UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

CHRISTINA ZAMORA, INDIVIDUALLY AND NEXT FRIEND OF M.Z., et al.,	§	
Plaintiffs,	§	Case No. 2:23-CV-00017-AM
v.	§	
DANIEL DEFENSE, LLC, et al,	§	
***Defendants*.**	§	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS BETANCOURT, MALDONADO, & KINDELL'S MOTION TO DISMISS PURSUANT TO RULES 12(B)(1) AND 12(B)(6)

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

Christina Zamora, as next friend of M.Z.; Ruben Zamora, as next friend of M.Z.; and Jamie Torres, as next friend of K.T. (collectively "Plaintiffs") file this brief in opposition to the motion to dismiss filed by Defendants Texas Department of Public Safety Captain Joel Betancourt, Sergeant Juan Maldonado, and Ranger Christopher Kindell (collectively, the "TDPS Defendants"). The Court should deny that motion for the reasons set forth below.

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TDPS DEFENDANTS TRAP CHILDREN WITH A KILLER, WHILE PREVENTING ANYONE FROM SAVING THEM

May 24, 2022 was supposed to be the day that fourth-grade student Plaintiff M.Z. celebrated receiving several awards at Robb Elementary School. It was supposed to be the day that Plaintiff K.T. shared her bubbles with her new fourth-grade classmates, cementing friendships she had recently made due to being new in town. It was supposed to be a day of joy, of pride, of excitement.

Instead, at 11:33 a.m. that day, a man armed with an assault rifle entered classrooms 111 and 112 and began shooting. Over the next 77 minutes, while the TDPS Defendants prevented other police officers and even parents from saving their children, the gunman murdered 19 children and two teachers. Seventeen other children, M.Z. and K.T. included, were wounded. All suffered the most extreme and severe psychological trauma one can endure.

Much of the violence could have been stopped. Defendant Maldonado arrived at Robb Elementary School just one minute after the massacre began, separated from the shooter only by a classroom door. Defendant Kindell followed soon after and was on scene when the shooter began firing again less than an hour into the shooting. In accordance with their active shooter training, there was only one reasonable course of action available to the TDPS Defendants: to breach the door to classroom 112, immediately engage the active shooter, and neutralize the shooter mere minutes after he began shooting. The TDPS Defendants could have saved countless lives that day. Instead, as a result of Defendant Betancourt's instructions, they barricaded the children in the classroom with the shooter, which led to the needless and preventable deaths of dozens. And they actively thwarted others from rescuing the children by stopping desperate parents from attempting to save their children in the face of shocking police inaction.

The TDPS Defendants' conduct violated M.Z. and K.T.'s constitutional rights. Their show of authority in barricading M.Z. and K.T. in their classrooms subjected them to an unlawful seizure in violation of their rights under the Fourth Amendment. Their decision to trap M.Z. and K.T. in a room with a shooter, while actively preventing anyone else from rescuing them, violated Plaintiffs'

substantive due process rights under the Fourteenth Amendment under both the state-created danger and custodial relationship theories of liability.

The TDPS Defendants sealed the fates of many children that day. For 77 agonizing minutes, they gave the shooter carte blanche to murder and severely wound two classrooms full of children. The Court should deny their motion in its entirety.

FACTUAL BACKGROUND

On May 24, 2022, Plaintiffs M.Z. and K.T. woke up excited for a special day at Robb Elementary School in Uvalde, Texas. Compl. ¶¶ 1-2.[1] It was awards day, a day to celebrate the hard-earned achievements of M.Z., K.T., and their fourth-grade classmates. M.Z. was particularly excited for the awards ceremony, knowing that she was going to win many awards. *Id.* ¶ 1. Her father, Plaintiff Ruben Zamora, treated her to a special breakfast of a Starbucks Frappuccino and breakfast sandwiches. *Id.* Later that morning, both Ruben and M.Z.'s mom, Plaintiff Christina Zamora, proudly watched as their daughter received three awards in Math, the Robotics Program, and for her success in the AB Honor Roll. *Id.* Despite having planned to spend the afternoon with Ruben, M.Z. decided to stay at school and spend as much time with her friends as possible before the summer break. *Id.*

