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

CHRISTINA ZAMORA, INDIVIDUALLY AND AS NEXT FRIEND OF M.Z.; RUBEN ZAMORA, INDIVIDUALLY AND AS NEXT FRIEND OF M.Z.; and JAMIE TORRES, INDIVIDUALLY AND AS NEXT FRIEND OF K.T. *Plaintiffs*, v. DANIEL DEFENSE, LLC, et al. *Movants*.	Case No. 2:23-cv-00017-AM

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

Movants Uvalde police officers Justin Mendoza, Max Dorflinger, Sergeant Telesforo Coronado, and Lieutenant Mariano Pargas[1] (collectively herein "Movants") move to dismiss Plaintiffs' complaint against these Movants as follows:

[1] Since claims against Lieutenant Pargas in his official capacity is a claim against the City of Uvalde, *See Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Flores v. Cameron County*, 92 F.3d 258, 261 (5th Cir. 1996); *Young v. City of Killeen*, 775 F.2d 1349, 1351 (5th Cir. 1985), Lieutenant Pargas addresses only Plaintiffs' claims against Lieutenant Pargas individually. Lieutenant Pargas would further show claims asserted against him in his purported "official capacity" are duplicative of claims against Uvalde and, therefore, are redundant and should be dismissed. *Compare, Monell v. New York City Dep't. of Social Services*, 436 U.S. 658, 690 (1978). *Accord, Turner v. Houma Municipal Fire and Police Civil Service Board*, 229 F.3d 478, 483 (5th Cir. 2000).

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SUMMARY OF THE ARGUMENT

The tragedy that occurred on May 24, 2022, undoubtedly taps the natural sympathy of any person to wish to *create* a legal remedy, where none exists, in hopes of ameliorating the unimaginable horror inflicted on the innocent at Robb Elementary in Uvalde, Texas by a deranged individual. "But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by any [police officer], but by [the Assailant[2]]." *Deshaney v. Winnebago Cty. Dep't of Soc. Servs*., 489 U.S. 189, 202 (1989).

Plaintiffs' complaint plainly disregards 30 years of binding precedent, and most egregiously, blatantly ignores the role of the criminal assailant who is solely responsible for the senseless killings and loss of life at Robb Elementary on May 24, 2022. Plaintiffs blanketly assert a "state-created danger" claim against 131 law enforcement officers—identifying only 12 by name—that has *never* been recognized by the Fifth Circuit. Plaintiffs further assert claims under the Fourteenth and Fourth Amendment that fail as a matter of law, even assuming, *arguendo,* Plaintiffs alleged facts which show actual personal involvement against any individual Defendant; which they do not.

Indeed, beyond Plaintiffs' glaring failure to state a claim by failing to allege facts to identify unconstitutional conduct by any – let alone each – individual Movant, Plaintiffs fail to allege *facts* which show Officer Justin Mendoza, Officer Max Dorflinger, Sergeant Telesforo Coronado, or retired Lieutenant Mariano Pargas engaged in any conduct that could plausibly show violated constitutional rights that were clearly established by law; both of which are Plaintiffs' pleading burden to avoid the presumption of these Movants' immunity from suit.

[2] Movants hereafter refer to Salvador Ramos as the "Assailant".

ARGUMENT AND AUTHORITIES

I. Claims Subject to Dismissal Under Rule 12(b)(1)

1. Rule 12(b)(1) allows a defendant to challenge the court's limited subject matter jurisdiction for lack of standing, which focuses on whether a plaintiff can bring suit. *Raines v. Byrd*, 521 U.S. 811, 818 (1997). Courts should decide a motion to dismiss based on FED. R. CIV. P. 12(b)(1) before addressing the merits of a lawsuit. *Wolcott v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Plaintiffs' own complaint allegations establish, as a matter of law, that Plaintiffs' claim must be dismissed under FED. R. CIV. P. 12(b)(1) for lack of standing.

A. Plaintiffs lack standing to prosecute a claim based upon the alleged violation of Plaintiffs M.Z's or K.T.'s rights.

2. "A claim is properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the claim." *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 286 (5th Cir. 2012) (internal quotations omitted). "A third party may not assert a civil rights claim based on the civil rights violations of another individual." *Barker v. Halliburton*, 645 F.3d 297, 300 (5th Cir. 2011). Absent application of authority supplied through 42 U.S.C. § 1988 incorporating Texas wrongful death and survival claims, a relative of an individual whose federal rights were allegedly violated lacks standing to prosecute a claim based on a deprivation of the family member's rights. *Martinez v. Maverick County*, 507 Fed. Appx. 446, 448 n.1 (5th Cir. 2013). Plaintiffs, "like all persons who claim a deprivation of constitutional rights, were required to prove some violation of **their personal rights**." *Coon v. Ledbetter*, 780 F.2d 1158, 1160-61 (5th Cir. 1986) (emphasis added).

