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

SANDRA C. TORRES, INDIVIDUALLY AND AS MOTHER AND REPRESENTATIVE OF THE ESTATE OF DECEDENT, ELIAHNA TORRES, AND AS NEXT FRIEND OF E.S.T., MINOR CHILD; ELI TORRES, JR.; and JUSTICE TORRES, *Plaintiffs* v. DANIEL DEFENSE, LLC, et al. *Defendants*	Case No. 2:22-cv-00059-AM-VRG

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

Police officer Defendants Justin Mendoza, Max Dorflinger, Telesforo Coronado, and Mariano Pargas[1] (collectively "Defendants") move to dismiss, under FED. R. CIV. P. 12, the claims asserted against Defendants in Plaintiffs' First Amended Complaint for Damages [Doc. 26].

[1] Lieutenant Pargas understands the City of Uvalde intends to defend against claims asserted through Lieutenant Pargas in his asserted "official capacity" since this is actually 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). Alternatively, Lieutenant Pargas would simply show that the 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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

SUMMARY OF THE ARGUMENT

1. Emotion stimulated by the tragic events that occurred at Robb Elementary School in Uvalde, Texas on May 24, 2022, naturally tends to invoke sympathy to *create* a legal remedy where none exists in hopes of repairing the unimaginable horrors inflicted on the innocent by a gunman. "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]]." *See Deshaney v. Winnebago Cty. Dep't of Soc. Servs*., 489 U.S. 189, 203 (1989). The Supreme Court's decision in *Deshaney*, is equally appropriate in this case, "[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *Id*. Like in *Deshaney*, in defense of those sued, "it must also be said that had they moved too soon," "they would likely have been met with charges of" other alleged improprieties. *See id*.

2. In this suit, Plaintiffs ask the Court to ignore 30 years of binding judicial precedent and ignore the obvious fact that the criminal Assailant is responsible for the senseless violence at Robb. Plaintiffs ask this Court to accept claims based on a "state-created danger" theory of liability has never been accepted by the Supreme Court or Fifth Circuit Court. Binding judicial authority precludes this this Court from subjecting the Defendants to liability on this basis. Plaintiffs similarly seek to creatively strain beyond reasonable limits the legal authorities applying the Fourth and Fourteenth Amendments in an effort to create a cause of action where none exists. Neither the factual allegations in Plaintiffs' complaint, nor the legal authorities that govern Plaintiffs' claims state a cognizable claim for relief against Officer Justin Mendoza, Officer Max Dorflinger, Sergeant Telesforo Coronado, or Lieutenant

[2] Defendants hereafter refer to Salvador Ramos as the "Assailant" to avoid further mention of his name.

Mariano Pargas. Therefore, the Court should dismiss the claims asserted against these officers.

PROCEDURAL HISTORY

3. Plaintiffs filed their original complaint on November 28, 2022, asserting various claims under §1983 against 12 identified law enforcement officers and claims of governmental liability against several entities, and state law claims against defendants Oasis Outback, LLC, Daniel Defense, LLC its related entities ("Daniel Defense"). [Doc. 1]. Daniel Defense filed its motion to dismiss on February 17, 2023, and Plaintiff filed their First Amended Complaint the same day. [Docs. 25-26].

4. Plaintiffs thereafter filed a stipulation of dismissal, without prejudice, of all claims against City of Uvalde police officers Eduardo Canales, Louis Landry, Donald Page, Javier Martinez, and Uvalde Fire Marshall Juan Hernandez. [Doc. 28]. Plaintiffs do not allege any claims against Uvalde police officers Eduardo Canales, Louis Landry, Donald Page, Javier Martinez, and Uvalde Fire Marshall Juan Hernandez in Plaintiffs first amended complaint. *Id.*

5. Plaintiffs amended complaint supplemented some former and added some new assertions - including times of alleged events, names of some officers, some officers' alleged locations throughout the occurrences which form the basis of the lawsuit, and asserted claims against the law enforcement officers who Plaintiffs identified in their amended complaint.[3] Plaintiffs served with process Uvalde police officers Justin Mendoza and Max Dorflinger, Uvalde Sergeant Telesforo Coronado, and Uvalde Lieutenant Mariano Pargas. These Defendants, herein, move for dismissal of the claims asserted against them because, Plaintiffs lack standing or capacity to assert any claim, and because the allegations in Plaintiffs' complaint fail to show a plausible claim for relief against any Defendant.