K.T. was also excited for school that day. She was new in town and eager to cement her newfound friendships with other fourth graders, planning to blow bubbles with them outside after class. *Id.* ¶ 2. Worried that her friend would not have bubbles of her own, K.T. and her grandmother (who was staying with the family) stopped at the store on the way to school to buy some extra. *Id.* Even though she was new to her class, K.T. beamed with pride as she won the "Outstanding Citizen award." *Id.*

M.Z.'s and K.T.'s excitement was abruptly 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

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

with an assault rifle, and murdered 19 children and two teachers, wounding at least 17 other children. *Id.* ¶¶ 3-4. He remained in those classrooms for a total of 77 minutes before the police entered. *Id.* ¶ 4. M.Z. was shot repeatedly and very nearly died, having to undergo over sixty surgeries; K.T. was hit by shrapnel after pretending to be dead to survive, laying in a pool of blood, with her eyes open to mirror her dead and dying classmates around her. *Id.* ¶ 5. Both suffered the most extreme psychological trauma that a fourth-grade child could possibly endure.

At 12:10 p.m., while the TDPS Defendants (and others) prevented anyone from saving her, K.T. found her teacher's phone, wiped the blood off the screen, called 911, and begged the dispatcher for help. *Id.* ¶ 169. 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., K.T. called 911 again, and told the dispatcher, "'There's a school shooting.'" *Id.* ¶ 179. The students, including M.Z. and K.T., heard the TDPS Defendants and the other officers outside of the classroom in the hallway. *Id.* ¶¶ 147, 179. K.T. asked the dispatcher, "'Can you tell the police to come to my room?'" *Id.* K.T. bravely suggested to the dispatcher that she could do what should have been the TDPS Defendants' responsibility: she could "open the door to her classroom so that the police gathered outside could enter." *Id.* But because the TDPS Defendants and their co-defendants chose to trap the children inside with the shooter, "[t]he dispatcher told her not to do that." *Id.* K.T. complied with the dispatcher's order and did not open the classroom door. *Id.* Given this show of force and express instructions, K.T. and M.Z. were not free to leave the classroom. *Id.* ¶¶ 155, 161, 179.

The TDPS Defendants are responsible for a significant portion of this ordeal. Faced with the chance to save the lives of several fourth-grade children, the TDPS Defendants chose—and instructed others—to do the opposite.

Defendant Betancourt

Defendant Betancourt was one of the first officers to institute the unlawful policy of barricading the children inside the classrooms with the active shooter. Having been outside of Uvalde when the shooting began, Betancourt drove to Robb Elementary, and while doing so "called the mayor of the City of Uvalde and the Chief of the Uvalde Police Department, and he then instructed TDPS officers on the scene that they should remain outside Robb Elementary and establish a perimeter." *Id.* ¶ 162. This instruction, made in Betancourt's capacity as TDPS Captain, "further ensured that M.Z., K.T., and the other victims would remain trapped inside classrooms 111 and 112 with their murderer, unable to access rescue, emergency medical services, and the comfort of their loved ones." *Id.* ¶ 163.

Betancourt perpetuated the barricade policy in concert with his co-defendants—for example, Defendant Nolasco texted him soon after the shooting began and confirmed that Betancourt's instructions were being carried out and that the shooter was "Barricaded at the school." *Id.* ¶ 164. At 12:30 p.m., when Betancourt finally arrived at Robb Elementary, he "instructed state police officers on site to remain outside and establish a perimeter, rather than rush inside, as active shooter protocol would have dictated." *Id.* ¶ 177. And because of "the law enforcement perimeter that Defendant Betancourt had ordered into place," Plaintiff Ruben Zamora "was prevented from mounting a rescue operation" and attempting to rescue his daughter and the other children in the classrooms. *Id.* ¶ 183.

Finally, determined to keep his barricade policy in place as long as possible, Betancourt went so far as trying to *prevent others*, including a U.S. Border Patrol Tactical Unit ("BORTAC") group of officers, from saving the children. At 12:48 p.m., as the BORTAC unit was set to breach the classrooms, "Defendant Betancourt came over the radio with a message: 'Hey, this is D.P.S. Captain Betancourt. The team that's going to make breach, I need you to stand by.' Thankfully, his message was ignored." *Id.* ¶ 187.