3. Plaintiffs have not demonstrated that any Defendant violated Plaintiffs' federal rights.

Instead, the allegations in Plaintiffs' complaint show that Plaintiffs seek to prosecute claims based upon the alleged violation of Plaintiffs' M.Z.'s and K.T.'s rights. Plaintiffs' claims, therefore, should be dismissed under FED. R. CIV. P. 12(b)(1) on this basis.

B. Plaintiffs lack standing to prosecute a claim based on Movants' alleged failure to properly enforce criminal laws.

4. "The 'Due Process Clause does not require a State to provide its citizens with particular protective services.'" *DeShaney,* 489 U.S. at 197. Thus, [t]here is no constitutional right to state protection for acts carried out by a private actor," as was the case here, *Beltran v. City of El Paso*, 367 F.3d 299, 304 (5th Cir. 2004). Movants had no constitutional duty to enforce criminal laws. *See, McKee v. City of Rockwall*, 877 F.2d 409, 413-14 (5th Cir. 1989). Therefore, because Plaintiffs have no claim based on any Defendant's alleged failure to enforce criminal laws to the Plaintiffs' satisfaction, Plaintiffs' claims should be dismissed under FED. R. CIV. P. 12(b)(1) on this additional basis.

II. Claims Subject to Dismissal Under Rule 12(b)(6)

A. Plaintiffs' allegations fail to satisfy the pleading standard required to show that any Defendant plausibly violated a Plaintiff's federal rights.

5. As to any claim the Court does not dismiss under Rule 12 (b) (1), the Court should dismiss Plaintiffs' claims under Rule 12 (b) (6) based on Plaintiffs' failure to plead *factual* allegations that state a claim for relief. In *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), the Supreme Court enunciated the pleading standard required for a plaintiff to state a plausible claim for relief and detailed the appropriate method for analyzing the adequacy of pleading allegations. The Supreme Court directed reviewing courts to perform "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. "To survive a motion to dismiss, a complaint must contain **sufficient factual matter**, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S.

544, 570 (2007)) (emphasis added). "Thread-bare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*. at 679. A court is not required to accept legal conclusions as true, instead a complaint "must be supported by factual allegations." *Id*.

6. Moreover, merely listing generalized legal standards, without providing substantive factual matter to support each element of a claim does not state a claim. *See Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 387 (5th Cir. 2001)."[P]leaded facts must allow a reasonable inference that the plaintiff should prevail. Facts that only conceivably give rise to relief don't suffice." *Smith v. Heap*, 31 F.4th 905, 910 (5th Cir. 2022). The Court should not "strain to find inferences favorable to the plaintiffs" or "accept conclusory allegations, unwarranted deductions, or legal conclusions." *R2 Investments LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005) (*quoting Southland Sec. Corp. v. Inspire Solutions, Inc*., 365 F.3d 353, 361 (5th Cir. 2004).

7. Additionally, to state a claim against these Movants, who are presumed to be entitled to qualified immunity, a plaintiff must "plead more than conclusions" but must allege facts that overcome qualified immunity. *See Schultea v. Wood*, 47 F.3d 1427, 1430-34 (5th Cir. 1995) (En Banc). When a governmental employee raises qualified immunity, "the complaint must state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity." *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994) (emphasis added); *accord Fisher v. Moore*, No. 21-20553, 2023 U.S. App. LEXIS 6317,___F.4th___ (5th Cir. March 16, 2023); *Smith*, 31 F.4th at 911; *Jackson v. Hearne*, 959 F.3d 194, 20102 (5th Cir. 2020); *Bustillos v. El Paso County Hospital Dist*., 891 F.3d 214, 223 (5th Cir. 2018; *Zapata v. Melson*, 750 F.3d 481, 484-486 (5th Cir. 2014); *Backe v. LeBlanc*, 691 F.3d 645, 649 (5th Cir. 2012); *Schultea*, 47 F.3d at 1430-34.

