UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

SANDRA C. TORRES, INDIVIDUALLY AND AS MOTHER AND REPRESENTATIVE OF THE ESTATE OF DECEDENT, E.T., et al.,	§	
Plaintiffs,	§	Case No. 2:22-CV-00059-AM
v.	§	
DANIEL DEFENSE, LLC, et al,	§	
***Defendants*.**	§	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT ARREDONDO'S MOTION TO DISMISS

To the Honorable Chief U.S. District Judge Moses:

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 (collectively "Plaintiffs") file this brief in opposition to the motion to dismiss the First Amended Complaint filed by Defendant Pedro Arredondo ("Arredondo" or "Defendant"). The Court should deny that motion for the reasons set forth below.

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CHIEF ARRENDONDO TRAPS CHILDREN WITH A KILLER, WHILE PREVENTING ANYONE FROM SAVING THEM

May 24, 2022 was supposed to be the day that fourth-grade student Plaintiff E.T. celebrated receiving awards at Robb Elementary School. Her final softball game was supposed to be that day and she was to learn about whether she made the all-star team. It was supposed to be a day of joy, of pride, of excitement.

Instead, it was the final day that E.T. got to tell her mother that she loved her. She died that day. At 11:33 a.m., a man armed with an assault rifle entered classrooms 111 and 112 and began shooting. Over the next 77 minutes, while Defendant Pedro Arredondo prevented other police officers and even parents from saving their children, the gunman murdered 19 children and two teachers. Seventeen other children were wounded.

Much of the violence could have been stopped. Fewer than three minutes after the shooting began, officers including Defendant Arredondo arrived at the scene of the massacre, separated from the shooter only by a classroom door. As required by his training and UCISD policy, Arredondo should have immediately engaged the active shooter in classroom 112. As Police Chief, Arredondo was required to instruct the several other officers with him to breach the door of the classroom. Arredondo was required to neutralize the shooter mere minutes after he began shooting. Arredondo could have saved countless lives that day. Instead, Arredondo ignored his training, which led to the needless death of dozens, primarily young children.

Arredondo did not breach the classroom. He did not engage the active shooter conducting a massacre mere feet away from him, separated only by a door. Instead of stopping the bloodshed 90 seconds after it started, Arredondo did the exact opposite. He barricaded a group of helpless children, including E.T., inside a classroom with an active shooter. When other officers tried to do the right thing and breach the classroom, Arredondo ordered them to "f*****g wait." And he did so despite knowing "we probably have kids in there [classrooms 111 and 112]." Faced with trying to stop an

ongoing massacre of children versus intentionally trapping those children in a room with an active shooter, Arredondo chose the latter. Shame on him.

Arredondo's conduct violated E.T.'s constitutional rights. Arredondo's show of authority in barricading E.T. in her classrooms subjected her to an unlawful seizure in violation of her rights under the Fourth Amendment. His decision to trap E.T. in a room with a shooter, while actively preventing anyone else from rescuing her, violated her substantive due process rights under the Fourteenth Amendment under both the state-created danger and custodial relationship theories of liability.

Through his cowardice, Arredondo sealed the fates of many children that day. For 77 agonizing minutes, he gave the shooter carte blanche to murder and severely wound two classrooms full of children. The Court should deny his motion in its entirety.

FACTUAL BACKGROUND

On May 24, 2022, Plaintiff E.T. woke up nervous about whether she would make the all-star team in softball; her final game of the season was that night. Am. Compl. ¶ 1.[1] E.T. called her mother that morning, who had left early for work, to tell her that she loved her. *Id.* It was awards day at Robb Elementary School in Uvalde, Texas, a day to celebrate the hard-earned achievements of E.T., and her fourth-grade classmates. *Id.* E.T. posed for a photo with some of her best friends at the ceremony. *Id.*

E.T. did not make it to softball. E.T.'s day—and life—was abruptly and tragically cut short. At approximately 11:30 a.m., Salvador Ramos walked into a set of connected classrooms, rooms 111 and 112 of Robb Elementary, armed with an assault rifle, and murdered 19 children and two teachers, wounding at least 17 other children. *Id.* ¶¶ 2-3. He remained in those classrooms for a total of 77 minutes before police entered. *Id.* ¶ 3. E.T. was killed and her family's life was destroyed. *Id.* ¶ 4. For hours her mother, Sandra Torres, searched for her, desperately hoping she was alive. *Id.* ¶¶ 13, 194-98.

[1] Citations to "Am. Compl." are to Plaintiffs' Amended Complaint for Damages, ECF No. 26.

Approximately three minutes after the shooting began, Defendant Uvalde Consolidated Independent School District ("UCISD") Police Chief Pedro "Pete" Arredondo entered the school from the south side of the building. *Id.* ¶ 126. He was one of the first officers to arrive to classrooms 111 and 112. *Id.* Arredondo publicly stated the day after the shooting that he immediately heard "'plenty' of gunshots" and saw gunshots coming out through the walls of the classroom. *Id.* As one of the first to arrive on-scene, Chief Arredondo was both required by UCISD policy and trained to engage the active shooter and put an end to the bloodshed occurring in classrooms 111 and 112, just minutes after it began. *Id.* Arredondo chose not to do so. *Id.* One minute after his arrival, Ramos resumed shooting inside the classrooms. *Id.* ¶ 130.

