No. 22-20652

United States Court of Appeals for the Fifth Circuit

John Doe 1, on behalf of themselves and a Class of all other similarly situated John and or Jane Doe employees of Harris County; John Doe 2, on behalf of themselves and a Class of all other similarly situated John and or Jane Doe employees of Harris County,

Plaintiffs - Appellants

v.

Harris County, Texas; Lina Hidalgo, County Judge; Rodney Ellis, Precinct 1 Commissioner; Adrian Garcia, Precinct 2 Commissioner; Jack Cagle, Precinct 4, Commissioner; Tom S. Ramsey, Precinct 3, Commissioner; Edward Gonzalez, Harris County Sheriff,

Defendants – Appellees

Appeal from the United States District Court for the Southern District of Texas in Case No. 4:21-CV-3036, the Honorable Andrew Hanen

---

BRIEF OF APPELLEES JACK CAGLE, RODNEY ELLIS, ADRIAN GARCIA, EDWARD GONZALEZ, HARRIS COUNTY, TEXAS, LINA HIDALGO, AND TOM RAMSEY

CHRISTIAN D. MENEFEE
Harris County Attorney
JONATHAN FOMBONNE
First Assistant County Attorney
SETH HOPKINS
Special Assistant County Attorney
Harris County Attorney's Office
1019 Congress Plaza, 15th Floor
Houston, Texas 77002
(713) 274-5141 (telephone)
Seth.Hopkins@HarrisCountyTx.gov
ATTORNEYS FOR APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants	Counsel
John Doe 1, on behalf of themselves and a Class of all other similarly situated John and or Jane Doe employees of Harris County **John Doe 2**, on behalf of themselves and a Class of all other similarly situated John and or Jane Doe employees of Harris County	**Appellate Counsel:** **David Batton** Law Office of David Batton Norman, Oklahoma **Trial Counsel:** **J. Marcus Hill** Hill Hill PC Houston, Texas **Robin McIlhenny Foster** Houston, Texas

Defendants-Appellees	Counsel
Jack Cagle, replaced by **Lesley Briones** as successor under Fed. R. App. P. 43(c)(2) Commissioner, Precinct 4 **Rodney Ellis** Commissioner, Precinct 1 **Adrian Garcia** Commissioner, Precinct 2 **Edward Gonzalez** Sheriff, Harris County **Harris County, Texas** **Lina Hidalgo** Harris County Judge **Tom Ramsey** Commissioner, Precinct 3	**Appellate Counsel:** **Christian Menefee** **Jonathan Fombonne** **Seth Hopkins** Harris County Attorney's Office Houston, Texas **Trial Counsel:** **Jennifer Callan** **James Butt** Harris County Attorney's Office Houston, Texas

/s/ Seth Hopkins

Attorney for Appellees

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Fifth Circuit Rule 28.2.3, Appellees believe the dispositive issues have been authoritatively decided, the facts and legal arguments in this appeal are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

STATEMENT OF THE ISSUES

Appellees respectfully suggest Appellants' Statement of the Issues does not accurately reflect the issues before the Court. A more accurate Statement of the Issues is as follows:

1. Whether the district court properly held that Appellants failed to state a Due Process claim when employees have no constitutional right to particular workplace conditions.

2. Whether the district court properly held that Appellants failed to state a claim under the state-created danger doctrine because this circuit has rejected the doctrine and Appellants failed to plead the elements required by other circuits.

3. Whether the district court properly held that Appellants may not receive injunctive or declaratory relief to interfere with Harris County's legislative or executive processes of allocating public money or operating the Jail.

STATEMENT OF THE CASE

I.
FACTS

On September 20, 2021, a putative class of anonymous current and former jailers and jail staff (collectively, "Jailers" or "Appellants") filed suit against the Sheriff, members of the Harris County Commissioners Court,[1] and the County Judge (collectively, "County" or "Appellees").

Appellants sought declaratory and injunctive relief to require the commissioners to increase funding to the Harris County Jail so their work conditions would improve. Their live Complaint gave anecdotes about inmates with mental illness engaging in violence, indecent exposure, and drug use. ROA.426-427. Appellants also complained about staffing levels, work hours, and training. ROA.428; ROA.434-441. They claimed they lacked time to go to the bathroom or take breaks (ROA.429-430) and criticized their workers' compensation plan, the quality of doors, speakers, and other facilities in the Jail, the temperature, and the fact that inmates sometimes tried to start fires. ROA.432-434; ROA.438.