8. Plaintiffs fail to allege facts which show personal involvement of *any* Movant, let alone conduct that violated M.Z.'s and K.T.'s constitutional rights, much less conduct clearly prohibited by established law. As a threshold matter, an individual defendant "must have been personally involved in the alleged constitutional deprivation or have engaged in wrongful conduct that is causally connected to the constitutional violation." *Turner v. Lieutenant Driver*, 848 F.3d 678, 695-96 (5th Cir. 2017) (citing *Mesa v. Prejean*, 543 F.3d 264, 274 (5th Cir. 2008)). "Personal involvement [in unlawful conduct] is **an essential element** of a civil rights cause of action." *Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1983) (emphasis added). This personal involvement can only be shown by facts.

9. In evaluating whether the factual allegations in the complaint plausibly show any Movant violated M.Z.'s and K.T.'s rights, the Court must assess the lawfulness of each individual Defendant separately. *Compare*, *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020); *Iqbal*, 556 U.S. at 676; *Solis v. Serrett*, 31 F.4th 975, 981 (5th Cir. 2022); *Wilson v. City of Bastrop*, 26 F.4th 709, 713 (5th 2022); *Joseph v. Bartlett*, 981 F.3d 319, 325 (5th Cir. 2020); *Meadours v. Ermel*, 483 F.3d 417, 421-22 (5th Cir. 2007). Accordingly, Plaintiffs' factual allegations must specify each Defendant's personal involvement in conduct that caused a constitutional violation to support any claim against that Defendant. *See Murphy v. Kellar*, 950 F.2d 290, 292 (5th Cir. 1992). The factual allegations in Plaintiffs' complaint fail to show a plausible claim for relief against any Defendant under these controlling pleading standards. To the contrary, because Plaintiffs' lump together 131 law enforcement officers throughout Plaintiffs' complaint, the Movants cannot determine—or illustrate to this Court—whether, let alone what, factual allegations that show any Movant was "personally involved in [any] alleged constitutional deprivation or [has] engaged in wrongful conduct" to state a claim against any – let alone all - under §1983. *Turner*, 848 F.3d at 695-96.

10. At most, Plaintiffs allege the following against the Movants: Officer Dorflinger restrained and tackled "people," who Plaintiffs fail to identify.[3] Those bare assertions deprive this Court of *factual* allegations necessary for the "context-specific task that requires the reviewing court to draw on its judicial experience and common sense" to determine if Plaintiffs have alleged facts that show a plausible claim for relief against Officer Dorflinger. *Iqbal*, 556 U.S. 662, 679 (2009).

11. Plaintiffs allege Lieutenant Pargas and Sergeant Coronado were amongst the first to arrive at the scene.[4] Sergeant Coronado heard shots as Sergeant Coronado approached the West building from its South side, the Assailant fired inside, and Sergeant Coronado exited the West building where Sergeant Coronado radioed that the Assailant was "barricaded" or contained, " requested helicopter support and ballistic shields, and waited outside for 30 minutes warning other officers of a "fatal funnel."[5] Sergeant Coronado later assisted crowd control efforts outside the school, and at 12:36 p.m., Sergeant Coronado conferred and agreed with Uvalde School District Police Chief Pete Arredondo, that people were in a classroom that Plaintiffs do not identify, with casualties.[6] None of these sparse factual allegations, even if true, state a claim of unconstitutional conduct, and continually fail to show a violation of clearly established law.

12. As to Lieutenant Pargas, the acting City police chief, Plaintiffs allege Lieutenant Pargas entered the West building with other officers who Plaintiffs fail to identify, and that Lieutenant Pargas stood back from a classroom Plaintiffs also do not identify.[7] At 12:12 p.m. Lieutenant Pargas and Sheriff Nolasco, received a radio dispatch that one of the classrooms was full of

[3] Doc. 1, at ¶182.
[4] Doc. 1, at ¶116.
[5] Doc. 1, at ¶¶116, 126, 128-131, 142-143, 154, 157.
[6] Doc. 1, at ¶178.
[7] Doc. 1, at ¶¶128-129, 140.

victims.[8] Lieutenant Pargas entered the school at 12:17 p.m. and informed the Border Patrol agents who were inside the school of the presence of victims.[9] Lieutenant Pargas remained in the school for another three minutes before walking out and remained outside for the next 30 minutes.[10] Plaintiffs make no other factual allegations against Lieutenant Pargas which show unconstitutional conduct, and continually fail to show a violation of clearly established law.