[3] [Doc. 26, at ¶¶ 108-109, 114,117-120, 123-127, 129-132, 134-140, 142-148, 151-152, 154-155, 157, 160-172, 175-179, 182-184, 186, 189-192, 196, 281, 284-285, 289-294, 299-301, 305-308, 312].

ARGUMENT AND AUTHORITIES

I. CLAIMS SUBJECT TO DISMISSAL UNDER RULE 12(b)(1)

6. Courts should decide on a motion filed under 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). 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). The assertions on the face of Plaintiffs' complaint establish, as a matter of law, that claims Plaintiffs' assert must be dismissed through FED. R. CIV. P. 12(b)(1).

A. Plaintiffs lack standing to prosecute a claim based upon the alleged violation of decedent E.T.'s rights.

7. "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,[4] 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-

[4] Defendants do not move, under FED. R. CIV. P. 12(b)(1), to dismiss federal claims Plaintiff Sandra C. Torres asserts through 42 U.S.C. § 1988 based on Texas wrongful death and survival statutes.

61 (5th Cir. 1986) (emphasis added).

8. 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 decedent E.T.'s rights. Plaintiffs' claims, therefore, should be dismissed under FED. R. CIV. P. 12(b)(1) on this basis.

B. Plaintiffs Eli Torres, Jr., Justice Torres, and E.S.T. —all *siblings* of decedent E.T.— lack standing and capacity to prosecute any claim.

9. "Every action shall be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17(a); *Thomas v. N.A. Chase Manhattan Bank*, 994 F.2d 236, 243 (5th Cir. 1993).

> Pursuant to 42 U.S.C. §1988, we must look to the state wrongful death statute to determine who has standing to bring a wrongful death claim under §1983. The Texas Wrongful Death and Survival Statutes, Tex. Civ. Prac. & Rem. Code §§ 71.004 and 71.021, set forth the parties who can bring suit.

Aguillard v. McGowen, 207 F.3d 226, 231 (5th Cir. 2000).

10. Under the Texas Wrongful Death Act, an action for damages arising from a death shall be for the "exclusive benefit of the surviving spouse, children and parents of the deceased." TEX. CIV. PRAC. & REM. CODE §71.004. "[S]iblings are based on the plain language of the statutes, plainly not within the scope of the Texas Wrongful Death and Survivor Statutes." *Aguillard,* 207 F.3d at 231. Plaintiff E.T.'s siblings: E.S.T., Eli Torres, Jr, and Justice Torres lack standing to assert any claim through 42 U.S.C. § 1988 through the Texas Wrongful Death Act. *See id*; [Doc. 26, at 18-20].

11. Under the Texas survival statute, "[a] personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person." TEX. CIV. PRAC. & REM. CODE §71.021. Generally, "only the estate's personal representative has the capacity to bring a survival claim." *Austin Nursing Ctr. v. Lovato*, 171 S.W.3d 845, 850-51 (Tex. 2005). In this suit, Plaintiff Sandra

Torres sues in the capacity of the representative of decedent E.T.'s estate. Therefore, the other Plaintiffs are not proper parties to this litigation.

12. For a legal heir to sue on behalf of an estate, the heir must prove 'there is no administration [of the estate] pending and no necessity for same and that they are the only heirs (or devisees) of the deceased." *De Aguilar v. Boeing Co*., 47 F.3d 1404, 1415 (5th Cir. 1995) *cert. denied*, 516 U.S. 865 (1995) (quoting *Lozano v. Smith*, 718 F.2d 756, 773 n.38 (5th Cir. 1983)). Plaintiffs' pleading allegations fail to show that no estate administration is pending or needed. Instead, Plaintiff Sandra Torres sues in the capacity of the representative of decedent E.T.'s estate.

13. Additionally, "[w]hether Texas law authorize[] [Plaintiffs Eli Torres, Jr, Justice Torres, and minor E.S.T.] to maintain [a] survival action as [E.T's] legal heir[s] (i.e. whether administration is necessary) is tightly bound up with whether [Plaintiffs Eli Torres, Jr, Justice Torres, and minor E.S.T. are] the estate's sole beneficiary and there are no creditors." *Rodgers v. Lancaster Police & Fire Dep't*, 819 F.3d 205, 212 (5th Cir. 2016).

14. Plaintiffs Eli Torres, Jr, Justice Torres, and E.S.T. have not shown they have capacity or standing to prosecute any claim [Doc. 26, at 18-20], so the Court should dismiss the claims asserted by Eli Torres, Jr, Justice Torres, and E.S.T.