The Jailers asserted six federal claims:

[1] On January 1, 2023, Commissioner Jack Cagle was replaced by Commissioner Lesley Briones. Pursuant to Fed. R. App. P. 43(c)(2), she is Commissioner Cagle's successor and automatically substituted as a party.

(1) A Fourteenth Amendment Substantive Due Process right to additional funding and staff levels at the Jail based on a state-created danger to Jail employees. ROA.442-450.

(2) A Fourteenth Amendment Substantive Due Process right to additional funding and staff levels at the Jail based on a hostile work environment. ROA.450-451.

(3) An *ultra vires* claim that Appellees had a ministerial duty under Tex. Loc. Gov't Code § 351.001(a) & § 351.041 to provide more funding at the Jail. ROA.452-454.

(4) A Fourteenth Amendment Due Process claim based on the theory that unnamed employees received unspecified negative employment notes when they wanted to retire, transfer, or leave the Sheriff's Office. ROA.454-455.

(5) A Fifth Amendment taking because the Sheriff scheduled them to work hours and conditions that they did not like. They argued that their time off is a property right. ROA.456-458.

(6) An *ultra vires* claim that Appellees violated the Texas Commission on Jail Standards by providing inadequate jail funding and staffing levels. ROA.458.

II.
PROCEDURAL HISTORY

Appellants filed suit on September 20, 2021. ROA.20-220. On October 11, 2021, the County filed a Motion to Dismiss (ROA.249-271) and an Amended Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) because some claims were prescribed under the relevant statute of limitations and the Complaint failed to plead facts to support claims for municipal

liability or *ultra vires* acts, failed to satisfy the requirements of a class action, and failed to plead a claim for injunctive relief and/or declaratory judgment under any constitutional theory. ROA.272-294.

On December 3, 2021, Appellants responded to the Amended Motion to Dismiss. ROA.303-333. On April 22, 2022, the district court conditionally granted the Motion, but permitted Appellants 30 days to amend their complaint to state a cause of action.[2]

On June 20, 2022, Appellants filed their First Amended Complaint—their live pleading. ROA.419-464. On July 15, 2022, the County moved to dismiss the amended complaint. ROA.465-486. On September 12, 2022, Appellants responded. ROA.500-517. On November 17, 2022, the district court dismissed the case and issued a Memorandum and Order (ROA.518-532) and Final Judgment. ROA.533.

First, the district court held the Jailers could not state a Fourteenth Amendment claim for state-created danger because this circuit has "consistently refused to recognize" the theory. ROA.523.

[2] ROA.362-391. The district court extended this deadline by another month. ROA.418.

Second, the district court held the Jailers could not state a Fourteenth Amendment claim for understaffing or an abusive work environment because they "do not have a protected liberty or property interest in a safe working environment and cannot maintain a due process claim on that basis." ROA.523.

Third, the district court dismissed the *ultra vires* claims for failure to fund or comply with the Texas Commission on Jail Standards because these are state law matters, and any effort to enforce them in federal court would "improperly bootstrap state law into the Constitution." ROA.526, quoting *Bryan v. Cano*, No. 22-50035, 2022 WL 16756388, at *4 (5th Cir. Nov. 8, 2022).

Fourth, the district court dismissed the Due Process claims because the Jailers pleaded no facts to meet their burden of showing they were discharged in a manner that falsely stigmatized them without providing notice and an opportunity for hearing. ROA.527, citing *Bellard v. Gautreaux*, 675 F.3d 454, 461-62 (5th Cir. 2012). The Jailers also failed to "specify the disciplinary measures to which they were subjected" and used "vague, conclusory pleadings" without specific facts. ROA.528.

Fifth, the district court dismissed the Fifth Amendment taking claim because it was an "attempt to repackage their failed state-created danger due process claim in Claim 1 and their unsafe/abusive work environment claim in Claim 2." ROA.529. The Jailers failed to show they had a property interest in their time off, and their allegations of not being able to take leave was conclusory and lacked facts to state a claim. ROA.530. Further, a taking requires the government to have the right to take property if the owner is compensated—it does not apply to claims where the government is alleged to have acted illegally. ROA.529, citing *Lafaye v. City of New Orleans*, 35 F.4th 940, 943 (5th Cir. 2022).

