IN THE 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.	§	**Civil Action No. 2:23-cv-00017**
***Plaintiffs*,**	§	
v.	§	
DANIEL DEFENSE, LLC, et al.	§	
***Defendants*.**	§	

DEFENDANTS BETANCOURT, MALDONADO, & KINDELL'S MOTION TO DISMISS PURSUANT TO RULES 12(B)(1) AND 12(B)(6)

Defendants DPS Captain Joel Betancourt, DPS Sergeant Juan Maldonado, and DPS Ranger Christopher Kindell file this motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure in response to Plaintiff's Original Complaint. ECF No. 1.

I. Statement of the Case

In their Original Complaint, Plaintiffs Christina and Ruben Zamora, individually and as next friends of M.Z., and Jamie Torres, individually and as next friend of K.T., sue Defendants Texas Department of Public Safety Captain Joel Betancourt, Sergeant Juan Maldonado, and Ranger Christopher Kindell (collectively, Texas Department of Public Safety or "DPS" Defendants) in their individual capacities for violations of their constitutional rights. *See generally* ECF No. 1. Plaintiffs sue under 42 U.S.C. § 1983, alleging the DPS Defendants were deliberately indifferent when they unlawfully seized M.Z. and K.T. and denied them substantive due process under the special relationship and state created danger theories. *Id.* at 77–78.

II. Statement of Facts

On the morning of May 24, 2022, Salvador Ramos, a "troubled and violent young man" armed with an AR-15 style semiautomatic rifle,[1] shot his grandmother and then drove to Robb Elementary in Uvalde, Texas, where he entered co-joining classrooms and proceeded to murder children and teachers. ECF No. 1 at 37, 46–47. In response to emergency calls, Uvalde Police officers ("UPD") were the first to arrive on the scene. *Id.* at 47. Within a few minutes of UPD arriving, DPS Sgt. Maldonado parked his car outside of the school. *Id.* Meanwhile, UPD officers approached the classrooms where they heard shots being fired and observed bullets coming out through the walls. *Id.* According to the Plaintiffs' complaint, once the UPD officers realized Ramos was armed with an "extraordinarily lethal assault weapon," they backed away from the classrooms and requested additional equipment. ECF No. 43, 48. A minute later, another group of UPD officers approached and prepared to breach the classroom, but the UPD officers retreated after Ramos fired at and wounded two officers with ammunition that could pierce through walls. *Id.* at 49.

At the same time the wounded UPD officers were exiting the building, Sgt. Maldonado was approaching the school's entrance. *Id.* at 50. Sgt. Maldonado was informed shots had been fired, and he observed the injured officers. *Id.* Rather than confront the gunman alone, Sgt. Maldonado opted to wait for his team to arrive. *Id.* A minute later, the UPD SWAT Team commander announced over the radio that the shooter was "contained" and requested ballistic shields and helicopter support. *Id.* at 50–51. Two minutes later, Uvalde CISD Police Chief Pedro "Pete" Arredondo called police dispatch and sought additional officers to participate in a barricade, stating that he needed "a lot of fire power" and the building to be "surrounded by as many AR-15s as possible." *Id.* at 52–53.

[1] According to the complaint, Ramos was in possession of a rapid-fire powered assault weapon which descended from military rifles developed for offensive combat and designed to kill soldiers on the battlefield. ECF No. 1 at 19.

Meanwhile, while en route to Robb Elementary, DPS Cpt. Bentacourt, who was 70 miles away when Ramos began shooting, called the Mayor of the City of Uvalde and the Chief of UPD. *Id.* at 55. Cpt. Bentacourt also received information via text message from the Sheriff of Uvalde County that the shooter was "barricaded at the school." *Id.* Relying on the information given to him by the officials in command at the scene, Cpt. Bentacourt ordered the DPS officers on the scene to remain outside and establish a perimeter. *Id.* All officers on the scene were instructed by UPD CISD Chief Arredondo not to perform a breach of the classroom. *Id.* at 56.