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

15. Also, [t]here is no constitutional right to state protection for acts carried out by a private actor." *Beltran v. City of El Paso*, 367 F.3d 299, 304 (5th Cir. 2004). Defendants had no Constitutional duty to enforce criminal laws. *See McKee v. City of Rockwall*, 877 F.2d 409, 413-14 (5th Cir. 1989). "The 'Due Process Clause does not require a State to provide its citizens with particular protective services.'" *DeShaney,* 489 U.S. at 197. Therefore, because Plaintiffs have no claim based on any

Defendant's alleged failure to enforce criminal laws to the Plaintiff's 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.

16. The Court should also dismiss the claims asserted against Defendants due to Plaintiffs' failure to plead 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 (emphasis added) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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*.

17. Merely listing generalized legal standards, without providing substantive factual matter to support them 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).

18. Additionally, to state a claim against the police Defendants here who have asserted qualified immunity, a plaintiff must "plead more than conclusions" and 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 (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.

19. In this case, Plaintiffs fail to allege facts which show the personal involvement of any Defendant in a violation of E.T.'s rights, much less through clearly unlawful conduct by any Defendant. As a threshold matter, to establish liability under § 1983, 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).

20. In evaluating whether the factual allegations in the complaint plausibly show that a Defendant violated E.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). Those 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. Contrarily, because Plaintiffs' group 131 law enforcement officers throughout their complaint, the Defendants cannot determine—or illustrate to this Court—factual allegations that show any Defendant was "personally involved in the alleged constitutional deprivation or have engaged in wrongful conduct" for any claim under §1983. *Turner*, 848 F.3d at 695-96.

21. At best, Plaintiffs allege the following against the Defendants: Officer Dorflinger restrained and tackled "plaintiff Justice Torres' husband," **who is not a Plaintiff in this case**. [Doc. 26, at ¶177]. Officer Mendoza stood in the general hallway while gunshots are heard in the background. *Id* at ¶¶151-152. Plaintiffs make no other factual allegations against Officers Dorflinger or Mendoza.

22. Plaintiffs allege Lieutenant Pargas and Sergeant Coronado were amongst the first to arrive at the scene. *Id* at ¶114. 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." *Id* at ¶¶114, 124, 126-130, 138-141, 150, 153. 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. *Id* at ¶174.

23. Lieutenant Pargas was the acting City police chief, and he entered the West building with other unidentified officers and stood back from a classroom. [Doc. 26, at ¶¶126-127, 138]. At 12:12 p.m. Lieutenant Pargas received a radio dispatch that one of the classrooms was full of victims. *Id* at ¶¶166, 168. Lieutenant Pargas entered the school at 12:17 p.m. and informed border patrol agents inside the school of the presence of victims. *Id* at ¶168. Lieutenant Pargas remained in the school for another three minutes before walking out and remained outside for the next 30 minutes. *Id* at ¶168.

24. Plaintiffs make no other factual allegations against Lieutenant Pargas. Plaintiffs' bare assertions against unspecified officers deny the Court factual allegations necessary for the "context-specific task that requires the reviewing court to draw on its judicial experience and common sense" to find that Plaintiffs have alleged facts that show a plausible claim for relief. *See Iqbal*, 556 U.S. at 679. [Doc. 1, at ¶182].

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

25. 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 Defendants' alleged failure to properly enforce criminal laws.

26. If, *arguendo*, a Plaintiff established standing to prosecute a claim, Plaintiffs nonetheless fail to allege facts which show a plausible claim based on Defendants' 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 that any Defendant seized E.T.

27. Civil rights statute 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 § 1983 claim imposes liability for violation of a constitutionally protected right, § 1983 cannot be viewed in terms of traditional tort-law concepts. *Baker*, 443 U.S. at *Harper v. Merkle*, 638 F.2d 848, 860 (5th Cir.), *cert. denied*, 454 U.S. 816, 102 S. Ct. 93 (1981).

28. "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 [E.T.], for [courts] rarely probe the subjective motivations of police officers in the Fourth Amendment context." *Id*. "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)).

29. 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.

30. Plaintiffs' claim fails under the Fourth Amendment first because Plaintiffs have not alleged facts which show that any Defendant, with intent to restrain E.T., acquired physical control over E.T. at any specific moment by applying physical force to restrain E.T.'s movement and gaining physical control over E.T. through stopping E.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 E.T. was objectively unreasonable.