Defendants Maldonado and Kindell

Defendant Maldonado was one of the first officers to arrive on scene. At 11:34 a.m., just one minute after the shooter entered the classrooms, Maldonado "parked his TDPS car at Robb Elementary School." *Id.* ¶ 127. At 11:37 a.m., Maldonado approached the school building. *Id.* ¶ 138. At that point, he learned from Defendant Canales, who was exiting the building, that "[the shooter] is in the class." *Id.* At that point, Maldonado knew that the proper course of action was to breach the classroom, as "Sgt. Canales also told Defendant Maldonado, 'Shots fired, we got to get in there.'" *Id.* Contrary to active shooter protocol, Maldonado chose instead to fortify the barricade, standing outside the building and saying that "D.P.S. is sending people," *id.* ¶ 139, in a show of authority that prevented others from entering the building. And Maldonado did so knowing that his actions would have devastating consequences: "While standing outside, doing nothing, before the breach, Defendant Maldonado told another officer, 'This is so sad, dude. He shot kids, bro.'" *Id.* ¶ 186.

Defendant Kindell was one of the officers who followed Captain Betancourt's instruction to trap the children in the classroom. At 12:21 p.m., the shooter began firing again in the classroom after a 37-minute break in shooting. *Id.* ¶ 175. At that time, Kindell responded by perpetuating the barricade policy, refusing "to approach the classroom in response to the shots fired." *Id.* Instead, contrary to active shooter protocol, "[h]e continued to confer with Border Patrol agents instead of rushing the classroom as active shooter protocol requires. This conference clogged the hallway and contributed to barricading the students and teachers in the classrooms with the shooter." *Id.*

"Detective Kindell was later fired by TPDS" seemingly because, among other things, he contravened the TDPS manual's instruction "to take action 'for the detection, prevention and prosecution of violators of any criminal law'" "if 'the exigencies of the situation require immediate police action.'" *Id.* ¶ 176. In firing Kindell, TDPS's director wrote him a letter, correctly noting that

he "should have recognized the incident was and remained an active shooter situation which demanded an active shooter response rather than a barricaded subject situation." *Id.*

* * *

Just as K.T. followed orders not to open the door to her classroom, the TDPS Defendants, too, never opened the classroom door. Despite knowing that their actions would likely lead to more kids being murdered, the TDPS Defendants never breached the classroom or shot the gunman and, to the contrary, took active steps to prevent others from doing so. It took a U.S. Customs and Border Patrol-led group of officers to open the door and free the children, over an hour after the TDPS Defendants had arrived on scene, and against the instruction of Defendant Betancourt. *Id.* ¶¶ 187–88.

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 low burden at the pleading stage.[2]

II. QUALIFIED IMMUNITY DOES NOT EXIST

The TDPS Defendants argue that they are 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, 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 a "Statutes at Large") is controlling, even if codified incorrectly or never codified at all. *See In United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (holding that a statute

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[2] Plaintiffs Christina and Ruben Zamora and Jamie Torres no longer maintain their individual claims. The TDPS Defendants do not challenge the Court's jurisdiction over their claims as next friends of Plaintiffs M.Z. and K.T., respectively.

[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).

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 the TDPS Defendants cannot invoke it as a defense. Even if it did exist, it would not be available to the TDPS Defendants. *See* Sections III.C., IV.A.-B., V., *infra.*

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

A. Plaintiffs Have Alleged Personal Involvement of Each TDPS Defendant

As a threshold matter, the Complaint adequately alleges that the TDPS Defendants were each "personally involved in the acts causing the deprivation of his constitutional rights or that a causal connection exists between an act of [the TDPS Defendants] and the alleged constitutional violation." *Douthit v. Jones*, 641 F.2d 345, 346 (5th Cir. 1981). As described further below, Plaintiffs' constitutional claims are founded on the theory that the TDPS Defendants and their co-defendants instituted and carried out a policy of barricading children in classrooms with an active shooter, rather than engaging the shooter immediately, and in doing so, prevented others—including desperate parents—from attempting to save the children from near-certain death.