After a 37-minute break in shooting, Ramos began firing again and a team of officers, including DPS Ranger Kindell, approached the classroom from the hallway, but did they not breach the classroom. *Id.* at 58. The officers continued to confer with Border Control in the hallway. *Id.* Cpt. Bentacourt arrived and again instructed the DPS officers to establish a perimeter. *Id.* at 59. About 15 minutes after Cpt. Bentacourt arrived, a team of officers led by the Border Control Tactical Unit ("BORTAC") prepared to breach the classroom door. *Id.* at 61. Despite Cpt. Betancourt's instructions to "standby," the BORTAC-led team breached the door and shot and killed Ramos. *Id.* Tragically, many students and teachers lost their lives at the hands of Ramos that day. *Id.* at 58. K.T. and M.Z. were among the injured survivors. *Id.* at 62.

III. Standards of Review

Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). When the court lacks the statutory or constitutional power to adjudicate a case, the case is properly dismissed for lack of subject-matter jurisdiction. *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 312 (5th Cir. 2015). "The objection that a federal court lacks subject-matter jurisdiction, *see* Fed. Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgement." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). "Whenever it appears by suggestion of the parties or otherwise

that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Id.* at 507 (*citing Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)); *see* Fed. R. Civ. P. 12(h)(3). "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). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.* A motion to dismiss for lack of subject-matter jurisdiction brought pursuant to Federal Rule of Civil Procedure 12(b)(1) is reviewed de novo. *Rodriguez v. Tex. Comm'n on the Arts*, 199 F.3d 279, 280 (5th Cir. 2000) (citations omitted); *U.S. v. Tex. Tech. Univ.*, 171 F.3d 279, 288 (5th Cir. 1999).

When evaluating a motion to dismiss under Rule 12(b)(6), the complaint must be liberally construed in favor of the plaintiff and all facts pleaded therein must be taken as true. *Leatherman v. Tarrant Cnty Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 164 (1993); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). A complaint must nevertheless contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 554, 570 (2007). This plausibility standard is not simply a "probability requirement," but imposes a standard higher than "a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

The standard is properly guided by "[t]wo working principles." *Id.* First, although "a court must accept as true all of the allegations contained in the complaint," that tenet "is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." *Id.* at 667–78. Second, "[d]etermining whether a complaint states a plausible claim for relief will…be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. In considering a motion to dismiss, therefore, the court must initially identify pleadings that are no more than legal conclusions not entitled to the assumption of truth, then assume the veracity of well-pleaded factual allegations to determine

whether those allegations plausibly give rise to any right to relief. If not, "the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* (internal quotations omitted).

IV. Argument and Authorities

A. Motion to Dismiss for Lack of Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(1)

a. The parents of M.Z. and K.T. lack standing to recover in their individual capacities.

Christina and Ruben Zamora sue on their own behalf and on behalf of their child, M.Z. ECF No. 1 at 1. Jamie Torres sues on behalf of herself and her child, K.T. *Id.* While the parents have representative capacity to sue on behalf of their minor children as next friend, they lack standing to bring individual claims. Under § 1983, the parents have standing in their individual capacity if they "clearly allege[s] an injury to [her] own personal constitutional rights." *Hooker v. Dallas Indep. Sch. Dist.*, No. 3:09-CV-1289-D, 2010 U.S. Dist. LEXIS 108886, 2010 WL 4025877, at *5 (N.D. Tex. Oct. 13, 2010) (quoting *Trujillo v. Board of County Comm'rs*, 768 F.2d 1186, 1187 (10th Cir. 1985)).

The Supreme Court has recognized that parental rights are a protected liberty interest under the Fourteenth Amendment. *Troxel v. Granville*, 530 U.S. 57, 65–66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (discussing "extensive precedent"). However, the case law governing parental liberty rights is narrow and primarily addresses parental rights with respect to child-rearing decisions concerning the care, custody, and control of minors. *Id.* Although not laid out specifically, the parents in this case presumably seek to recover for their own mental anguish and economic damages for missed work. *See* ECF No. 1 at 64–69 ("The Impact of Shooting on the Plaintiffs"). These claims do not implicate a constitutional right and, therefore, are not cognizable under § 1983 as a violation of the parents' own constitutional rights. *See T.F.R. v. Morris Cnty. Prosecutor's Office*, No. 2:16-5407, 2017 U.S. Dist. LEXIS 163192, 2017 WL 4390098, at *4 (D. N.J. Oct. 3, 2017) (dismissing parents' individual claims under § 1983 for lack of standing where parents suffered loss of income and emotional injuries that stemmed from alleged constitutional violations during their son's arrest and prosecution); *see also Burrow v.*