Finally, the district court held the *ultra vires* claims and alleged violations of Texas law were based in state law, and the court declined to exercise supplemental jurisdiction. ROA.531, citing *Broussard v. Basaldua*, 410 Fed. Appx. 838, 840 (5th Cir. 2011 (per curiam). It explained, "the State of Texas has an interest in determining when its officials or officials in its subdivisions are acting *ultra vires* of its own laws, and Texas state courts are best equipped to navigate this complex state-law issue." ROA.531, citing 28 U.S.C. § 1367(c)(1).

The Jailers appeal the dismissal of their Fourteenth Amendment Substantive Due Process claims based on hostile work environment and state-created danger. They do not appeal their Fourteenth Amendment claim for negative employment notes, their Fifth Amendment taking claim, or their state-law *ultra vires* claims.[3]

SUMMARY OF THE ARGUMENT

This court should affirm the district court's dismissal. Appellants fail to state a claim under 42 U.S.C. § 1983 because there is no constitutional right to a particular work environment, and this circuit has not adopted the state-created danger doctrine. Even if the Court overruled longstanding precedent and adopted the state-created danger doctrine, Appellants fail to meet their own proposed test under this theory. Finally, the district court properly held that even if Appellants had a viable claim under any theory, they have no actionable remedy for injunctive or declaratory relief under federal law.

[3] On page 6 of their Brief, Appellants make the conclusory statement that "each identified Harris County Appellee has ultra vires liability for the decisions they had made to allocate jail resources…" However, this issue was otherwise never briefed.

ARGUMENT

I.
STANDARD OF REVIEW

A. Standard of review for a motion to dismiss.

A court of appeals reviews a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) *de novo*. *Molina-Aranda v. Black Magic Enters., L.L.C.*, 983 F.3d 779, 783 (5th Cir. 2020). Rule 12(b)(6) permits a defendant to move for dismissal when the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

To survive dismissal, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A court accepts all well-pleaded facts as true and views them in the light most favorable to the plaintiff. *Molina-Aranda*, 983 F.3d at 783. "But the court does not 'presume true a number of categories of statements, including legal conclusions; mere labels; threadbare recitals of the elements of a cause of action; conclusory statements; and naked

assertions devoid of further factual enhancement.'" *Armstrong v. Ashley*, 60 F.4th 262, 269 (5th Cir. 2023), quoting *Harmon v. City of Arlington, Texas*, 16 F.4th 1159, 1162-63 (5th Cir. 2021).

Rule 12 interacts with Rule 8, which requires that a pleading contain a short and plain statement of the grounds for the court's jurisdiction and a short and plain statement showing the pleader is entitled to relief. Fed. R. Civ. P. 8(a). Rule 8 does not require "detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

B. Standard of review for a claim under 42 U.S.C. § 1983.

Appellants claim they have a cause of action under 42 U.S.C. § 1983 to force the County to provide more jail funding and make other changes to their work environment. Section 1983 does not grant substantive rights; it provides a cause of action for those deprived of their rights

under the Constitution or other laws. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). To prevail under § 1983, a plaintiff must show (1) the conduct complained of was committed under color of law and (2) that conduct deprived him of his rights under the Constitution or laws of the United States. See *Hernandez v. Maxwell*, 905 F.2d 94, 95 (5th Cir. 1990).

To hold a municipality liable under § 1983, a plaintiff has additional burdens under *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978). He must first prove his constitutional rights were violated. He must then prove (1) the existence of an official policy, custom, or practice, (2) of which a municipal policymaker had actual or constructive knowledge, (3) that was the moving force causing the constitutional violation. *Pineda v. City of Houston*, 291 F.3d 325, 325 (5th Cir. 2002).

If a policy is facially innocuous, a plaintiff must prove it was "promulgated with deliberate indifference to the known or obvious consequences that constitutional violations would result." *Piotrowski v. City of Houston*, 237 F.3d 567, 579-80 (5th Cir. 2001) (internal quotation marks and citations omitted). Further, causation is strictly construed, and there must be a "direct causal link between the municipal policy and the constitutional deprivation." *Id.*, 237 F.3d at 580.

II.
THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' CLAIMS BECAUSE THEY FAIL TO STATE A CONSTITUTIONAL VIOLATION

(Response to Appellants' Brief at 13-17.)