Faced with the chance to save the lives of two rooms filled with fourth-grade children, Arredondo chose—and instructed others—to do the opposite. As UCISD Police Chief, Arredondo decided to override established active shooter policy, and instead "barricade[d] children, including E.T., inside a classroom with an active shooter, delaying rescue and emergency medical services and depriving them of the comfort of their family." *Id.* ¶ 131. "He intentionally trapped children in the room with the shooter." *Id.*

Over the next 77 minutes, Arredondo doubled down on his decision to trap the children. At 11:40 a.m., he called police dispatch and requested yet more officers to barricade the classrooms, and "did not request or set up for a breach of the classroom." *Id.* ¶ 147. In order to make sure that no one could breach the classroom, neutralize the gunman, and save the children, Arredondo actively *prevented* other officers from breaching the classroom. At 11:43 a.m., he "gave orders to officers to stand down while the shooter was actively shooting teachers and students trapped in classrooms 111 and 112." *Id.* ¶ 149. Again at 12:09 p.m., Arredondo instructed other officers "not to perform a breach of the classroom," all while children "were dying in the classrooms that officers had surrounded." *Id.* ¶ 164. At 12:20 p.m., as a group of officers prepared to breach the classroom in defiance of Arredondo's instructions, Arredondo said, "'tell them to f*****g wait.'" *Id.* ¶ 170. Due to Arredondo's decision and

orders for other officers to stand down while children were murdered, "[m]any family members, hearing gunfire and seeing no discernable police response, wanted to go into the classroom themselves." *Id.* ¶ 176. Consistent with Arredondo's decision to barricade the classrooms, "Defendant Nolasco kept parents from entering the school, even as parents yelled at him to do something, anything, to rescue their children." *Id.* Arredondo never made any attempt to enter the classroom. As he later explained in an interview, the only other idea he had was "'to start shooting through that wall.'" *Id.* ¶ 170. Not once did Arredondo even think about following policy and treating the situation as one involving an active shooter.

Arredondo did all of this knowingly and intentionally. During the shooting, he told other officers he knew that "we probably have kids in there [classrooms 111 and 112]." *Id.* ¶ 164. In an interview shortly after the shooting, he admitted he "had [Ramos] contained" and "kn[e]w there's probably victims in there," referring to classrooms 111 and 112. *Id.* ¶ 131.

At 12:10 p.m., while Arredondo (and others) prevented anyone from breaching the classroom, a student found her teacher's phone, wiped the blood off the screen, called 911, and begged the dispatcher for help. *Id.* ¶ 165. She stayed on the phone for 17 minutes, risking her life if the shooter had realized what she was doing, before hanging up when she feared that the shooter was about to discover her. *Id.* At 12:36 p.m., the student called 911 again, and told the dispatcher, "'There's a school shooting.'" *Id.* ¶ 175. The student heard Arredondo and the other officers outside of the classroom in the hallway and asked the dispatcher, "'Can you tell the police to come to my room?'" *Id.* The student suggested to the dispatcher that she could do what should have been Arredondo's responsibility: she could "open the door to her classroom so that the police gathered outside could enter." *Id.* But because Arredondo chose to trap the children inside with the shooter, "[t]he dispatcher told her not to do that." *Id.* The student complied with the dispatcher's order and did not open the classroom door. *Id.* Given this show of force and express instructions, no student was free to leave the classroom. *Id.* ¶¶ 151, 157, 175.

Arredondo, too, never opened the classroom door. Despite knowing that his actions would likely lead to more kids being murdered, Arredondo never breached the classroom or shot the gunman and took active steps to prevent others from doing so—it took a U.S. Customs and Border Patrol led group of officers to do so, over an hour after Arredondo arrived on scene. *Id.* ¶ 182.

ARGUMENT

I. LEGAL STANDARD

Plaintiffs need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a). To defeat a Rule 12(b)(6) Motion, the complaint need only include sufficient factual allegations "to raise a right to relief above the speculative level" and to provide "fair notice" of the plaintiff's claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). In considering a Rule 12(b)(6) motion, the Court must "take all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff . . . and ask whether the pleadings contain 'enough facts to state a claim to relief that is plausible on its face.'" *Yumilicious Franchise, L.L.C. v. Barrie*, 819 F.3d 170, 174 (5th Cir. 2016). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[T]he court must accept as true all material allegations in the complaint, as well as any reasonable inferences to be drawn from them . . . and must review those facts in a light most favorable to the plaintiff." *Schydlower v. Pan Am. Life Ins. Co.*, 231 F.R.D. 493, 498 (W.D. Tex. 2005). Plaintiffs have met their burden at the pleadings stage.[2]

II. QUALIFIED IMMUNITY DOES NOT EXIST

Arredondo argues that he is entitled to qualified immunity on each of Plaintiffs' claims. But as Judge Willett of the Fifth Circuit recently noted, recent academic scholarship "paints the qualified-immunity doctrine as flawed—foundationally—from its inception," because "courts have been construing the wrong version of § 1983 for virtually its entire legal life." *Rogers v. Jarrett*, 63 F.4th 971,

[2] Plaintiffs no longer maintain their claim against Defendant Arredondo in his official capacity.