Postville Cmty. Sch. Dist., 929 F. Supp. 1193, 1208 (N.D. Iowa 1996) (holding that parents could not bring a § 1983 action against the school based on their own claims of emotional distress); *Morgan v. City of New York*, 166 F. Supp. 2d 817, 819 (S.D.N.Y. 2001) (holding that a mother lacked standing to bring individual claims under § 1983 based on a deprivation of [her child's] constitutional rights). Because the parents have not alleged a personal claim under § 1983, i.e., a constitutional violation against them personally, they do not have standing to recover in their individual capacities.

B. Motion to Dismiss for Failure to State a Claim pursuant to Fed. R. Civ. P. 12(b)(6)

a. Plaintiff's allegations fail to overcome the DPS Defendants' entitlement to qualified immunity.

Qualified immunity is applicable to suits arising under §1983 that are filed against public officials in their individual capacity. *Crostley v. Lamar Cnty., Tex.*, 717 F.3d 410, 422 (5th Cir. 2013). Qualified immunity "[p]rotects government officials from liability for civil damages to the extent that their conduct is objectively reasonable in light of clearly established law." *Id.* The defense shields government officials who perform discretionary functions from liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Fraire v. City of Arlington*, 957 F.2d 1268, 1273 (5th Cir. 1992) (internal quotation omitted). Foundational to the qualified immunity doctrine is the concept that an officer's actions must be viewed from that officer's point of view without the benefit of hindsight. *Solis v. Serrett*, 31 F.4th 975, 978 (5th Cir. 2022). "From the comfort of a courtroom or chambers, it is often possible for judges to muse on how an officer could have handled a situation better. But that does not mean the officer is not entitled to qualified immunity." *Id.*

To decide whether the defendant is entitled to qualified immunity, the court conducts a two-prong inquiry determining (1) whether the defendant committed a constitutional violation under current law and (2) whether the defendant's actions were objectively unreasonable in light of the law that was clearly established at the time of the alleged wrongdoing. *Crostley*, 717 F.3d at 422.

Importantly, the plaintiff "bear[s] the burden to rebut [the] qualified immunity defense and demonstrate that there were [constitutional] rights that were clearly established at the time of the constitutional violation." *Keller v. Fleming*, 952 F.3d 216, 221 (5th Cir. 2020). "To show the law is clearly established, a party must 'identify a case where an officer acting under similar circumstances…was held to have violated'" the plaintiff's federal rights. *Nerio v. Evans*, 974 F.3d 571, 575 (5th Cir. 2020) (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 589, 199 L. Ed. 2d 453 (2018)). Moreover, "[t]his inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (citations omitted, punctuation altered).

In this case, the DPS Defendants are entitled to qualified immunity because Plaintiffs fail to show that the DPS Defendants violated their clearly established constitutional rights. Plaintiffs' facts as alleged do not amount to unlawful seizure or deliberate indifference, and the Fifth Circuit has not formally recognized the state-created danger theory. Moreover, there is no case that Plaintiffs can point to which holds that the DPS Defendants' actions, specifically as alleged here, were objectively unreasonable. Even if Plaintiffs could state a constitutional violation, which they cannot, the DPS Defendants are nonetheless entitled to qualified immunity because the rights at issue undoubtedly are not clearly established. In other words, the rights at issue are not "beyond debate." *See McCoy v. Alamu*, 950 F.3d 226, 233 (5th Cir. 2020) ("[F]or the law to be clearly established, it must have been 'beyond debate' that [the Defendants] broke the law."). Because Plaintiffs cannot meet their burden to overcome qualified immunity, the claims against the DPS Defendants must be dismissed with prejudice.

b. Plaintiffs fail to state a claim for unlawful seizure under the Fourth and Fourteenth Amendments.