B. Plaintiffs fail to allege facts which show that any Plaintiff was deprived of a constitutional right.

13. Assuming *arguendo* a Plaintiff in this suit established standing to prosecute a claim, Plaintiffs nonetheless fail to allege facts which show that any Plaintiff was individually deprived of a constitutional right. *Compare*, *Barker*, *Martinez*, and *Coon*, *supra*.

C. Plaintiffs fail to allege facts which show a plausible claim based on Movants' alleged failure to properly enforce criminal laws.

14. If, *arguendo*, a Plaintiff established standing to prosecute a claim, Plaintiffs nonetheless fail to allege facts which show a plausible claim based on Movants' alleged failure to properly enforce criminal laws. *See DeShaney,* 489 U.S. at 197; *Beltran*, 367 F.3d at 304.

D. Plaintiffs fail to allege facts which state a plausible claim under the Fourth Amendment.

1. Plaintiffs have not alleged facts which show any Defendant seized M.Z. or K.T.

15. 42 U.S.C. § 1983 "is not itself a source of substantive rights," it merely provides "a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 145 n.3 (1979). Because a claim brought under § 1983 imposes liability for violation of a constitutionally protected right, § 1983 cannot be viewed exclusively in terms of traditional tort-law concepts.

[8] *Id* at ¶¶170, 172.
[9] *Id* at ¶172.
[10] *Id* at ¶168.

Baker, 443 U.S. at 146; *Harper v. Merkle*, 638 F.2d 848, 860 (5th Cir.), *cert. denied*, 454 U.S. 816 (1981).

16. "The Fourth Amendment prohibits unreasonable 'seizures' to safeguard '[t]he right of the people to be secure in their persons.'" *Torres v. Madrid*, 141 S. Ct. 989, 993 (2021). A Fourth Amendment seizure requires the **intentional acquisition of physical control**, i.e. laying of hands on an individual or applying physical force to restrain movement and actually gaining physical control. *see California v. Hodari D.*, 499 U.S. 621, 624 (1991); *Brower v. Inyo County*, 489 U.S. 593, 596 (1989) (emphasis added). "A seizure requires the use of force *with intent to restrain*. Accidental force will not qualify." *Torres*, 141 S. Ct. at 998. "Moreover, the appropriate inquiry is whether the challenged conduct *objectively* manifests an *intent to restrain* [M.Z and K.T.], for [courts] rarely probe the subjective motivations of police officers in the Fourth Amendment context." *Id*. (emphasis added) "Only an objective test 'allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.'" *Id*. (quoting *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988)).

17. Moreover, "[u]nlike a seizure by force, a seizure by acquisition of control [like that Plaintiffs assert] involves either voluntary submission to a show of authority or the termination of freedom of movement." *Id*. at 1001. "A prime example of the latter comes from *Brower*, where the police seized a driver when he crashed into their roadblock." *Id*. "Such a seizure requires that 'a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.'" *Id*. (quoting *Brower*, 489 U.S. at 599). "A seizure is a single act, not a continuous fact." *Hodari D.*, 499 U.S. at 625. "For centuries, the common law rule has avoided such line-drawing problems by fixing the moment of the seizure." *Torres*, 141 S. Ct. at 1002.

18. Plaintiffs' claim fails under the Fourth Amendment first because Plaintiffs have not alleged

facts which show any Movant even acquired physical control over M.Z or K.T. with intent to restrain M.Z or K.T., by applying physical force to restrain M.Z.'s or K.T.'s movement and gained physical control over M.Z or K.T. through stopping M.Z or K.T. "by the very instrumentality set in motion or put in place in order to achieve that result.'" *Id*. (quoting *Brower*, 489 U.S. at 599).

2. Plaintiffs have not alleged facts which show that any Defendant's seizure of M.Z. or K.T. was objectively unreasonable.

19. Plaintiffs' claims *also* fail under the Fourth Amendment because, even assuming *arguendo* that any Defendant's conduct could reasonably be construed as having seized Plaintiffs M.Z. or K.T. as "'[s]eizure' alone is not enough for § 1983 liability; the seizure must be 'unreasonable.'" *Brower,* 489 U.S. at 599. "Because this case involves the rights of students in a public school, [if the court finds an actual seizure by any Movant], a full bore *Terry* analysis [would be] inappropriate. *Milligan v. City of Slidell*, 226 F.3d 652, 654 (5th Cir. 2000). Under that analysis, "the reasonableness of seizures must be determined in light of all of the circumstances, with particular attention being paid to whether the seizure was justified at its inception and reasonable in scope. *Hassan v. Lubbock Indep. Sch. Dist.,* 55 F.3d 1075, 1079 (5th Cir. 1995) (citing *New Jersey v. T. L. O.*, 469 U.S. 325 (1985)). To be sure, "students in the school environment have a 'lesser expectation of privacy than members of the population generally.'" *Milligan*, 226 F.3d at 655 (internal citations omitted). Here, Movants "sought to protect [the Plaintiff] students, and to deter… violent misconduct. These are compelling governmental interests. And the immediacy of the concerns is obvious" given the assailant's criminal conduct which prompted police presence outside the classrooms. *Id* at 655.