979 (5th Cir. 2023) (Willet, J., concurring). The original text of Section 1 of the Civil Rights Act of 1871 (known as § 1983) included a "Notwithstanding Clause" that "explicitly displaces common-law defenses"—including qualified immunity—by stating that "§ 1983 claims are viable notwithstanding 'any such law, statute, ordinance, regulation, custom, or usage of the State to contrary.'" *Id.* at 979-80.[3] But "[f]or reasons lost to history, the critical 'Notwithstanding Clause' was inexplicably omitted from the first compilation of federal law in 1874." *Id.* at 980. Thus, "the Supreme Court's original justification for qualified immunity—that Congress wouldn't have abrogated common-law immunities absent explicit language—is faulty because the 1871 Civil Rights Act *expressly included such language*." *Id.* (emphasis in original).

The Supreme Court has explained that language of the statute as passed (known as "Statutes at Large") is controlling, even if codified incorrectly or never codified at all. *See In United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 448 (1993) (holding that a statute inadvertently omitted from the United States Code remained valid law); *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) ("[T]he Code cannot prevail over the Statutes at Large when the two are inconsistent.") (cleaned up); *Stephan v. United States*, 319 U.S. 423, 426 (1943) (same). And any textual changes stemming from the codification of the federal laws in 1874 were not meant to alter the scope of the 1871 Civil Rights Act. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 203 n.15 (1970) (Brennan, J., concurring in part and dissenting in part); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 510 (1939).

Qualified immunity does not exist, and Arredondo cannot invoke it as a defense. Even if it did exist, it would not be available to Arredondo. *See* Sections III.B., IV.A.-B., V., *infra*

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[3] The full text of the original Section 1 of the Civil Rights Act of 1871 reads: "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . ." *Rogers*, 63 F.4th at 979 (Willet, J., concurring) (quoting Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871)) (emphasis in original).

III. PLAINTIFFS HAVE STATED A CLAIM FOR UNLAWFUL SEIZURE (FOURTH AMENDMENT)

A. Arredondo's Decision to Barricade Plaintiffs in Classrooms 111 and 112 Constitute a Seizure by "Show of Authority"

A person is seized when an officer, "by means of physical force *or show of authority*, has in some way restrained" that person's liberty. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (emphasis added). Physical force is not required for a seizure to occur—without it, only "submission to the assertion of authority is necessary." *McLin v. Ard*, 866 F.3d 682, 691 (5th Cir. 2017) (quoting *California v. Hodari D.*, 499 U.S. 621, 626 (1991)). When considering whether a seizure occurred, courts must assess, "in view of all of the circumstances surrounding the incident, [whether] a reasonable person would have believed that he was not free to leave." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

Here, Defendant Arredondo's decision to barricade Plaintiffs in a classroom, forbidding anyone from opening the door and attempting to save them, constitutes a seizure, as it caused Plaintiffs to believe they could not leave the classroom. Arredondo's central, factual, and false claims are (1) that "[i]t was the shooter, not the Law Enforcement Individual Defendants, who was restricting [Plaintiffs'] movements" and (2) that "Plaintiffs were not aware of any coercive effect that Arredondo or the Law Enforcement Individual Defendants could have had on them." Br. at 7.[4] But these arguments are belied by the allegations in the Complaint that Arredondo, time and time again, prevented others from breaching the classrooms, killing the shooter, or allowing Plaintiffs to leave the classrooms. He decided not to "request or set up for a breach of the classroom; rather, he requested additional officers to fortify the barricade" of children inside a classroom with the shooter. Am. Compl. ¶ 147. He instructed other officers not to breach the classroom—in response to seeing officers who were preparing to breach the classroom, he said to "'tell them to f*****g wait.'" *Id.* ¶ 170. These

[4] Citations to "Br." are to Defendant Arredondo's Motion to Dismiss Plaintiffs' Original Complaint and Brief, ECF No. 57.

actions constitute a "show of authority" that coerced Plaintiffs to stay in the classroom with the shooter, as "no reasonable person would have felt free to leave the classroom." *Id.* ¶ 151.

The notion that "Plaintiffs were not aware of any coercive effect" of Arredondo's actions is similarly incorrect. Br. at 7. Because E.T. did not survive, her account of the day will never be known, but the allegations in the complaint lead to one inescapable inference: Arredondo's actions in establishing a barricade made it impossible for her to flee to safety. As the Complaint alleges, a student called 911 multiple times while trapped in the classrooms with the shooter, begging for assistance from Arredondo or any of his fellow officers. Am. Compl. ¶¶ 165, 175. The student offered to "open the door to her classroom so that the police gathered outside could enter" and so that she could leave. *Id.* ¶ 175. But because Arredondo barricaded children inside the classrooms rather than breach it, the dispatcher instructed her not to do so. *Id.* And the children, who lived through the horrific day, reported that they heard officers in the hallway, *id.* ¶ 175, and thus believed that the police were intentionally keeping them in the classrooms, which they were. Given these facts, a jury could infer that it was reasonable for E.T. to "have believed that [she] was not free to leave," *Michigan*, 486 U.S. at 573, due to Arredondo's show of authority, and thus that a seizure occurred. Indeed, a jury could easily conclude that had any student attempted to leave the classroom, the masses of law enforcement officers waiting outside the classroom would have assumed that the person opening the door was the shooter and therefore would have been likely to shoot her. Drawing all "reasonable inferences . . . in a light most favorable to the plaintiff," *Schydlower*, 231 F.R.D. at 498, Plaintiffs have stated a claim for unlawful seizure.