Plaintiffs allege that "by using force and authority to involuntarily confine M.Z., K.T., and the other students and teachers inside classrooms 111 and 112 with Ramos," the Defendants "illegally

seized M.Z. and K.T." in violation of their clearly established rights. ECF No. 1 at 77. This claim fails because M.Z. and K.T. were not "seized" for purposes of the Fourth Amendment, and even if they were, the DPS Defendants' conduct was objectively reasonable in light of clearly established law.

1. Plaintiffs fail to plead specific facts against the DPS Defendants.

It is unclear how Plaintiffs contend the DPS Defendants' actions resulted in an unlawful seizure because Plaintiffs wholly fail to plead any facts alleging the DPS Defendants' personal involvement in the "barricade," which Plaintiffs argue involuntarily confined the students in the classroom. Individual-capacity claims require factual specificity. "Plaintiffs suing governmental officials in their individual capacities…must allege specific conduct giving rise to a constitutional violation. This standard requires more than conclusional assertions: The plaintiff must allege specific facts giving rise to the constitutional claims." *Oliver v. Scott*, 276 F.3d 736, 741 (5th Cir. 2002) (citation omitted); *see also Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1983) ("Personal involvement is an essential element of a civil rights cause of action.").[2] According to the Plaintiffs' own complaint, the only DPS officer inside the school was Ranger Kindell, who is alleged to have been standing and "conferring" in the hallway. ECF No. 1 at 58. Absent any specific facts as to how each DPS Defendant specifically seized M.Z. and K.T., Plaintiffs claims regarding unreasonable seizure must be dismissed.

2. Plaintiffs' unlawful seizure claim cannot be brought under the Fourteenth Amendment.

Plaintiffs' First Amended Complaint cites to the Fourth and Fourteenth Amendment for their claims related to unlawful seizure. ECF No. 1 at 77 ("42 U.S.C. § 1983 – Fourth and Fourteenth Amendments Unlawful Seizure"). Under the Fourth Amendment, an individual is protected from unreasonable seizures. U.S. Const. Amend. IV. "Where a particular Amendment 'provides an explicit

[2] To the extent Plaintiffs seek to hold any DPS Defendant liable in their supervisory capacity, that claim fails as a matter of law. *See Oliver*, 276 F.3d at 742 ("Section 1983 does not create supervisory or respondeat superior liability.").

textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). Because the Fourth Amendment specifically protects an individual from a seizure without probable cause, Plaintiff cannot also seek redress under the Fourteenth Amendment. *See, e.g.*, *Bosage v. Miss. Bureau of Narcotics*, 796 F.3d 435, 441–42 (5th Cir. 2015) (holding that plaintiff's claims of unlawful arrest and detention should be analyzed under the Fourth Amendment, not the Fourteenth Amendment). Because Plaintiffs' unlawful seizure claim should be brought under the Fourth Amendment, their Fourteenth Amendment claims should be dismissed.

3. M.Z. and K.T. were not "seized" for purposes of the Fourth Amendment.

M.Z. and K.T. were not "seized" for purposes of the Fourth Amendment because they were not the intended target of the "barricade." It is true that "a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement,…but only when there is a governmental termination of freedom of movement *through means intentionally applied*." *Brower v. County of Inyo*, 489 U.S. 593, 596-97, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989) (emphasis in original). And the "[v]iolation of the Fourth Amendment requires…[that the] detention or taking itself must be willful." *Id.* at 596. These principles ensure that every "negligent taking of a life" does not become "a constitutional deprivation" and have been applied consistently to foreclose Fourth Amendment claims in the context of the accidental deaths of innocent bystanders. *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985); *see also Moore v. Indehar*, 514 F.3d 756, 760 (8th Cir. 2008) (collecting cases) ("bystanders are not seized for Fourth Amendment purposes when struck by an errant bullet in a shootout"); *Childress v. City of Arapaho*, 210 F.3d 1154, 1156–57 (10th Cir. 2000) (finding, in hostage shooting case, no Fourth Amendment "seizure" because "[t]he officers intended