Appellants allege the district court erred by (1) not considering facts in a light most favorable to them (Appellants' Issue 1), (2) finding that they failed to plead a Fourteenth Amendment Substantive Due Process claim (Appellants' Issue 2), and (3) finding that they failed to plead a claim under the state-created danger doctrine (Appellants' Issue 3).[4] All three issues require that Appellants plead a plausible claim that one or more Appellees violated their Substantive Due Process rights based on the condition of their workplace. The district court correctly found that they did not do this.

[4] The County suggests the following issues are before the Court:

(1) Whether the district court properly held that Appellants failed to state a Due Process claim when employees have no constitutional right to particular workplace conditions.

(2) Whether the district court properly held that Appellants failed to state a claim under the state-created danger doctrine because this circuit has rejected the doctrine and Appellants failed to plead the elements required by other circuits.

(3) Whether the district court properly held that Appellants may not receive injunctive or declaratory relief to interfere with Harris County's legislative or executive processes of allocating public money or operating the Jail.

A. The Supreme Court and this Court hold that employees do not have a Substantive Due Process right to specific work conditions.

Appellants first contend that they have a Substantive Due Process right to require that their employer upgrade their workplace to meet certain standards. However, the Supreme Court has long held there is no protected liberty or property interest in a particular work environment.

In *Collins*, a sanitation worker died of asphyxia after entering a manhole to unstop a sewer line. *Collins v. City of Harker Heights, Texas*, 503 U.S. 115 (1992). The city violated Texas law by failing to train about the danger of working in sewers or provide required safety equipment, and Collins' surviving spouse alleged that, as a government worker, he had a constitutional interest in "certain minimal levels of safety and security in the workplace." *Id.* at 115-16.

The Supreme Court recognized that those deprived of liberty against their will have the right to "process," while those who "voluntarily accepted" an employment offer (and can quit at any time) do not. *Id.* The Court also held the city's violation of safety standards did not shock the conscious, even when it resulted in the death of an employee. *Id.* While

the claim might be actionable as "a fairly typical tort claim under state law," it is not a constitutional claim. *Id.*

In *Broussard*, this Court affirmed the dismissal of a jailer's claim against a sheriff after the jailer was assaulted by an inmate in a parish jail. *Broussard v. Basaldua*, 410 Fed. Appx. 838 (5th Cir. 2011 (per curiam). The jailer alleged the sheriff violated a contract with the federal government to safely house inmates and violated his Due Process rights by creating an unsafe workplace environment at the jail. *Id.* at 838. This Court rejected that argument and quoted *Collins*: "[n]either the text nor the history of the Due Process Clause supports [a] claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause." *Id.* at 839, quoting *Collins*, 503 U.S. at 126.

In *Santos*, one jailer was killed and a second seriously injured when inmates attempted to escape a county jail. *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989). The Drug Enforcement Administration had warned the sheriff that "a jailbreak was imminent," but the sheriff did not prepare. *Id.*, 883 F.2d at 386. One of the jailers sued the sheriff and Webb County Commissioners Court, which allegedly underfunded the

jail and prevented it from having the staffing needed to operate safely. *Id.* This Court affirmed dismissal of the case based on well-established authority that jailers lack workplace constitutional protection because they "enlisted, on terms they found satisfactory, and [who] were free to quit whenever they pleased." *Id.,* 883 F.2d at 388, quoting *Washington v. District of Columbia*, 802 F.2d 1478, 1482 (D.C.Cir.1986).

In *Greene*, a schoolteacher sued her school district and superintendent alleging she became sick from exposure to mold at her workplace. *Greene v. Plano Independent School District*, 103 Fed. Appx. 542, 543 (5th Cir. 2004). She claimed the building was poorly designed and maintained, and that because her employer was a public entity, its failure to warn its employees about known hazards in the workplace violated her Due Process rights. *Id.* at 544-45.

This Court rejected that argument and held: "Nor does [the Due Process Clause] guarantee [government] employees a workplace that is free of unreasonable risks of harm." *Id.*, quoting *Collins*, 503 U.S. at 129. It further held, "[a]t its core, Appellant's claim is nothing more than a claim of negligence not rising to the level of a due process violation." *Greene*, 103 Fed. Appx. at 545.

B. Appellants' cases are distinguished.

The cases above are directly on point, binding, and dispositive of this appeal. In contrast, Appellants cite cases that are inapposite, outside the Circuit, or both. They first cite *Rochin*, where the Supreme Court excluded evidence that police forcibly obtained by pumping a defendant's stomach against his will. *Rochin v. California*, 342 U.S. 165 (1952). The Court held this shocked the conscious and offended "even hardened sensibilities." *Id.* at 210, cited at Appellants' Brief at 13-14. Those facts are not even remotely similar. This is not a Fourth Amendment case and does not involve the state conducting an invasive medical procedure on Appellants to obtain evidence to convict them.