20. Plaintiffs hinge their seizure claim, amongst others, on a theory that law enforcement incorrectly – that is at most negligently - treated the situation as a "barricaded threat" rather than an "active shooter," to the resolution of what question does not at all bear upon whether Plaintiffs'

hypothesized "seizure" was unreasonable. "The reasonableness of a search or seizure is evaluated on its own merits, not by engaging in a series of 'what ifs,' *Id* at 655 n.3, as Plaintiffs suggest here. Thus, even if Plaintiffs had alleged facts showing any Movant "seized" either child, Plaintiffs fail to allege facts showing any such seizure was unreasonable based on no more than Plaintiffs' result oriented speculation. Assuming, *arguendo,* Plaintiffs had prepared facts showing any of these Movants' "barricade" seized any Plaintiff—which it did not—the individual officers had a legitimate governmental interest in ensuring public safety and Plaintiffs fail to allege facts to show public safety was not the purpose motivating any individual officers' unidentified behavior. *Compare Scott v. Harris*, 550 U.S. 372, 386 (2007).

E. Plaintiffs fail to allege facts to state a plausible claim under the Fourteenth Amendment.

1. Plaintiffs' claims of alleged unreasonable seizure must be evaluated under the Fourth Amendment.

21. "[W]here a provision of the Constitution provides an explicit textual source of Constitutional protection, a court must assess a plaintiff's claim under that explicit provision and not due process." *Conn v. Gabbert*, 526 U.S. 286, 293 (1999). "The Framers [of the Constitution] considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Albright v. Oliver*, 510 U.S. 266, 274 (1994). "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime – 'arrests' in traditional terminology. *Terry v. Ohio*, 392 U.S. 1, 16 (1968); *accord United States v. Mendenhall,* 446 U.S. 544, 552 (1980). Plaintiffs' "seizure" claims, if any, must be analyzed under the Fourth Amendment not Fourteenth Amendment.

2. Plaintiffs have not alleged facts which show any Defendant denied M.Z. or K.T. due process.

22. "[A] State's failure to protect an individual against private violence [as Plaintiffs assert here] simply does not constitute a violation of the Due Process Clause." *Deshaney*, 489 U.S. at 196. Plaintiffs cannot plausibly assert an "affirmative right" the Constitution does not provide under the Fourteenth Amendment. *See Id*. "[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id*.

a. Movants' rescue efforts in response to the Assailant's criminal conduct did not create a "special relationship" between Movants and M.Z. or K.T.

23. The Fifth Circuit has "recognized **just one exception** to the general rule [barring any Fourteenth Amendment Due Process claim based on affirmative right to state protection]: 'when [a] **special relationship** between the individual and the state imposes upon the state a constitutional duty to protect that individual from known threats of harm by private actors." *Fisher,* 2023 U.S. App. LEXIS 6317 at *8,___F.4th___ (emphasis added); *see also Bustos v. Martini Club*, 599 F.3d 458, 466 (5th Cir. 2010); *Walton v. Alexander*, 44 F.3d 1297, 1304 (5th Cir. 1995). According to binding precedent, such a special relationship exists only "in the circumstances of incarceration, involuntary institutionalization, and foster care" *Doe v. Covington Cty. Sch. Dist*., 675 F.3d 849, 859 (5th Cir. 2012).

24. Here, "Plaintiffs' complaint does not allege that any of the Movants affirmatively acted to restrain [Plaintiffs'] personal liberty in a similar way to incarceration or institutionalization." *Compare*, *Cook v. Hopkins,* 795 F. App'x 906, 913 (5th Cir. 2019). Instead, Plaintiffs conclusory assertions are merely that unidentified officers were present with an intent to rescue M.Z. and K.T. and other victims but these unidentified officers did not timely rescue M.Z. and K.T. [Doc.1, at

¶¶161, 185]. Plaintiffs' assertions fail to allege facts to show any Plaintiff was in state custody merely by virtue of unidentified officers' presence at the school so as to create the necessary "special relationship." *Compare Walton,* 44 F.3d at 1304; *Beltran*, 367 F.3d at 302.