to restrain the minivan and the fugitives, not [the hostages]"); *Claybrook v. Birchwell*, 199 F.3d 350, 355, 359 (6th Cir. 2000) (determining that a plaintiff struck by errant bullet during police shootout was not seized because officers were aiming at her father-in-law and did not realize she was hiding in nearby parked car); *Medeiros v. O'Connell*, 150 F.3d 164, 167–69 (2nd Cir. 1998) (holding that where a hostage is struck by an errant bullet, there is no Fourth Amendment seizure or violation); *Rucker v. Harford County, Md.*, 946 F.2d 278, 281 (4th Cir. 1991) (explaining that *Brower* "does not mean…that a seizure occurs just so long as the act of restraint itself is intended…though it restrains one not intended to be restrained"); *Landol—Rivera v. Cruz Cosme*, 906 F.2d 791, 794–96 (1st Cir. 1990) (declining to hold that hostage was seized for Fourth Amendment purposes when police officers fired at suspect's getaway car and accidentally struck the hostage); *Estate of Amelia H. Macias v. Tex. Dep't of Pub. Safety*, No. SA-20-CV-00460-FB, 2021 U.S. Dist. LEXIS 25043, at *29–31 (W.D. Tex. Feb. 9, 2021) (holding no seizure occurred when the DPS SWAT team mistook the suspect's mother for the suspect and targeted her during a shootout, intending to result in the seizure of the suspect).

In this case, the innocent children and teachers in the classrooms were not the intended target of the "barricade," despite the Plaintiffs' theory that the "barricade" resulted in their unlawful seizure. The facts pleaded by Plaintiffs indicate the students and teachers were unable to leave the room because Ramos was holding them hostage with an assault rifle, not because of any actions taken by the DPS Defendants.[3] ECF No. 1 at 47 (Ramos entered unlocked classrooms…and began shooting…Ramos dropped to his knees and told the children it was "time to die."). Clearly established law dictates that the alleged actions of the law enforcement officials in "barricading" the students and teachers in the classrooms when the intended target was Ramos does not constitute a "seizure" under

[3] According to the Plaintiffs' allegations, Ranger Kindell was the only DPS Defendant inside the school, and he was "conferring in the hallway." ECF No. 1 at 58.

the Fourth Amendment. As such, the DPS Defendants are entitled to qualified immunity on this claim.

c. Plaintiffs fail to overcome the DPS Defendants' entitlement to qualified immunity under the state-created danger and custodial relationship theories.

Plaintiffs allege that "by using force to barricade M.Z. and K.T. and other students and teachers inside classrooms 111 and 112 with Ramos," the DPS Defendants "illegally created a dangerous environment for M.Z. and K.T." ECF No. 1 at 78. The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall…deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Concerning the scope of the clause, "[t]here can be no dispute that the Fourteenth Amendment includes as a liberty interest 'a right to be free from…unjustified intrusions on personal security.'" *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977). "The reach of substantive due process is limited, however, and it protects against only the most serious of governmental wrongs." *Breen v. Tex. A & M Univ.*, 485 F.3d 325, 332 (5th Cir. 2007) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)). "The Court has emphasized that 'because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended,' courts should be 'reluctant to expand the concept of substantive due process.'" *Id.* at 332–33 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)). Here, Plaintiffs' attempts to circumvent qualified immunity by alleging theories not recognized in this circuit is unavailing. This Court should decline Plaintiff's invitation to expand the concept of substantive due process beyond what is already clearly established.

1. There is no constitutional duty for a state official to protect an individual from private violence.

"When a plaintiff complains of abusive executive action, substantive due process is violated 'only when [the conduct] can properly be characterized as arbitrary, or conscience shocking in a

constitutional sense.'" *Id.* at 333 (alteration in original) (quoting *Cnty. of Sacramento*, 523 U.S. at 847) (quotation marks omitted). "Negligent acts, for example, are insufficient to trigger a substantive due process violation." *Id.* (citing *Cnty. of Sacramento*, 523 U.S. at 849) ("[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."). Here, there is no due process violation as there is no affirmative duty to protect against private violence. There are no applicable exceptions to that rule.