Appellants cite *Lewis* for the proposition that an official can shock the conscious by arbitrarily denying a person fundamental procedural fairness or exercising power without any reasonable justification to support a legitimate government objective. Appellants' Brief at 14, quoting *County of Sacramento v. Lewis*, 523 U.S. 833 at 845-46 (1998). *Lewis* involved a high-speed police chase, and neither the facts, nor the law, are relevant. Appellants do not explain how the County's decision to allocate limited resources caused them to be arbitrarily denied

fundamental procedural fairness, or how it was inconsistent with a legitimate government objective.

Next, Appellants contend "[i]t is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement." Appellants' Brief at 14, citing *Smith v. Sullivan*, 611 F.2d 1039 (5th Cir. 1980) (emphasis added). In *Smith*, the El Paso County Jail was ordered to limit the inmate population and submit weekly reports to the court. *Id.* That case is distinguished because it was brought by inmates challenging their forced living conditions. Jailers are not subjected to "unconstitutional conditions of confinement." *Id.* They are free to go home at the end of their shifts, free to quit their jobs at any time, and free to walk out of jail under their own terms.

Appellants make the conclusory allegation that they were subjected to "brutal and inhume abuse of official power," have been "abuse[d]" by Harris County, had their "rights and liberty" taken from them, and that this "shock[s] the conscience" and "is actionable under the Fourteenth Amendment." Appellants' Brief at 14-15. Appellants never provide factual or legal support for these conclusions and cannot point to any

binding authority that employees (as opposed to detainees) have a constitutional right to any particular jail conditions.

Appellants acknowledge the "Due Process Clause does not guarantee state employees 'certain minimal levels of safety and security' in the workplace." Appellants' Brief at 15-16, citing *Collins*, 503 U.S. at 126. However, they contend that an employee can bring a Substantive Due Process claim if the "state compelled the employee to be exposed to a risk of harm not inherent in the workplace." Appellants' Brief at 16, citing *Kedra v. Schroeter*, 876 F.3d 424, 436 n.6 (3rd Cir. 2017).

In *Kendra*, the Third Circuit held that when a firearms instructor criminally shoots and kills an employee, that it is not a risk inherent to the workplace. *Id.* In contrast, the risks the Jailers describe—long hours, dangerous inmates, and crowded facilities requiring maintenance and repair—are well-known risks inherent to working in a jail.[5]

[5] Appellants admit "the jail is inherently dangerous." Appellants' Brief at 23. Further, their own cases describe jail conditions worse than those alleged in Harris County. For example, in *Smith*, the El Paso County Jail was under court order because of incidents of inmate attacks, rapes, temperature extremes, failure to quarantine contagious inmates, poor design, cramped conditions, and lack of care for those with mental illness. *Smith v. Sullivan*, 611 F.2d 1039, 1046-48 (5th Cir. 1980). In *Santos*, an officer was killed during a jail break that the sheriff knew about in advance, but allegedly lacked the resources to prepare for. *Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989).

Appellants contend that officials can be liable for a Substantive Due Process violation when their "conduct is a substantial departure from professional judgment" and they "act with conscious indifference." Appellants' Brief at 16, citing *Schwartz v. Booker*, 702 F.3d 573 (10th Cir. 2012). In *Scwartz*, the Tenth Circuit held that officials who failed to respond to evidence of child abuse could be liable when the child was found starved to death. *Id.* That case—like others cited by Appellants—is inapposite and based on law not binding in this circuit.

Finally, in *Guertin*, the City of Flint poisoned its residents with water contaminated with bacteria, lead, and corrosive chemicals. *Guertin v. State*, 912 F.3d 907, 915 (6th Cir. 2019). The Seventh Circuit held that those injured by the water could bring a Bodily-Integrity Substantive Due Process claim against the officials who made the deliberate decision to switch water sources and use a treatment facility they knew was unsafe, falsely tell people it was safe, and refuse to reconnect to the previous water source. *Guertin v. State*, 912 F.3d 907, 915 (6th Cir. 2019).