31. The second reason Plaintiffs' claims fail under the Fourth Amendment, is that assuming *arguendo*, any Defendant's conduct could reasonably be construed as having seized E.T., "'[s]eizure' alone is not enough for § 1983 liability; the seizure must be 'unreasonable.'" *Brower v. Cty. of Inyo*, 489 U.S. 593, 599 (1989). "Because this case involves the rights of students in a public school, a full bore *Terry* analysis is inappropriate. *Milligan v. City of Slidell*, 226 F.3d 652, 654 (5th Cir. 2000). Rather, "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)).

32. Moreover, "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, defendants "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.

33. Plaintiffs hinge their seizure claim, amongst others, on a theory that law enforcement incorrectly treated the situation as a "barricaded threat" rather than an "active shooter," which is inapposite to whether a seizure is unreasonable. "The reasonableness of a search or seizure is evaluated on its own merits, not by engaging in a series of 'what ifs.'" as Plaintiffs seek to do here. *Id* at 655 n.3. Thus, even if a *seizure* occurred, it was not unreasonable based on Plaintiffs' hindsight speculations. Assuming *arguendo* the officers "barricade" seized the Plaintiffs—which it did not—the individual officers have a legitimate governmental interest in ensuring public safety and Plaintiffs nowhere suggest facts to show that public safety was not the purpose motivating any individual officers' behavior. *compare Scott v. Harris*, 550 U.S. 372, 386 (2007).

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

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

34. "[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 that any Defendant denied E.T. due process.

35. "[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. Defendants' rescue efforts in response to the Assailant's criminal conduct did not create a "special relationship" between Defendants and E.T.

36. 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 (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). Such a special relationship exists "in the circumstances of incarceration, involuntary institutionalization, and foster care" *Doe v. Covington Cty. Sch. Dist*., 675 F.3d 849, 859 (5th Cir. 2012).

37. However, "[t]he complaint does not allege that any of the Defendants 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 officers were present to rescue E.T. and other victims but did not timely

rescue E.T. [Doc.26, at ¶¶ 179]. Plaintiffs' assertions fail to plausibly show that Plaintiff was in the state's custody creating a "special relationship" by virtue of the officer's mere presence outside the classroom where E.T. was being held captive by the criminal Assailant. *Compare Walton,* 44 F.3d at 1304; with *Beltran*, 367 F.3d at 302.

38. Plaintiffs simply fail to show that any Defendant's conduct "effectively [took E.T.'s] liberty under terms that provide[d] no realistic means of voluntarily terminating the state's custody *and* thus deprive[d] [E.T.] of the ability or opportunity to provide for [her] 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" 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.

39. In *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 defendants used their authority to create a dangerous environment for the plaintiff and [2] that the defendants acted with deliberate indifference to the plight of the plaintiff." *Scanlan*, 343 F.3d at 537-38. However, "the problem for [Plaintiffs] is that 'the Fifth Circuit has never recognized th[e] state-created-danger exception" so Plaintiffs' state created danger theory fails as a matter of law. *See Fisher*, 2023 U.S. App. LEXIS 6317, at *8.

40. 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 E.T. Plaintiffs' allegations show the contrary, that the Assailant created the dangerous environment before any Defendant arrived at Robb Elementary School.

41. Moreover, to establish deliberate indifference of a Defendant, Plaintiffs are required to allege facts which plausibly show that "[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." [Doc.1, at ¶144]. But "errors constitute negligence, not deliberate indifference. *See Beltran,* 367 F.3d at 308. "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. The allegations in the complaint do not show a plausible claim under a state created danger theory of liability.

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

42. "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). 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 the violation of E.T.'s rights; and (3) the failure to supervise amounted to deliberate indifference to E.T.'s rights. *See Roberts v. City of Shreveport*, 397 F.3d 287, 292 (5th Cir. 2005). To state a claim, Plaintiffs must further allege facts which show that officers, under the supervision of

Lieutenant Pargas**,** 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). Plaintiffs allege no such facts and lieutenant Pargas' presence at the scene of the shooting belies this assertion.

43. Additionally, "[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). Plaintiffs do not allege facts which show that Lieutenant Pargas was aware that any subordinate officer received no supervision, facts which show that Lieutenant Pargas knew that greater supervision of an officer was needed, and facts which show that Lieutenant Pargas deliberately chose not to provide any needed supervision to subordinate officer. Plaintiffs fail to allege facts that show a plausible claim against Lieutenant Pargas under any element of the required test.