Although the Due Process Clause provides a general protection from unjustified intrusions on personal security, "a state official has no constitutional duty to protect an individual from private violence." *McClendon v. City of Columbia*, 305 F.3d 314, 324 (5th Cir. 2002) (citing *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 197, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989)). Stated differently, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003) (citing *DeShaney*, 489 U.S. at 197). The harm inflicted upon M.Z. and K.T. was caused by a private actor, i.e., Ramos, not the DPS Defendants. Plaintiffs' Fourteenth Amendment due process claim inherently involves an attempt to hold the DPS Defendants liable for a private actor's violence. Plaintiffs' claim conflicts with clearly established precedent and seeks to hold the DPS Defendants to a non-existent constitutional standard.

2. The "special relationship" exception does not apply, and the Fifth Circuit does not recognize the "state-created danger" theory.

The Fifth Circuit has discussed two possible exceptions to the general rule of "no affirmative duty to protect," which are rooted in the language of *DeShaney*. *Breen*, 485 F.3d at 332. First, under the "special relationship" exception, "the Constitution imposes upon the state a duty of care towards individuals who are in the custody of the state." *Id.*; *DeShaney*, 489 U.S. at 199–200 ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it

a corresponding duty to assume some responsibility for his safety and general well-being."); *see also Leffall v. Dall. Indep. Sch. Dist.*, 28 F.3d 521, 526 (5th Cir. 1994).

Second, "some language from *DeShaney* has been read to suggest that state officials also have a duty to protect individuals from harm when their actions created or exacerbated a danger to the individual." *Breen*, 485 F.3d at 333; *DeShaney*, 489 U.S. at 201 ("While the State may have been aware of the dangers that [plaintiff] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."). "This latter exception mentioned in *DeShaney* is often recognized as the primary source for what has been termed the state-created danger theory." *Breen*, 485 F.3d at 333 (footnote omitted).

The special relationship exception does not apply here. *See Villalon v. City of McAllen*, No. 7:20-CV-0264, 2022 U.S. Dist. LEXIS 88002, 2022 WL 1547759, at *6 (S.D. Tex. Apr. 7, 2022), *rec. adopted*, 2022 U.S. Dist. LEXIS 87488, 2022 WL 1540425 (S.D. Tex. May 16, 2022) ("The scope of this [special relationship] exception is narrow, such that the Fifth Circuit has extended it to circumstances involving only incarcerated prisoners, individuals involuntarily committed to institutions, or children in foster care."). Here, the actions of the DPS Defendants in establishing a perimeter outside the school or "conferring" in the hallway do not equate to taking M.Z. and K.T. into custody and holding them against their will. The students were held against their will by the shooter, not law enforcement. Plaintiffs' facts simply do not provide a basis to conclude that any law enforcement official, including the DPS Defendants, assumed a constitutional duty to protect M.Z. and K.T. The contours of the special relationship exception plainly do not apply to these circumstances.

Similarly, the state-created danger exception does not apply here. Although the Fifth Circuit in *Leffall* discussed the state-created danger theory and set forth the elements necessary to establish the claim as a basis for liability, the panel "ultimately held that even if the state-created danger theory

