cause, and files this Reply to Plaintiffs' Response to Defendant Suarez's Motion to Dismiss, and would show the Court, as follows:

PLAINTIFFS' FOURTH and FOURTEENTH AMENDMENT CLAIMS

"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). Plaintiffs have failed to state a claim under the Fourteenth Amendment under the circumstances of this case. Plaintiff asserts that Defendant waived any argument regarding what they call the "custodial relationship between E.T. and Suarez", under the Fourteenth Amendment. However, Plaintiffs themselves reference Movant's response denying any custodial relationship as it relates to the claims made by Plaintiff. Movant's

position is clear. Movant has denied that "by means of physical force or show of authority, has in some way restrained" E.T.s liberty. While Defendant understands that, at this stage of the case, Plaintiffs' pleadings must be taken as true, it is also clear that there was no custodial relationship as described by Plaintiffs. As previously noted, Movant's actions during the incident did not trap the students, but the actions of the shooter did.

STATE CREATED DANGER THEORY

Movants assert that the "state-created danger" theory of liability has been adopted in the Fifth Circuit, citing *Fisher v. Moore,* 62 F.4th 912 (5th Cir. 2023). However, that opinion was withdrawn and substituted with *Fisher v. Moore*, 73 F.4th 367, 2023 U.S. App. LEXIS 17996 *2, 2023 WL 4539588 (5th Cir. 2023) (*Fisher* II). The Fifth circuit has never adopted a state-created danger exception to the sweeping 'no duty to protect' rule. And a never-established right cannot be a clearly established one. Id. at *2-3. Some might reasonably contend, given [the Fifth] circuit's decade-plus of indecision – never adopting state-created danger yet never rejecting it – that if the theory is to be squarely engaged, its once-and-for-all adoption or rejection should come from the en banc court rather than a panel." Id. at *10 n.15. *Fisher* II further held that the adoption of the state-created-danger theory of liability in other circuits fails to provide a "robust 'consensus of persuasive authority' [that] suffice[s] to clearly establish a constitutional right." *Id.* at *11 (quoting *Morgan v. Swanson*, 659 F.3d 371-72 (5th Cir. 2011) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 2009)). On July 17, 2023, the Fifth Circuit Court also issued its decision in *Zinsou v. Fort Bend County*, 2023 U.S. App. LEXIS 18111 *6, 2023 WL 4559365 (5th Cir. 2023) (not scheduled for publication), in which the Court cited the substituted *Fisher* opinion.

Plaintiffs face a further "heavy" burden in this case that requires particularized identification of "relevant precedent [that] 'ha[s] placed the … constitutional question beyond debate.'" *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019) (quoting *al-Kidd*, 563 U.S. at 741). The Court "must frame

the constitutional question with specificity and granularity." *Id.* The 5th Circuit has not fully adopted the state-created danger theory as Plaintiff has asserted. Therefore, Movant was *not* on notice "beyond debate" that his actions were clearly unlawful. See *Id.* at 875 12. The [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 "suggested what elements any such theory might include—should [the Fifth Circuit] ever adopt it." *Fisher*, 2023 U.S. App. LEXIS 17996, at *11.

It should also be noted that Suarez' actions did not create a "special relationship" with any Plaintiff. "*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). Plaintiffs were taken into custody involuntarily by the shooter. Movant did not take the students into custody or hold them against their will. As noted, any such actions were by the shooter, not movant.

Also, demonstrating that the State acted with deliberate indifference is a significantly high burden for plaintiffs to overcome. *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.

As noted, on July 14, 2023, the Fifth Circuit again declined to recognize a "State Created Danger" theory of liability, and Plaintiffs fail to establish facts which show the elements of this claim even if it existed. In *Fisher* II, the Fifth Circuit made clear that the Circuit "has never adopted a state-

created danger exception to the sweeping 'no duty to protect' rule. And a never established right cannot be a clearly established one" *Fisher v. Moore,* No. 21-20553, 2023 U.S. App. LEXIS 17996, at * (5th Cir. 2023). *Fisher* II further held that the adoption of the state-created-danger theory of liability in other circuits fails to provide a "robust 'consensus of persuasive authority' [that] suffice[s] to clearly establish a constitutional right." Id. at *11 (quoting *Morgan v. Swanson*, 659 F.3d 371-72 (5th Cir. 2011) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 2009)).

SUAREZ IS ENTITLED TO QUALIFIED IMMUNITY

Plaintiffs ask this Court to ignore the right of Defendants to Qualified Immunity. As noted by various Co-defendants, the United States Supreme Court has ruled on this issue multiple times 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).

Under current law, 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.'" *Rich v. Palko*, 920 F.3d 288, 294 (5th Cir. 2019) (internal citations omitted).

Based on all of the above, Defendant Suarez' Moton to Dismiss should be granted and he should be dismissed from this matter, with prejudice to refiling same, and for such other relief to which he is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that August 18th 2023, a true and correct copy of the foregoing document was electronically served on all parties, pursuant to the Federal Rules of Civil Procedure:

/s/James E. Byrom
James E. Byrom