B. Arredondo Is Not Entitled to Qualified Immunity

Qualified immunity fails when (1) an official violated a constitutional right; and (2) the right was clearly established at the time of the challenged conduct. *Scott v. Harris*, 550 U.S. 372, 377 (2007). As noted, Plaintiffs have stated a claim for unlawful seizure in violation of the Fourth Amendment. In establishing that a right was "clearly established," a plaintiff need not establish that "the [specific]

action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Further, the Supreme Court does not require directly on-point precedent to determine the "clearly established" prong of qualified immunity where, as here, an officer's conduct is so egregious on its face that it "should have provided respondents with some notice that their alleged conduct violated" Plaintiffs' constitutional rights. *Hope v. Pelzer*, 536 U.S. 730, 745–46 (2002); *see also Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (reversing grant of qualified immunity due to the "particularly egregious facts of this case").

Officers can be put on notice that their conduct is unlawful in egregious, "novel factual circumstances." *Hope*, 536 U.S. at 741. As Justice Scalia summarized, "[w]hen properly applied, [qualified immunity] protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S.731, 743 (2011) (internal quotation marks omitted). Deliberately trapping children in a classroom with a killer for 77 minutes while preventing others from mounting a rescue is not a reasonable mistake, and every officer in the country ought to know this. At best, Arredondo was plainly incompetent. Qualified immunity is not intended to protect officials, like Arredondo, whose actions are obviously harmful and unconstitutional.

Since at least 2004, "the Fifth Circuit has also made clear that '[s]tudents have a constitutional right under the Fourth and Fourteenth Amendments to be free from unreasonable search and seizures while on school premises.'" *T.O. v. Fort Bend Indep. Sch. Dist.*, No. CV H-19-0331, 2020 WL 1442470, at *3 (S.D. Tex. Jan. 29, 2020), *report and recommendation adopted*, 2020 WL 1445701 (S.D. Tex. Mar. 24, 2020), *aff'd*, 2 F.4th 407 (5th Cir. 2021) (quoting *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 621–22 (5th Cir. 2004). The egregious facts of this case should have provided Arredondo with notice that trapping children in a classroom with a school shooter violated their constitutional right to be free from unlawful seizure.

Arredondo argues that "clearly established law is that officers can detain witnesses during an event for several hours." Br. at 9. He characterizes 77 minutes of being trapped in a classroom with

an active shooter as a "brief 'detention' [which] was not a constitutional violation," and which compared to cases with a longer detention period, was not "objectively unreasonable in light of then clearly established law." *Id.* at 10. Setting aside the factual inaccuracy of characterizing these 77 minutes as a "brief detention", this is an incorrect statement of the law, as the Supreme Court has "consistently rejected hard-and-fast time limits" as the basis for an unlawful seizure. *United States v. Montoya de Hernandez*, 473 U.S. 531, 543 (1985). The cases Arredondo cites—two out-of-circuit—uniformly involve detention periods reasonably necessary for police to obtain a warrant or investigate reasonable suspicion of criminal activity. *Illinois v. McArthur*, 531 U.S. 326, 327 (2001) (detention was "no longer than reasonably necessary for [the police], acting with diligence to obtain the warrant"); *Montoya de Hernandez*, 473 U.S. at 542-43 (obtaining a warrant took "a number of hours to procure, through no apparent fault of the inspectors"); *United States v. Williams*, 185 Fed. App'x 866, 869–70 (11th Cir. 2006) (per curiam) (investigating reasonable suspicion of criminal activity); *United States v. Gil*, 204 F.3d 1347, 1350–51 (11th Cir. 2000) (same). These cases are inapposite. No one claims police detained children or anyone in order to get a warrant. Nor can Arredondo make any credible argument that it was "reasonably necessary" to trap students in a classroom with a school shooter for any length of time, let alone 77 agonizing and fatal minutes.

IV. PLAINTIFFS HAVE STATED CLAIMS UNDER THE STATE-CREATED DANGER THEORY OF LIABILITY (DUE PROCESS)

Arredondo does not attempt to argue that Plaintiffs failed to adequately plead facts giving rise to the state-created danger theory of liability under the Due Process Clause. Instead, Arredondo argues that "the Fifth Circuit has repeatedly declined to recognize the state-created danger theory of liability" and thus that Arredondo is entitled to qualified immunity on this point. Br. at 11. But the state-created danger theory of liability is clearly established.