was constitutionally sound, the plaintiff failed to meet the necessary elements. Subsequent § 1983 cases predicated on the state created danger theory similarly pretermit the issue." *Saenz v. City of McAllen*, 396 F. App'x 173, 176–77 (5th Cir. 2010) (per curiam) (citing *Leffall*, 28 F.3d at 529). In other words, the Fifth Circuit has not recognized the exception. *See Fisher v. Moore*, 62 F.4th 912, 916 (5th Cir. 2023) ("This circuit has never adopted a state-created danger exception to the sweeping 'no duty to protect' rule."); *Watts v. Northside Indep. Sch. Dist.*, 37 F.4th 1094, 1096 (5th Cir. 2022) ("We have 'repeatedly declined to recognize the state-created danger doctrine.'" (quotation omitted)); *Joiner v. United States*, 955 F.3d 399, 407 (5th Cir. 2020); *Robinson v. Webster Cnty., Miss.*, 825 F. App'x 192, 196 (5th Cir. 2020) (per curiam) ("[T]his Court has 'repeatedly noted' the unavailability of the [state-created danger] theory in this circuit." (quotation omitted)), *cert. denied*, 141 S. Ct. 1450 (2021). Nor have district courts applied the exception. *Estate of Carmichael ex rel. Carmichael v. Galbraith*, No. 3:11-CV-0622-D, 2012 U.S. Dist. LEXIS 857, 2012 WL 13568, at *3 (N.D. Tex. Jan. 4, 2012) (Fitzwater, C.J.) ("[B]ecause the state-created danger exception to *DeShaney* is not recognized in this circuit, the court dismisses [plaintiffs'] § 1983 claim to the extent it is based on an alleged violation of the Due Process Clause of the Fourteenth Amendment."); *see Doe on Behalf of Doe v. Dall. Indep. Sch. Dist.*, 534 F.Supp.3d 682, 690 (N.D. Tex. 2021) (Scholer, J.) ("[T]he Fifth Circuit, however, does not recognize state-created danger as a viable claim."); *Rideau v. Keller Indep. Sch. Dist.*, No. 4:10-CV-926-Y, 2012 U.S. Dist. LEXIS 193657, 2012 WL 12885087, at *3 (N.D. Tex. Jan. 31, 2012) (Means, J.); *see also Villalon v. City of McAllen*, No. 7:20-CV-0264, 2022 U.S. Dist. LEXIS 88002, 2022 WL 1547759, at *9 (S.D. Tex. Apr. 7, 2022), *rec. adopted*, 2022 U.S. Dist. LEXIS 87488, 2022 WL 1540425 (S.D. Tex. May 16, 2022); *Strickland v. Dall. Indep. Sch. Dist.*, No. 3:22-CV-0056-D, 2022 U.S. Dist. LEXIS 137994, at *15 (N.D. Tex. Aug. 3, 2022) (Fitzwater, S.A.). Plaintiffs' claims predicated on the state-created danger theory must fail as a matter of law because they cannot establish a substantive due process right on the facts as alleged.

3. "A right never established cannot be one clearly established."

Even if the Fifth Circuit did recognize the state-created danger exception, the elements of the theory are not properly pleaded. "[T]o recover on a state-created danger claim, the Plaintiff[s'] must show that the harm to [M.Z. and K.T.] resulted because (1) the [DPS Defendants'] actions created or increased the danger to [M.Z. and K.T.], and (2) the [DPS Defendants] acted with deliberate indifference toward [M.Z. and K.T.]." *Breen*, 485 F.3d at 334–35. The Plaintiffs must also show that the DPS Defendants specifically "used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Fisher*, 62 F.4th at 916–17 (citing *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 865 (5th Cir. 2012) (en banc)).

Plaintiffs fail to state any facts from which the court could infer the actions of the DPS Defendants created or increased the danger to M.Z. and K.T. Ramos, a mass-murderer holding a deadly assault rifle, created the danger, which law enforcement attempted to curtail. The actions of the DPS Defendants certainly did not create an opportunity for the shooter that would not otherwise have existed, as the shooter had already begun his murderous rampage before the arrival of any DPS Defendants.

Moreover, the fact that the law enforcement officials, including the DPS Defendants, were taking steps to stop the shooter and protect the public directly rebuts Plaintiffs claims of deliberate indifference. "Deliberate indifference is an extremely high standard to meet." *Id.* (quoting *Domino v. Tex. Dep't of Crim. Just.*, 239 F.3d 752, 756 (5th Cir. 2001)). An official is not liable unless he "knows of and disregards an excessive risk" to a plaintiff's safety. *Garza v. City of Donna*, 922 F.3d 626, 635 (5th Cir.) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)), *cert. denied*, 140 S. Ct. 651, 205 L. Ed. 2d 386 (2019). However, "deliberate indifference cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm." *Thompson*, 245 F.3d at 459 (citing *Hare v. City of Corinth*, 74 F.3d 633, 649–50 (5th Cir. 1996) (en

banc)). Rather, the Plaintiffs must show the officials "refused to treat [M.Z. and K.T.], ignored [their] complaints, intentionally treated [them] incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.'" *Domino*, 239 F.3d at 756 (quoting *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985)); *accord Easter v. Powell*, 467 F.3d 459, 464 (5th Cir. 2006). "[A]ctions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and do not divest officials of qualified immunity." *Hernandez ex rel. Hernandez v. Texas Dep't. of Protective & Regulatory Servs.*, 380 F.3d 872, 883 (5th Cir. 2004) (quoting *Alton v. Texas A&M Univ.*, 168 F.3d 196, 201 (5th Cir. 1999)).