Guertin is not binding in the Fifth Circuit and the facts are distinguished. Appellants never allege any County defendant knowingly poisoned them or took any action to directly harm them. Instead, they

allege only that they agreed to work in a facility that comes with inherent risks, and they want officials to provide more money because they believe it will improve their environment.

III.
THE DISTRICT COURT PROPERLY FOUND THAT THIS CIRCUIT DOES NOT RECOGNIZE THE STATE-CREATED DANGER DOCTRINE, AND EVEN IF IT DID, APPELLANTS FAIL TO PLEAD THE REQUIRED ELEMENTS

(Response to Appellants' Brief at 18-26.)

A. As Appellants acknowledge, this Court "has steadfastly declined to recognize a state-created danger doctrine of § 1983 liability."

Appellants never suggest that any Appellee directly harmed them. Instead, they claim Appellees' funding of the Jail created an environment where third parties were more likely to harm them. Appellants Brief at 4. To prevail on this attenuated claim, Appellants must establish they are entitled to the state-created danger doctrine, which they cannot do as a matter of law.

Appellants acknowledge "the Supreme Court has generally held that the government has no duty to act to protect citizens from harm committed by third parties." Appellants' Brief at 18. They further acknowledge that this Circuit "has steadfastly declined to recognize a state-created danger doctrine of § 1983 liability." Appellants' Brief at 18,

citing *McClendon v. City of Columbia*, 305 F.3d 314, n.12 (5th Cir. 2002) (The Fifth Circuit is reluctant to "embrace some version of the state-created danger theory despite numerous opportunities to do so."); *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004) ("This court 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."); *Lester v. City of College Station*, 103 F.App'x 814, 815 (5th Cir. 2004) ("…this court has neither adopted nor accepted the state-created-danger theory…"); *Bustos v. Martini Club, Inc.*, 599 F.3d 458, 466 (5th Cir. 2010) ("But this circuit has not adopted the state-created danger theory."); *Cook v. Hopkins*, 795 Fed.Appx. 906, 914 (5th Cir. 2019) ("…this circuit does not recognize the state-created danger theory…"); and *Yarbrough v. Santa Fe Independent School District*, 2022 WL 885093, at *1 (5th Cir. 2022) ("We have 'repeatedly declined to recognize the state-created danger doctrine in this circuit.'").

These cases dispose of Appellants' final issue for review. Nevertheless, Appellants ask the Court to make an exception in their case and adopt a doctrine that this circuit has repeatedly rejected.

B. Appellants could never meet the state-created danger standard adopted by other circuits.

Appellants ask the Court to permit them to recover if they can show the state "created or exacerbated the danger of private violence against an individual" and the government acted with deliberate indifference to the danger. Appellants' Brief at 18-19, quoting *Bustos*, 599 F.3d at 466.

Appellants propose that under their new standard, they would have the burden of showing: (1) the harm was foreseeable and direct, (2) a state actor acted with deliberate indifference that shocks the conscience, (3) the state actor and plaintiff had a relationship that made plaintiff a foreseeable victim of the state actor's acts or was a member of a discrete class of persons subject to potential harm by the acts,[6] and (4) the state actor affirmatively used authority to create a danger to plaintiff or render plaintiff more vulnerable to danger. Appellants' Brief at 19 (paraphrased).

[6] A plaintiff must be more than a "foreseeable" victim. This Court has held that the state-created danger theory requires an official to be "aware of an immediate danger facing a known victim." *Lester v. City of College Station*, 103 Fed. Appx. 814, 815 (5th Cir. 2004) (emphasis added). Thus, even if this circuit had adopted this theory, Appellants would need to show each Appellee knew each plaintiff and knew each plaintiff was in immediate danger. Appellants have not pleaded any of this, or even identified which plaintiffs were injured or how each Appellee was aware of that danger immediately before it occurred.

Appellants suggest they developed this "theoretical test" "[u]nder the dicta" of cases where this Court rejected the state-created danger doctrine. Appellants' Brief at 18-19. Appellants provide no further detail about how they developed this test or why the Court should reverse well-established law. This new theory should be rejected, but even if the Court adopted the state-created danger doctrine, Appellants could never satisfy their own proposed criteria.

1. Funding county services does not result in direct and foreseeable harm to the Jailers.

(Response to Appellants' Brief at 20-21.)

Appellants cannot meet the first element of their test, which requires them to show the harm they suffered was "foreseeable and direct." Appellant Brief at 20. This requires a state actor to be "aware of an immediate danger facing a known victim." *Lester*, 103 Fed. Appx. at 815 (emphasis added).