A legal theory need not have been expressly adopted by the Fifth Circuit in order to put a defendant on notice that "every reasonable official would understand that what he is doing violates the law," and thus for the doctrine to be clearly established. *Morgan v. Swanson*, 659 F.3d 359, 371-72

(5th Cir. 2011). The Fifth Circuit has recognized that such notice can be accomplished by pointing to "controlling authority—***or a robust consensus of persuasive authority***—that defines the contours of the right in question with a high degree of particularity." *Id.* (cleaned up) (emphasis added). That test is squarely met here.

A. The Fifth Circuit Has Repeatedly "Recognized" the State-Created Danger Theory and Defined It with Particularity

First, there is plenty of "controlling authority" in the Fifth Circuit that, while not expressly adopting the state-created danger theory, "defines the contours of the right in question with a high degree of particularity." *Morgan*, 659 F.3d at 372.

The state-created danger theory stems from the Supreme Court's decision in *DeShaney v. Winnebago County Department Social Services*, 489 U.S. 189, 201 (1989), in which the court indicated that Section 1983 liability for private-actor conduct arises if the state played any part in creating the danger the victim faced. *Id.* at 201 ("While the State may have been aware of the dangers that Joshua 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.*") (emphasis added). Since at least 1994, the Fifth Circuit has repeatedly recognized and discussed in great detail the "contours" of the theory. In *Leffall v. Dallas Independent School District*, 28 F.3d 521 (5th Cir. 1994), the parent of a student sued a school district under § 1983 after the student was killed by random gunfire in the school's parking lot. For the purpose of this analysis, the court discussed the theory in detail, including the level of "culpability" required to state such a claim, and noted in doing so that the court "may assume without deciding that our court would recognize the state-created danger theory." *Id.* at 530. Ultimately, the Court found the particular allegations in that case insufficient to state a claim. *Id.* at 532.

Three months after *Leffall*, the Fifth Circuit again set out the theory in even greater detail in *Johnson v. Dallas Independent School District*, 38 F.3d 198 (5th Cir. 1994). Its discussion clearly defined the "contours" of the theory:

> When state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state "custody." This principle has been applied in a number of cases from other circuits.
> . . .
> The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or *cutting off potential sources of private aid*. Thus the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur. Put otherwise, the defendants must have been at least deliberately indifferent to the plight of the plaintiff.

Id. at 200–01 (cleaned up). Again, the Fifth Circuit acknowledged the theory, concluding only that the pleadings in that case were insufficient to state a claim. *Id.* at 201.

Two years later, the Fifth Circuit again recognized the theory, concluding in *Scanlan v. Texas A&M University*, 343 F.3d 533 (5th Cir. 2003) that "the district court should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory." *Id.* at 538. In a subsequent case, the Fifth Circuit went on to note that *Scanlan* "clearly implied recognition of state-created danger as a valid legal theory," but later withdrew that portion of the opinion on rehearing. *Breen v. Texas A&M Univ.*, 485 F.3d 325, 336 (5th Cir. 2007); *Breen v. Tex. A&M Univ.*, 494 F.3d 516, 518 (5th Cir. 2007).

The Fifth Circuit has since clarified that *Scanlan* did not officially adopt the theory. *See, e.g.*, *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 422–23 (5th Cir. 2006). But in subsequent cases, the Fifth Circuit has only held that the pleadings did not adequately satisfy the theory. *See Doe v. Covington County Sch. Dist.*, 675 F.3d 849, 865-66 (5th Cir. 2012) ("Although we have not recognized the [state-created danger] theory, we have stated the elements that such a cause of action would require. . . . even if we were to embrace the state-created danger theory, the claim would necessarily fail [due to insufficient allegations]."); *Dixon v. Alcorn County Sch. Dist.*, 499 Fed. App'x 364, 368 (5th Cir. 2012) ("There is therefore no need to determine whether this Court should adopt the state-created danger theory of liability on the present facts."); *Est. Of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 1003 (5th Cir.

2017) ("[T]his case does not sustain a state-created danger claim, even assuming that theory's validity.").

The state-created danger theory of liability was implied by the Supreme Court in 1989; as explained below, it was adopted and defined in no fewer than ten circuits; and it remains unquestioned (though never expressly adopted) by the Fifth Circuit. It is clearly established.

B. *Ten* Circuits Have Expressly Adopted the State-Created Danger Theory

Second, *ten* courts of appeals have adopted the state-created danger theory stemming from *Deshaney*. *Irish v. Fowler*, 979 F.3d 65, 67, 74-75, 77 (1st Cir. 2020) (the state-created danger "theory of substantive due process liability is viable" and clearly-established); *Okin v. Vill. of Cornwall-On-Hudson P.D.,* 577 F.3d 415, 434 (2d Cir. 2009) (state-created danger theory a clearly established right); *Kneipp v. Tedder*, 95 F.3d 1199, 1211 (3d Cir. 1996) ("[T]he state-created danger theory is a viable mechanism for establishing constitutional violation under 42 U.S.C. § 1983"); *Doe v. Rosa*, 795 F.3d 429, 438–39 (4th Cir. 2015) (recognizing state-created danger theory); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066–67 (6th Cir. 1998) (plaintiffs stated viable claims under state-created danger theory); *Jackson v. Indian Prairie Sch. Dist. 204*, 653 F.3d 647, 654 (7th Cir. 2011) (recognizing state-created danger theory); *Glasgow v. State of Nebraska*, 819 F.3d 436, 442 (8th Cir. 2016) (same); *Wood v. Ostrander*, 879 F.2d 583, 589–96 (9th Cir. 1989) (concluding plaintiff stated a valid claim under state-created danger theory); *Matthews v. Bergdorf*, 889 F.3d 1136, 1143 (10th Cir. 2018) (recognizing state-created danger theory); *Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C. Cir. 2001) ("[T]he State also owes a duty of protection when its agents create or increase the danger to an individual.").