G. Plaintiffs have not alleged facts which overcome any Defendant's qualified immunity.

44. "To overcome the [Defendants] 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)0. "Because the officers invoked a qualified immunity defense, the burden shifts to [Plaintiffs'] to show the [Defendants] 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, he 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)).

45. "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)0. This portion of the 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 cannot 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.

46. Assuming Plaintiffs' have alleged facts which show a "seizure" under the Fourth Amendment, Plaintiffs cannot show facts which overcome any Defendant's qualified immunity in the circumstances of this case.

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

47. 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 of the case before this Court. *See Doe*, 675 F.3d at 859; *accord Beltran*, 367 F.3d at 307; *Bustos*, 599 F.3d at 466; *Doe*, 675 F.3d at 856**;** *Keller v. Fleming*, 952 F.3d 216, 226 (5th Cir. 2020); *Fisher*, 2023 U.S. App. LEXIS 6317, at *8.

48. At best, Plaintiffs assertions resemble 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 Sheriff Don Carpenter demanded Fort Worth officers leave the scene generally citing a jurisdiction qualm. *Id.* The Tarrant County Sheriff's office had no SWAT team, no hostage negotiation policy, and only five deputies had attended a one-week hostage negotiation training a year before the incident. No deputy had any practical experience, communication equipment, or training comparable to 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. Rather, much like the Defendants 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*.

49. 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. The same is true in this case. Like *Carpenter*, Plaintiffs simply assert this was a failed rescue effort, officers were not sufficiently trained, while the allegations show that Defendants made efforts, albeit unsuccessful to rescue Plaintiff E.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.

50. **"[A] *never*-established right cannot be a *clearly* established one."** *Fisher,* 2023 U.S. App. LEXIS 6317, at *2 (emphasis added). The Fifth Circuit has consistently declined to recognize the same state-created danger theory that Plaintiffs assert here. *See Id; accord 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*, 305 F.3d at 324; *Scanlan,* 343 F.3d at 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).

51. Irrespective of over 30 years of 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. 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)).

52. The Court need look no earlier than *Deshaney* to find that such a state-created-danger claim lacks roots in our Nation's history or tradition. *Deshaney*, 489 U.S. 189, at 198. Contrarily, *Deshaney* held that 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.

53. Particularly in the context of law enforcement, other areas of constitutional law consistently discourage the type of "hindsight" analysis and judicial "second-guessing" of a danger presented by

a particular 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). **"**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.

H. Defendants are immune from Plaintiffs' claims brought under Texas law.

54. Defendants are immune from Plaintiffs' survival claims and claims of alleged wrongful death brought under Texas law. *See* TEX. CIV. PRAC. & REM. CODE § 101.106. "The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter." TEX. CIV. PRAC. & REM. CODE § 101.106(a); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 658-59 (2008). Alternatively, Plaintiffs' state law claims are barred by TEX. CIV. PRAC. & REM. CODE § 101.106(f). *See Garza v. Harrison*, 574 S.W.3d 389, 406 (Tex. 2019).

CONCLUSION AND PRAYER

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

Respectfully submitted,

/s/ Norman Ray Giles
William S. Helfand
Attorney-In-Charge
Texas Bar No. 09388250

Norman Ray Giles
Texas Bar No. 24014084
Randy Edward Lopez
Texas Bar No. 24091829

OF COUNSEL:

LEWIS BRISBOIS BISGAARD & SMITH, LLP
24 Greenway Plaza, Suite 1400
Houston, Texas 77046
(713) 659-6767
(713) 759-6830 (Fax)
ATTORNEYS FOR DEFENDANTS
LIEUTENANT MARIANO PARGAS
SERGEANT TELESFORO CORONADO
OFFICER MAX DORFLINGER
OFFICER JUSTIN MENDOZA

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/ *Norman Ray Giles*

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

SANDRA C. TORRES, INDIVIDUALLY AND AS MOTHER AND REPRESENTATIVE OF THE ESTATE OF DECEDENT, E.T. AND AS NEXT FRIEND OF E.S.T., MINOR CHILD; ELI TORRES, JR.; and JUSTICE TORRES, *Plaintiffs* v. DANIEL DEFENSE, LLC, et al. *Defendants*	Case No. 2:22-cv-00059-AM-VRG

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 VICTOR R. GARCIA
UNITED STATES DISTRICT JUDGE