Appellants must demonstrate how each Appellee knew of an immediate danger to each Appellant. Appellants admit they cannot show the Sheriff, County Judge, or Commissioners knew "that a specific employee, inmate, or visitor will be assaulted, raped, or murdered at any given moment." Appellants' Brief at 20. Instead, they vaguely suggest it

is "a given that it will happen." Appellants' Brief at 20. That fails to meet any circuit's state-created danger test and is the kind of "conclusory statement" and "naked assertions devoid of further factual enhancement" that mandates dismissal under Rule 12(b)(6). *Harmon*, 16 F.4th at 1162-63 (5th Cir. 2021).

Appellants cite *Watts* for the principle that a state actor is "responsible for allowing dangerous conditions to persist." Appellants' Brief at 21, citing *Watts v. Northside Independent School District*, 37 F.4th 1094 (5th Cir. 2022). However, *Watts* held that an individual may lose qualified immunity for ordering a third party to commit an assault. That is different from holding an official liable for making a discretionary funding decision, or requiring that a municipality alter its legislative process and reallocate funds to prioritize programs selected by a plaintiff. Further, *Watts* makes clear: "[w]e have 'repeatedly declined to recognize the state-created danger doctrine.'" *Id*, 37 F.4th at 1096, quoting *Joiner v. United States*, 955 F.3d 399, 407 (5th Cir. 2020). For these reasons, Appellants fail to meet the first element of their proposed test.

2. There are no facts to suggest deliberate indifference. (Response to Appellants' Brief at 21-23.)

Appellants' next proposed burden is to plead how Appellees acted with deliberate indifference that shocks the conscience. In a state-created danger context, this requires showing "state actors created a dangerous environment, that they knew it was dangerous, and that they 'used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur.'" *McKinney v. Irving Independent School District*, 309 F.3d 308, 314-15 (5th Cir. 2002), quoting *Johnson v. Dallas Independent School District*, 38 F.3d 198 (5th Cir. 1994).

Appellants allege no facts to suggest that the Commissioners, County Judge, or Sheriff engaged in any conduct that rises to the level of deliberate indifference. Instead, Appellants acknowledge that Jailers accept risk in their jobs and are free to leave anytime. However, they speculate that if "every employee now and in the future should simply quit," that would leave "no individual to work in the jail as required by law." Appellants' Brief at 21. This does not advance Appellants' deliberate indifference argument, and the fact that the Sheriff continues to staff the largest jail in Texas runs counter to the Jailers' claims of intolerable working conditions.

3. The County's elected officials do not have the kind of "special relationship" with Appellees required under the state-controlled danger doctrine.

(Response to Appellants' Brief at 23-24.)

The Supreme Court has held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197 (1989). There is one limited exception. A state may create a "special relationship" with a particular citizen that requires the state to protect him from harm "when the State takes a person into its custody and holds him there against his will." *Doe ex rel. Magee v. Covington County School District. ex rel. Keys*, 675 F.3d 849, 855 (5th Cir. 2012), quoting *DeShaney*, 489 U.S. at 199-200.

Thus, Appellants' proposed test requires them to show that they had a "special relationship" with their elected officials similar to that of a person being held against his will. As noted, the Jailers are always free to leave their jobs, and no one is compelled to work in the Jail. Appellants never explain how their employment creates this special relationship under *DeShaney*, other than to repeat their assertion that the County should have known of the risk of harm. Appellants' Brief at 23-24. That fails to satisfy the state-controlled danger test.

4. There are no facts to show that Appellees used their authority in a way to create danger to Appellants or render them more vulnerable to danger.

(Response to Appellants' Brief at 24-26.)

The final element of the test requires Appellants to show how a state actor affirmatively placed an individual in danger and stripped the person of her ability to defend herself or cut off potential sources of private aid. *McKinney*, 309 F.3d at 315, citing *Johnson*, 38 F.3d at 201.

As noted, Appellants are not compelled to work in the Jail, and no plaintiffs ever pleaded facts to suggest they were unable to walk away from their jobs or take other steps to defend themselves. Appellants are also vague about what "authority" created the alleged danger. They suggest that third parties manipulated jail data to make the facility meet state standards (Appellants' Brief at 24) but do not identify any Appellees who did this and do not explain how attempts to meet state standards placed Appellants in danger from which they could not leave.