Ten different circuits adopting the state-created danger theory—with no circuit rejecting it—is most certainly a "robust consensus of persuasive authority." *Morgan*, 659 F.3d at 382. Whether or not the Fifth Circuit had expressly adopted the state-created danger theory, the robust consensus of ten circuits certainly put Arredondo "on notice [his] conduct was unlawful." *Hope*, 536 U.S. at 739. He cannot credibly argue that his actions were "reasonable but mistaken judgments about open legal

questions," *al-Kidd*, 563 U.S. at 743, when ten circuits have adopted the state-created danger theory. His decision to deliberately trap children in a classroom with a killer for 77 minutes while preventing others from mounting a rescue is the height of "plainly incompetent" conduct that qualified immunity does not protect. *Id.*

C. If There Were Ever a Case to Expressly Adopt the State-Created Danger Theory, It Is This One

Because the Fifth Circuit has not expressly *rejected* the theory, and rather has laid out the theory's elements, Plaintiffs should be allowed to develop evidence as to a state-created danger claim in discovery and at trial. *See Kemp v. City of Houston*, No. CIV.A. H-10-3111, 2013 WL 4459049, at *6 (S.D. Tex. Aug. 16, 2013) (allowing state-created danger claim to proceed to trial because "[w]hether the evidence at trial rises to a level sufficient to submit this claim to the jury, particularly since the Fifth Circuit has not yet adopted the theory, remains to be seen."). In recognizing the state-created danger theory, the Fifth Circuit has explained: "When state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state 'custody.'" *Johnson*, 38 F.3d at 200. It is telling that Arredondo does not even attempt to engage with the state-created danger theory on its merits—if there were ever a set of facts to justify the express adoption of this theory of liability, the facts of this case would manifestly qualify.

Prior Fifth Circuit cases declining to apply the state-created danger theory on particular facts have lacked a key requirement: that the state actor actually knew or had reason to know that the private bad actor was likely to commit misconduct as a result of the state actor's conduct, evidenced by the state actor impeding *others* from preventing the bad actor's misconduct. "The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, *or cutting off potential sources of private aid." Id.* at 201 (cleaned up) (emphasis added). The Fifth Circuit's analyses on the merits of the theory have thus typically stopped there, as it is understandably rare for

a plaintiff to be able to plead facts reflecting that culpable knowledge and conduct. *See, e.g.*, *Covington*, 675 F.3d at 866; *Lance*, 743 F.3d at 1001–02.

The uniquely horrifying set of facts of this case, however, does not suffer from this flaw. As the Complaint plainly alleges, Arredondo and his co-defendants "knowingly placed[d]" E.T. in danger. *Johnson*, 38 F.3d at 200. Arredondo knew "he 'had [Ramos] contained' and 'kn[e]w there's probably victims in there' with the shooter." Am. Compl. ¶ 131. Arredondo knowingly and intentionally "barricade[d] children, including E.T., inside a classroom with an active shooter, delaying rescue and emergency medical services and depriving them of the comfort of their family." *Id.* "He intentionally trapped children in the room with the shooter." *Id.* Arredondo "requested additional officers to fortify the barricade" of children inside a classroom with the shooter. *Id.* ¶ 147. As a rare example of a state actor "cutting off potential sources of private aid," *Johnson*, 38 F.3d at 201, he ordered other officers *not* to breach the classroom, despite admitting that "'we probably have kids in there [Classrooms 111 and 112].'" Am. Compl. ¶ 164. He "'t[old] them to f*****g wait.'" *Id.* ¶ 170. His "flagrant disregard for the lives of the children in the classroom was apparent, as he even stated in an interview that 'the thought crossed my mind to start shooting through that wall' into the classrooms with Ramos." *Id.*

In sum, the Complaint more than adequately alleges that Arredondo had "culpable knowledge and conduct in affirmatively placing [E.T.] in a position of danger." *Johnson*, 38 F.3d at 201. It was Arredondo's unconstitutional decisions—to barricade the students inside Classrooms 111 and 112, to prevent other officers from breaching the classroom, and as a result of his barricade, to keep "parents from entering the school, even as parents yelled at [Defendant Nolasco] to do something, anything, to rescue their children," Am. Compl. ¶ 176—that allowed Ramos to inflict the level of harm he did. As the Fifth Circuit put it in 1994, Arredondo "cut[] off potential sources of private aid" to E.T., *Johnson*, 38 F.3d at 201, going as far as preventing *others* from breaching the classroom. This is exactly the scenario envisioned by the state-created danger theory. Arredondo created a dangerous environment, he has publicly admitted to knowing that it was dangerous, and for 77 minutes, he "used

[his] authority to create an opportunity that would not otherwise have existed for the third party's crime" to continue, even as Plaintiffs and others suffered. *Id.* at 201. This Court should reject his attempt to escape accountability for his actions.