25. Plaintiffs simply fail to allege facts to show any Movant's conduct "effectively [took M.Z.'s and K.T.'s] liberty under terms that provide[d] no realistic means of voluntarily terminating the state's custody *and* thus deprive[d] [M.Z. and K.T.] of the ability or opportunity to provide for [their] own care and safety." *Walton,* 44 F.3d at 1304. At most, Plaintiffs "bare assertions… amount to nothing more than a formulaic recitation of the elements" of an alleged claim, which deprive this court of the ability to "draw the reasonable inference that the defendant is liability for the misconduct alleged" and is not enough to survive a motion to dismiss. *See, Iqbal*, 556 U.S. at 678.

b. Plaintiffs' negligent police response claims do not show a "state-created danger" theory of liability even assuming *arguendo* a "state-created danger" theory of liability is recognized in the Fifth Circuit.

26. Underscoring that theory is anything but clearly established in this circuit, *Scanlan v. Texas A&M University*, 343 F.3d 533 (5th Cir. 2003), the Fifth Circuit held that a state created danger theory, **if recognized**, would require "a plaintiff [to] show [1] the Movants used their authority to *create a dangerous environment* for the plaintiff and [2] that the Movants acted with deliberate indifference to the plight of the plaintiff." *Scanlan*, 343 F.3d at 537-38. (emphasis added). Not only do Plaintiffs' own allegations establish the assailant—not Movants—created a dangerous environment, "the [additional] problem for [Plaintiffs] is that 'the Fifth Circuit has never recognized th[e] state-created-danger exception." *See Fisher*, 2023 U.S. App. LEXIS 6317, at *8.

27. But that is not the only problem Plaintiffs face. Plaintiffs do not allege facts which show a plausible claim under the state-created-danger theory even if the Fifth Circuit were to recognize

such a theory of liability in this case. First, Plaintiffs make no factual allegation which shows that any *Defendant used his authority to create a dangerous environment* for Plaintiff M.Z. or K.T. Plaintiffs' allegations show the contrary. Namely, Plaintiffs allege the Assailant created the dangerous environment *before* any Defendant arrived at Robb Elementary School.[11]

28. Moreover, to establish deliberate indifference, Plaintiffs are required to allege facts as to each which plausibly show "[t]he environment created by the state actors must be dangerous; they must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Scanlan*, 343 F.3d at 537-38. At best, Plaintiffs allege the officers *erred* in treating the Assailant as a "barricaded subject" as opposed to a "active shooter," a legally unavailing exercise in hindsight. At most, such alleged "errors constitute negligence, not deliberate indifference, *Beltran,* 367 F.3d at 308, which is not actionable under § 1983. Rather, "deliberate indifference requires that the state actor both knew of and disregarded an excessive risk to the victim's health and safety." *Id* at 307. Plaintiffs do not, and cannot, state a claim of state created danger, particularly against these Movants.

F. Plaintiffs fail to allege facts which plausibly show a failure to supervise claim against Lieutenant Pargas .

29. "Under section 1983, supervisory officials are not liable for the actions of subordinate officers on any theory of vicarious liability." *Thompkins v. Belt*, 828 F.2d 298, 303 (5th Cir. 1987), yet that is Plaintiffs' only supervisory liability theory against Lieutenant Pargas. To state a supervisory claim against Lieutenant Pargas, Plaintiffs must allege facts which show that (1) Lieutenant Pargas failed to supervise officers; (2) a causal connection existed between the failure to supervise and conduct by any officer that constituted a violation of M.Z.'s and K.T.'s rights;

[11] Doc. 1, at ¶125.

and (3) the failure to supervise amounted to deliberate indifference to M.Z.'s and K.T.'s rights. *See Roberts v. City of Shreveport*, 397 F.3d 287, 292 (5th Cir. 2005). While Plaintiffs do not allege facts addressing any of these required elements to state a claim, Plaintiffs must also allege *facts* showing that officers, under Lieutenant Pargas' supervision**,** received **no supervision** whatsoever. *See 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).

30. Additionally, the event of "[d]eliberate indifference is a stringent standard, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Valle v. City of Houston*, 613 F.3d 536, 547 (5th Cir. 2010) (citation omitted). Yet Plaintiffs fail to allege facts to show Lieutenant Pargas was aware any subordinate officer had received no supervision, facts which show Lieutenant Pargas knew that greater supervision of an officer was needed, or facts which show Lieutenant Pargas deliberately chose not to provide any perceived necessary supervision to **any** subordinate officer.