The only real "authority" that Appellants cite is Appellees' funding decisions. Appellants' Brief at 26; ROA.458. Even assuming this was

actionable,[7] Appellants never identified the Jail's budget, explained why it was deficient, or suggested what the budget should be. They certainly never pleaded facts to link the budget with each Jailer's specific, direct, and foreseeable harm.

The closest Appellants come to meeting this burden is to make the unexplained assertion that Appellees should hire "approximately 500 additional employees." Appellants' Brief at 26. Funding decisions, alone, is not "authority" that places voluntary employees in danger or strips them of their ability to defend themselves or seek private aid.

IV.
THE DISTRICT COURT PROPERLY FOUND THAT APPELLANTS HAVE NO INJUNCTIVE OR DECLARATORY REMEDY TO INTERFERE IN THE COUNTY'S LEGISLATIVE OR EXECUTIVE PROCESSES OF ALLOCATING PUBLIC MONEY OR OPERATING THE JAIL

Assuming Appellants pleaded a viable constitutional claim, they would still lack any remedy. Appellants sought declaratory and injunctive relief to require Appellees to provide certain funding and other non-monetary concessions (and attorney fees). ROA.458. However, the Supreme Court has flatly rejected the contention that a plaintiff has the

[7] *Collins v. City of Harker Heights, Texas*, 503 U.S. at 116 (There is a "presumption that the administration of government programs is based on a rational decision making process that takes account of competing forces…")

right to force a government to reallocate funds to improve workplace conditions:

> In light of the presumption that the administration of government programs is based on a rational decision making process that takes account of competing forces, decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as employee training, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the country's basic charter of Government.

Collins v. City of Harker Heights, Texas, 503 U.S. at 116.

The creation of a Texas county budget is a legislative function, and commissioners have broad discretion in doing so. *See Griffin v. Birkman*, 266 S.W.3d 189, 194-95 (Tex. App.—Austin 2008) (internal citation omitted). The budget process "combines inextricably the two legislative powers of 'taxation' and 'appropriation,' the latter being a distribution and setting aside of parts of the total available revenue among the various government functions, operations, and programs." *Id.* "There could be no clearer grant of *discretionary* power." *Id.* (emphasis added).

Similarly, a private party has no right of action to force a sheriff to meet certain staffing standards under the Texas Commission on Jail Standards. The Texas Administrative Code provides a process by which

the commission enforces jail standards by issuing findings, notices of noncompliance, and suggested corrective measures. If those measures are unsuccessful, the commission can issue a "remedial order" that "the facility in question or any portion thereof be closed." Tex. Admin. Code § 297.11(a).

The Texas Local Government Code is clear that these standards are only "enforceable by the Commission on Jail Standards." Tex. Loc. Gov't Code § 351.015. Texas law provides for administrative review, but it does not provide for private lawsuits or subject matter jurisdiction for courts to second-guess a sheriff or commission's broad discretion to operate and regulate Texas jails.

CONCLUSION AND PRAYER

Appellants sought review of two issues—whether the Substantive Due Process Clause permits employees to force a legislative body to allocate more funding to improve the employees' workplace, and whether this circuit should abandon long-standing precedent and apply the state-created danger theory to jail employees at risk of harm by third parties. The district court issued a thorough and well-reasoned opinion that

correctly rejected both arguments. Appellees respectfully request that this Court affirm the district court's dismissal of this case.

Respectfully submitted,

/s/ Seth Hopkins

CHRISTIAN D. MENEFEE
Harris County Attorney
JONATHAN FOMBONNE
First Assistant County Attorney
SETH HOPKINS
Special Assistant County Attorney
Texas Bar No. 24032435
Harris County Attorney's Office
1019 Congress Plaza, 15th Floor
Houston, Texas 77002
(713) 274-5141 (telephone)
Seth.Hopkins@HarrisCountyTx.gov

ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

I certify that on June 23, 2023, I filed a true and correct copy of the foregoing brief via the Court's CM/ECF system, which will automatically serve a copy on all parties' counsel. I further certify that I emailed an electronic copy of this brief to the counsel of record below:

David Batton
Law Office of David Batton

Via email at:

(1) DBatton@hcdo.com

(2) dave@dbattonlaw.com

/s/ Seth Hopkins

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), and 5th CIR. R. 32.1: this document contains 5,849 words.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5), and 5th CIR. R. 32.1 and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word Office 365 in Century Schoolbook 14-point font.

/s/ Seth Hopkins