V. PLAINTIFFS HAVE STATED CLAIMS UNDER THE CUSTODIAL RELATIONSHIP THEORY OF LIABILITY (DUE PROCESS)

The special relationship between Arredondo and Plaintiffs provides a second, independent source of liability under the Due Process Clause.

Arredondo is correct that, ordinarily, liability under the custodial relationship theory is unavailable in the public-school context, as there is typically no "special relationship" between students and state actors in that context. But this is no ordinary case. The Fifth Circuit has found a special relationship between a person and the state "when this person is involuntarily confined against his will through the affirmative exercise of state power." *Walton v. Alexander*, 44 F.3d 1297,1306 (5th Cir. 1995). "[T]he duty owed by a state to prisoners and the institutionalized might also be owed to other categories of persons in custody by means of 'similar restraints of personal liberty.'" *Walton v. Alexander*, 20 F.3d 1350, 1354 (5th Cir. 1994), *on reh'g en banc*, 44 F.3d 1297 (5th Cir. 1995) (cleaned up). Distinguishing cases where no such relationship arose, such as those cited by Arredondo (*see* Br. at 10–12), the Fifth Circuit has noted that a special relationship exists where "the state has effectively taken the plaintiff's liberty under terms that provide no realistic means of voluntarily terminating the state's custody *and* which thus deprives the plaintiff of the ability or opportunity to provide for his own care and safety." *Walton*, 44 F.3d. at 1305 (emphasis in original).

Arredondo may well disagree that his actions rose to the requisite level of culpability under *Walton*, but such a determination "is necessarily a fact intensive inquiry which must be resolved during discovery or at the Rule 56 stage." *Bae Sys. Resol. Inc. v. Mission Transp.*, LLC, No. CV SA-19-CA-0974-FB, 2020 WL 7482036, at *2 (W.D. Tex. Aug. 19, 2020). "Rule 12(b)(6) does not provide a 'procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case,'" *id.* (cleaned up), and therefore, "a motion to dismiss is not appropriate at this stage in the

litigation," *Dixon v. Loc. Express, Inc.*, No. 4:16-CV-2081, 2017 WL 2778245, at *2 (S.D. Tex. June 26, 2017); *see also Glenntex, Inc. v. Drennan Day Custom Homes, Inc.*, No. 1:18-CV-973-LY, 2019 WL 6251455, at *3 n. 3 (W.D. Tex. Nov. 21, 2019), *report and recommendation adopted*, No. 1:18-CV-973-LY, 2019 WL 13150084 (W.D. Tex. Dec. 11, 2019) ("[T]his issue involves factual questions inappropriate for resolution at the motion-to-dismiss stage.") (cleaned up). The Court should not deny Plaintiffs that opportunity by dismissing this claim at such an early stage, particularly in light of this exceptional set of facts.

Instead, "the court must accept as true all material allegations in the complaint, as well as any reasonable inferences to be drawn from them . . . and must review those facts in a light most favorable to the plaintiff." *Schydlower*, 231 F.R.D. at 498. In that light, the exceptional circumstances of this case as alleged in the Complaint present precisely the type of limitations on a person's liberty envisioned by *Walton*. As described *supra*, Section III.A, IV.C., the Complaint alleges that Arredondo and his co-defendants knowingly trapped E.T. in classrooms 111 with an active shooter, preventing parents and other officers from saving them. Arredondo took ET.'s life in his hands, placing her in a situation which provided "no realistic means of voluntarily terminating" the barricade he created. *Walton*, 44 F.3d. at 1305. As explained in more detail above, a student called 911 multiple times asking for the police to come to her classroom, and even offered to open the door, but she was expressly told not to do so because she was being barricaded in by the police pursuant to Arredondo's orders. Am. Compl. ¶ 175. Arredondo's decision to trap students inside the classroom thus deprived E.T. "of the ability or opportunity to provide for [her] own care and safety." *Walton*, 44 F.3d. at 1305. The Complaint adequately states a claim under the custodial relationship theory.

Finally, *Walton* reflects the Fifth Circuit's recognition, since 1995, of the custodial relationship theory arising in circumstances such as those present here. This theory was clearly established 28 years ago. In addition, where as here an officer's conduct is egregious on its face, it "should have provided respondents with some notice that their alleged conduct violated" Plaintiffs' constitutional rights.

Hope, 536 U.S. at 745–46; *Taylor*, 141 S. Ct. at 54 (reversing grant of qualified immunity due to the "particularly egregious facts of this case"). The egregious facts of this case should have provided Arredondo with notice that trapping children in a classroom with a school shooter, while preventing other officers and parents from entering the classroom and trying to save them, would violate E.T.'s constitutional rights.