G. Plaintiffs have not disproven the presumption of each Movant's qualified immunity.

31. "To overcome the [Movants] qualified immunity defense, a plaintiff must allege facts showing that the officers (1) 'violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Templeton v. Jarmillo*, 28 F.4th 621 (quoting *Ashcroft v. Al-Kidd*, 563 U.S. 731-35 (2011)(emphasis added). "Because the officers invoked a qualified immunity defense, the burden shifts to [Plaintiffs'] to show the [Movants] violated his clearly established rights. *Templeton*, 28 F.4th 621. "The second question—whether the officer violated clearly established law—is a doozy." *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019). "A right is clearly established [only] when it is defined 'with sufficient clarity to enable a reasonable official to assess the lawfulness of his conduct.'" *Templeton*, 28 F.4th

621(citing *McClendon v. City of Columbia*, 305 F.3d 314, 331 (5th Cir. 2002). "Although a plaintiff does not need to identify a case 'directly on point' to meet this burden, [they] must identify caselaw that 'place[s] the statutory or constitutional question beyond debate.'" *Templeton*, 28 F.4th 621 (quoting *al-Kidd*, 563 U.S. 731, 741, (2011)).

32. "Overcoming qualified immunity requires showing clearly established law supporting the plaintiff's claim, and that demands "that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him." *Templeton*, 28 F.4th 621 (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). This analysis "focuses not only on the state of the law at the time of the complained of conduct, but also on the particulars of the challenged conduct and/or factual setting in which it took place." *Pierce v. Smith*, 117 F.3d 866, 882 n. 5 (5th Cir. 1997).

1. Plaintiffs fail to allege facts which show an unreasonable seizure based upon police efforts to rescue victims and prevent further criminal violence, much less a clearly unlawful seizure.

33. Assuming Plaintiffs' have alleged facts which show a "seizure" under the Fourth Amendment, Plaintiffs do not and cannot allege facts which overcome the presumption of every Movant's qualified immunity under the circumstances of this case.

2. Movants' rescue efforts in response to the Assailant's criminal conduct did not create a clearly established "special relationship" between Movants and M.Z. and K.T.

34. In *Walton*, 44 F.3d at 1304, the Fifth Circuit held that, under *Deshaney*, "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. *Id*. Consistent with *Walton*, the Fifth Circuit has since limited the special relationship theory "in the

circumstances of incarceration, involuntary institutionalization, and foster care," none of which show a clearly established "special relationship" in the circumstances Plaintiffs describe in the case before this Court. *See Doe*, 675 F.3d at 856, 859; *accord Beltran*, 367 F.3d at 307; *Bustos*, 599 F.3d at 466; *Keller v. Fleming*, 952 F.3d 216, 226 (5th Cir. 2020); *Fisher*, 2023 U.S. App. LEXIS 6317, at *8,___F.4th___ .

35. At best, Plaintiffs assertions resemble the facts of the hostage situation presented in *Salas v. Carpenter*, 980 F.2d 299, 302 (5th Cir. 1992). In *Salas* a court clerk and judge were taken hostage in the judge's chambers, which prompted the Tarrant County Sheriff's Department and Fort Worth Police Department to respond to the courthouse. *Id.* Before the Fort Worth police teams finished deploying, the Tarrant County elected Sheriff, Don Carpenter demanded Fort Worth officers leave the scene generally citing a jurisdictional dispute. *Id.* The Tarrant County Sheriff's office had no SWAT team, no hostage negotiation policy, and only five of the county's deputies had attended a one-week hostage negotiation training a year before the incident. *Id.* No deputy had any practical experience, communication equipment, or training comparable to that of the Fort Worth police officers. *Id.* Sheriff Carpenter, however, did not cut off all avenues of rescue for the hostage without providing an alternative. *Carpenter*, 980 F.2d at 308.

36. Rather, much like Plaintiffs allege of the Movants in the instant litigation, Sheriff Carpenter and other law enforcement officers on scene continued efforts to negotiate and take alternative defensive positions around the Courthouse. *Id*. In resolving a claim of state – created danger under much more clearly - described and troubling facts, the Fifth Circuit held that "[Plaintiff] was not held in state custody or otherwise prevented by the state from caring for herself. This was a failed rescue effort." *Carpenter,* 980 F.2d at 309.