Here, the facts as pleaded show that law enforcement officials acted to protect the victims and the public by barricading the classroom and the school. Even if the DPS Defendants could have acted differently, there are no facts pleaded indicating that any of the DPS Defendants were "ignoring" M.Z. or K.T. or treating them with "wanton disregard." Moreover, the decision of law enforcement to implement one plan of action over another under the pressure of the existing circumstances is precisely the type of conduct qualified immunity is meant to protect. And this decision-making under pressure must be assessed "*without* the aid of hindsight." *Tucker v. City of Shreveport*, 998 F.3d 165, 176 (5th Cir. 2021).

Simply put, the "no duty to protect" rule applies to this case without exception, and the Plaintiffs have failed to state a due process claim under the Fourteenth Amendment. The DPS Defendants are entitled to qualified immunity on the due process claim not only because Plaintiffs have failed to state a constitutional violation, but also because the state-created danger doctrine is not clearly established in the Fifth Circuit.

Qualified immunity attaches when an official's conduct "'does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known.'" *White v. Pauly*, 580 U.S. 73, 78–79, 137 S. Ct. 548, 551 (2017) (emphasis added) (quoting *Mullenix*, 577 U. S.

at 11). While the Supreme Court's case law "do[es] not require a case directly on point" for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* This Court is bound by Fifth Circuit precedent, which has repeatedly declined to adopt the state-created danger doctrine. "A right never established cannot be one clearly established." *Fisher*, 62 F.4th at 919. Plaintiffs' Fourteenth Amendment due process claim must be dismissed because the DPS Defendants are entitled to qualified immunity.

V. Conclusion

The DPS Defendants respectfully request that this Court grant their motion to dismiss based on qualified immunity and dismiss the case with prejudice.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
Deputy Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

SHAWN E. COWLES
Deputy Attorney General for Civil Litigation

SHANNA E. MOLINARE
Division Chief
Law Enforcement Defense Division

/s/ Briana M. Webb
BRIANA M. WEBB
Assistant Attorney General
Law Enforcement Defense Division
State Bar No. 24077883

Office of the Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080 / (512) 936-2109 Fax
Briana.Webb@oag.texas.gov

ATTORNEYS FOR DEFENDANTS BETANCOURT, KINDELL, & MALDONADO

NOTICE OF ELECTRONIC FILING

I, **BRIANA M. WEBB,** Assistant Attorney General of Texas, do hereby certify that I have electronically submitted for filing a true and correct copy of the above and foregoing in accordance with the Electronic Case Files System of the Western District of Texas, Del Rio Division on May 12, 2023.

/s/ Briana M. Webb
BRIANA M. WEBB
Assistant Attorney General

CERTIFICATE OF SERVICE

I, **BRIANA M. WEBB**, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing has been served via electronic mail on May 12, 2023 to all counsel of record.

/s/ Briana M. Webb
BRIANA M. WEBB
Assistant Attorney General

IN THE 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.	§	**Civil Action No. 2:23-cv-00017**
Plaintiffs,	§	
v.	§	
DANIEL DEFENSE, LLC, et al.	§	
Defendants.	§	

ORDER

After consideration of Defendants Betancourt, Maldonado, & Kindell's Motion to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6) this Court is of the opinion that it should be **GRANTED.**

It is **ORDERED** that Defendants Betancourt, Maldonado, and Kindell are dismissed with prejudice.

This is a **FINAL JUDGMENT**.

Signed on this _____ day of _____, 2023.

_____
JUDGE VICTOR R. GARCIA
UNITED STATES DISTRICT JUDGE