VI. THE COURT SHOULD NOT DISMISS PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES

Arredondo's motion to dismiss Plaintiffs' claim for an award of punitive damages should be denied. "Whether to award or deny punitive damages is best 'left to the finder of fact.'" *Carrasco v. Henkell*, No. 21-CV-00190-DC, 2022 WL 1760807, *6 (W.D. Tex. May 17, 2022) (quoting *Heaney v. Roberts*, 846 F.3d 795, 803 (5th Cir. 2017)). Where, as here, Plaintiffs plead "that Defendant acted recklessly or callously indifferent to his federally protected rights . . . it would be improper to dismiss Plaintiff[s'] request for punitive damages at the motion to dismiss stage." *Id.*

The above principle is borne out in Arredondo's argument, which ignores the Complaint's allegations of his recklessness, callousness, and indifference. *See* Br. at 18-19. He ignores his appalling decision to trap children in a classroom with an active shooter, Am. Compl. ¶ 131, "kn[owing] there's probably victims in there," *id.*; to give "orders to officers to stand down while the shooter was actively shooting teachers and students trapped in classrooms 111 and 112," *id.* ¶ 149; and to repeatedly instruct officers not to perform a potentially life-saving breach of the classroom, at one point instructing a group of officers preparing to do so "to f*****g wait," *id.* ¶ 170—all of which a jury could reasonably find reckless and callously indifferent to Plaintiffs' constitutional rights. The Court should leave Plaintiffs' claims for punitive damages "to the finder of fact." *Carrasco*, 2022 WL 1760807 at *6.

VII. SANDRA TORRES HAS STANDING TO PURSUE CLAIMS FOR HER OWN DAMAGE STEMMING FROM E.T.'S WRONGFUL DEATH

Arredondo argues that (1) Sandra Torres lacks Article III standing to bring her individual claim, Br. at 5-6, and (2) that the claim must be dismissed on state law grounds, Br. at 17.[5] Both arguments miss the mark. Sandra Torres, E.T.'s mother, has standing to bring claims for her own loss of comfort and emotional distress under the Texas Wrongful Death Act and § 1983. The Fifth Circuit has held that "individuals who are within the class of people entitled to recover under Texas's wrongful death statute have standing to sue under § 1983 for their own injuries resulting from the deprivation of decedent's constitutional rights." *Baker v. Putnal*, 75 F.3d 190, 195 (5th Cir. 1996). While generally one cannot recover for the constitutional harm caused to another under § 1983, "[s]tanding under the Civil Rights Statutes is guided by 42 U.S.C. § 1988, which provides that state common law is used to fill the gaps in administration of civil rights suits." *Pluet v. Frasier*, 355 F.3d 381, 383 (5th Cir. 2004). Because "[t]he [wrongful death] statute clearly recognizes the right of the surviving children and parents of the deceased to bring an action," "parents . . . are within the class of people entitled to recover." *Baker*, 75 F.3d at 195; *see also Kahng v. City of Houston*, 485 F. Supp. 2d 787, 792 (S.D. Tex. 2007) (finding that the plaintiff had "has standing to sue under § 1983 for her own injuries as a result of the deprivation of the decedent's constitutional rights.").

Sandra Torres suffered extreme trauma and emotional distress from the wrongful death of her daughter and can recover for those injuries. As the Amended Complaint alleges, Sandra is devastated by E.T.'s death. Am. Compl. ¶ 199. She has days where she cries for hours on end, and she yearns for her daughter. *Id.* The day of E.T.'s death was a traumatic nightmare; she searched for E.T., and was brought to identify the wrong body, only to finally be given the devastating news of E.T.'s death around 11:00 p.m. that night. *Id.* ¶¶ 194-98. This suffices at this early stage to establish standing to

[5] It bears note that Plaintiffs have not brought freestanding state tort law claims in this action against Defendant Arredondo. *See* Am. Compl. Counts 5-6. Rather, Plaintiffs plead that they were wrongful death beneficiaries for the reasons explained in text. The cases that Arredondo cites for the proposition that the Texas Torts Claims Act provides the exclusive state law remedy against him are thus irrelevant, because this case is brought under federal law alone. Br. at 17-18.

bring § 1983 claims for "injuries resulting from the deprivation of decedent's constitutional rights." *Baker*, 75 F.3d at 195.

VIII. IN THE ALTERNATIVE, THE COURT SHOULD PERMIT PLAINTIFFS TO AMEND

Plaintiffs have met the pleading standard necessary to assert viable claims, and Defendant Arredondo's motion should therefore be denied. In the alternative, Plaintiffs respectfully request that the Court allow them to amend the Complaint to allege additional facts to the extent the Court finds the allegations therein insufficient on any claim. For example, Plaintiffs recently obtained unabridged audio recordings of the 911 calls made by one student and can allege additional facts about those calls. Generally, courts within the Fifth Circuit allow plaintiffs at least one opportunity to cure any pleading deficiencies before dismissing a case under Rule 12(b)(6). *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002).

CONCLUSION

For the foregoing reasons, the Court should deny Defendant Arredondo's motion to dismiss. In the alternative, Plaintiffs respectfully request the opportunity to amend their Complaint.

DATED: May 17, 2023

Respectfully Submitted,

/s/ Ryan Gerber

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