37. Just as in *Carpenter*, Plaintiffs simply assert facts of a failed rescue effort, in which

Plaintiffs conclusory assert officers were not sufficiently trained, while Plaintiffs' own allegations show Movants made efforts, albeit unsuccessful in Plaintiffs' eyes, to rescue Plaintiffs M.Z. or K.T., but this is not enough to show a "special relationship" much less any special relationship that is clearly established under the law. *See Carpenter,* 980 F.2d at 309.

3. For over 30-years, and as recent as March 2023, the Supreme Court and the Fifth Circuit Court have never recognized a "state-created danger" theory of liability.

38. **As the fifth circuit has made plainly clear "[a] *never*-established right cannot be a *clearly* established one."** *Fisher,* 2023 U.S. App. LEXIS 6317, at *2, __F.4th__ (emphasis added). Consistent with 30 years of binding precedent, in *Fisher* the Fifth Circuit declined to recognize the very same state-created danger theory Plaintiffs assert here. *Id.* To be sure this precedent is well-grounded in circuit precedent. *See Randolph v. Cervantes*, 130 F.3d 727, 731 (5th Cir. 1997); *Piotrowski v. City of Hous.,* 237 F.3d 567, 584 (5th Cir. 2001);*McClendon v. City of Columbia*, 305 F.3d 314, 324 (5th Cir. 2002)(en banc); *Scanlan,* 343 F.3d 533; *Rivera v. Hous. Indep. Sch. Dist.,* 349 F.3d 244, 249 (5th Cir. 2003) ; *Beltran,* 367 F.3d at 307; *Keller,* 952 F.3d at 226; *Joiner v. United States*, 955 F.3d 399 (5th Cir. 2020).

39. Irrespective of over 30 years of precedent holding otherwise, this is not the case, that should recognize such a haphazard theory of liability "not merely because [the Fifth Circuit] ha[s] 'repeatedly' declined to do so on this exact issue, but also because the Supreme Court has expressed a strong reluctance to do so more generally in this area of constitutional law." *Fisher,* 2023 U.S. App. LEXIS 6317, at *11, __F.4th__. Rather, the Supreme Court has "reiterated—forcefully that rights protected by substantive due process 'must be deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty." *Id* quoting *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228, 2242 (2022).

40. The Court need look no earlier than *Deshaney* to find Plaintiffs' theory of a state-created-danger liability lacks the necessary roots in our Nation's history or tradition. *Deshaney*, 489 U.S. 189, at 198. Directly inapposite to plaintiffs' theory that the *Deshaney* court held the "purpose [of the due process clause] was to protect the people from the State, not to ensure that the State protected them from each other." *Deshaney,* 489 U.S. 189, 196.

41. **"**Second-guessing the decision of law enforcement officers regarding the choice of police personnel in a crisis…[and allow] [l]awsuits alleging that police should have acted one way or another in response to a hostage situation 'pose[] a no-win situation for the police and do[] nothing to encourage law enforcement or a respect for constitutional rights.'" *Carpenter*, 980 F.2d at 311. Particularly in the context of law enforcement, the law consistently discourages the type of "hindsight" analysis and judicial "second-guessing" of a danger presented by a particular dynamic situation, understanding that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 397 (1989).

CONCLUSION

42. Officer Justin Mendoza, Officer Max Dorflinger, Sergeant Telesforo Coronado, and Lieutenant Mariano Pargas pray the Court dismiss Plaintiffs' complaint against them with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I have served a true and correct copy of this motion on all counsel of record by and through the District's ECF service rules on April 11, 2023.

/s/ William S. Helfand

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

CHRISTINA ZAMORA, INDIVIDUALLY AND AS NEXT FRIEND OF M.Z.; RUBEN ZAMORA, INDIVIDUALLY AND AS NEXT FRIEND OF M.Z.; and JAMIE TORRES, INDIVIDUALLY AND AS NEXT FRIEND OF K.T.

Plaintiffs,

v.

DANIEL DEFENSE, LLC, et al.

Movants.

Case No. 2:23-cv-00017-AM

ORDER

The Court **GRANTS** Uvalde police officers Justin Mendoza's, Max Dorflinger's, Sergeant Telesforo Coronado's, and Lieutenant Mariano Pargas' motion to dismiss. It is therefore, **ORDERED** that Plaintiffs' claims are hereby dismissed.

SIGNED on this ___ day of _____, 2023

Judge Alia Moses
UNITED STATES DISTRICT JUDGE