No. _____

In the Supreme Court of the United States

DENISE FISHER, AS NEXT FRIEND OF M.F., A MINOR,

Applicant,

v.

JODI M. MOORE, ET AL.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

1. Pursuant to Supreme Court Rule 13.5, Applicant Denise Fisher, as next friend of M.F., a minor, respectfully requests a 60-day extension of time, to and including Monday, December 11, 2023, within which to file a petition for a writ of certiorari. The United States Court of Appeals for the Fifth Circuit issued an opinion on March 16, 2023. On July 14, 2023, the Fifth Circuit withdrew its March 16 opinion, denied Applicant's petition for rehearing en banc, and issued a substitute opinion. A copy of the opinion is attached. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

2. Absent an extension, a petition for a writ of certiorari would be due on October 12, 2023. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case.

3. This case concerns an important issue: Whether the state-created danger doctrine was "clearly established" when ten circuits unanimously recognized the doctrine, and whether the doctrine should be clearly established going forward.

4. In 2019, M.F. was thirteen years old and a public school student in the Fort Bend Independent School District. M.F. has several cognitive and physical disabilities, and she has the cognitive ability of a four- or five-year-old. She attended school under an Individualized Education Program (IEP) that was designed, among other purposes, to ensure her safety. Also attending M.F.'s school was R.R., a student with a well-known and documented history of severe behavioral problems, including repeated sexual misconduct. Despite her IEP, M.F. was left alone with R.R. and was sexually assaulted. The school district was aware of the assault almost immediately after it occurred. Two months after that first assault, M.F. was once again left alone at the same time that R.R. was allowed to wander the school alone. While M.F. was in the girls' bathroom, R.R. entered the bathroom, climbed under the stall, and sexually assaulted M.F. again. After an investigation, the Texas Education Agency found that the Fort Bend Independent School District violated both M.F.'s and R.R.'s IEPs.

5. Applicant filed suit on M.F.'s behalf under 42 U.S.C. § 1983, alleging several school officials and the school district created or increased a danger to M.F. and acted with deliberate indifference in violation of the Fourteenth Amendment. Believing they were entitled to qualified immunity, the individual defendants moved to dismiss. The district court denied the motion, but, on interlocutory appeal, the Fifth Circuit reversed and dismissed the suit. The Fifth Circuit found that the individual defendants were entitled to

qualified immunity because "the state-created danger theory of liability was not clearly established in [the Fifth Circuit]." Slip. op. at 6-7.

6. The Fifth Circuit recognized that "a majority of [its] sister circuits had adopted the state-created danger theory of liability in one form or another," but rejected the notion that "the mere fact that a large number of courts had recognized the existence of a right to be free from state-created danger" could render the rule clearly established. Slip op. at 9-10. The court found that the defendants were entitled to qualified immunity, but the court did not directly adopt or refute the state-created danger theory of liability. The court noted that while "the state-created danger doctrine is not clearly established in our circuit, we have not categorically *ruled out* the doctrine either," slip op. at 8, leaving the overarching question of whether the state-created danger doctrine exists in the Fifth Circuit unanswered.

7. Judge Wiener concurred in the decision, but "disagree[d] with [the court's] refusal to rehear this case en banc and join the ten other circuits that have now adopted the state-created danger cause of action." Slip op. at 14. Judge Wiener noted it was "well past time for this circuit to be dragged screaming into the 21st century by joining all those other circuits that have now unanimously recognized the state-created danger cause of action." *Id.*

8. Judges Higginson and Douglas, joined by Judges Stewart, Elrod, Haynes, and Graves, filed an opinion dissenting from the denial of rehearing en banc.[1] The

[1] Judge Wiener was on the three-judge panel but not eligible to vote on whether to take this case en banc, due to his Senior status. *See* Slip op. at 15 n.1; *see also Fisher v. Moore*,

dissenting judges noted that the Fifth Circuit's refusal to take the case en banc, despite ten other circuits definitively recognizing a state-created danger doctrine, "is a disservice to injured plaintiffs who are forced to litigate in endless uncertainty about their federal rights." Slip op. at 15. The dissent also advised that "[l]itigants should continue asking this court to decide the state-created danger issue," in hopes that either a "future panel" or subsequent en banc court would decide to recognize the doctrine. *Id.*

9. The Fifth Circuit's decision on this issue is in square conflict with ten other circuits. *See Irish v. Fowler*, 979 F.3d 65, 73-75 (1st Cir. 2020) (adopting the state-created danger doctrine and collecting cases from the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits that also recognize the doctrine). The Fifth Circuit stands alone on its side of the circuit split, allowing public officials to escape liability even when they help perpetuate the most foreseeable, grievous harm.

10. This case raises important questions of law related to qualified immunity and the state-created danger doctrine. The Fifth Circuit's decision means the rights of individuals to hold the government accountable for placing them in danger differ based on the circuit in which the individual lives. And, because the Fifth Circuit declined to definitively recognize or refute the state-created danger doctrine, this decision sows confusion about when a legal rule is "clearly established."

11. Applicant respectfully requests an extension of time to file a petition for a writ of certiorari. At the certiorari stage, Applicant engaged new counsel who were not

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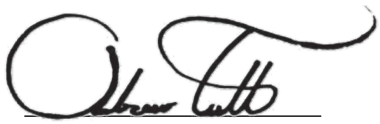
62 F. 4th 912, 919 (5th Cir. 2023) (Wiener, J., dissenting). Judge Wiener agreed with the dissent and that this case should have been heard en banc. *Id.*

previously involved in the case. A 60-day extension would allow counsel sufficient time to fully examine the decision's consequences, research and analyze the issues presented, and prepare the petition for filing. Additionally, the undersigned counsel have a number of other pending matters that will interfere with counsel's ability to file the petition on or before October 12, 2023.

Wherefore, Applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari to and including Monday, December 11, 2023.

Dated: September 18, 2023

Respectfully submitted,



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