Though the TDPS Defendants downplay the severity of their actions, the Complaint alleges that each of the TDPS Defendants was "personally involved" in perpetuating this policy and in "causing the deprivation" of Plaintiffs' constitutional rights. *Id.* Defendant Betancourt was one of the initiators of the policy to establish a perimeter to prevent others from entering the school, which "further ensured that M.Z., K.T., and the other victims would remain trapped inside classrooms 111 and 112 with their murderer, unable to access rescue, emergency medical services, and the comfort

of their loved ones." Compl. ¶ 163. Betancourt did so by instructing his officers and BORTAC officers, on multiple occasions, to barricade the shooter in the classroom instead of entering the school and attempting to save the children. *Id.* ¶¶ 163, 177, 187. Similarly, Kindell was on scene when the shooter began firing again after a pause, but decided not to approach the classrooms, instead clogging the hallway, thereby "contribut[ing] to barricading the students and teachers in the classrooms with the shooter." *Id.* ¶ 175. As detailed in Section III.B., *infra*, this barricade caused Plaintiffs to believe they could not leave the classroom, and was thus a show of authority constituting an unlawful seizure.

The TDPS Defendants' personal involvement is also reflected in the Complaint's several allegations of their personal knowledge that their actions would lead to a more dangerous situation. For example, Betancourt knew that the shooter was being "Barricaded at the school" with the children, in line with his instructions. Compl. ¶ 164. Similarly, Maldonado was told by another officer, "Shots fired, we got to get in there," and later acknowledged the gravity of his decision not to rush in and attempt to save the children, saying "This is so sad, dude. He shot kids, bro." *Id.* ¶¶ 138, 186. This personal knowledge of the consequences of their actions speaks to another element of Plaintiffs' unlawful seizure claim, demonstrating the objective unreasonableness of their seizure.[4]

B. The TDPS Defendants' 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).

[4] The TDPS Defendants do not make the same argument as to personal involvement concerning Plaintiffs' other claims, but for the avoidance of doubt, Plaintiffs' arguments apply equally in that context. For example, as a result of the TDPS Defendants' actions and "the law enforcement perimeter that Defendant Betancourt had ordered into place," Plaintiff Ruben Zamora "was prevented from mounting a rescue operation" and attempting to rescue his daughter and the other children in the classrooms. *Id.* ¶ 183. The TDPS Defendants were thus personally involved in a key element of Plaintiffs' state-created danger claim "in affirmatively placing [Plaintiffs] in a position of danger, effectively stripping a person of her ability to defend herself, *or cutting off potential sources of private aid*." *Johnson v. Dallas Ind, Sch. Dist.*, 38 F.3d 198, 200–01 (5th Cir. 1994) (emphasis added). Similarly, the TDPS Defendants' personal knowledge goes to another key element of Plaintiffs' state-created danger claim, having "culpable knowledge and conduct in affirmatively placing an individual in a position of danger." *Johnson*, 38 F.3d at 200 (cleaned up).

Physical force or "control" 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, the TDPS Defendants' 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, despite making efforts to do so. The TDPS Defendants first argue that no seizure occurred because Fourth Amendment[5] claims are "foreclose[d]" "in the context of the accidental deaths of innocent bystanders." Br. at 9.[6] But the Complaint does not allege that Plaintiffs were collateral, "accidental" victims. The TDPS Defendants actively established a barricade outside the classrooms and school, with full knowledge that doing so would lead to needless suffering. *See* Compl. ¶¶ 138–39, 162–64, 175–77, 183, 186–87. The harm that resulted from their show of authority was entirely foreseeable, and the TDPS Defendants cannot credibly argue that trapping students—who were still alive—in a room with an active shooter only led to unanticipated, "accidental" injuries to those students.

Next, the TDPS Defendants argue that it was the shooter that caused the students and teachers to stay in the classroom, rather than "any actions taken by the DPS Defendants." Br. at 10. But this assertion is belied by the allegations in the Complaint that the TDPS Defendants, time and time again, prevented others from breaching the classrooms, killing the shooter, or allowing

[5] While recognizing that Plaintiffs' unlawful seizure claim was properly brought under the Fourth Amendment, the TDPS Defendants argue that Plaintiffs' unlawful seizure claim "cannot be brought under the Fourteenth Amendment." Br. at 12. For the avoidance of doubt, Plaintiffs' unlawful seizure claim alleges violations of their rights under the Fourth Amendment, and references the Fourteenth Amendment simply because it "incorporated the protections of the Fourth Amendment against the States." *Torres v. Madrid*, 141 S. Ct. 989, 997 (2021).

[6] Citations to "Br." are to Defendants Betancourt, Maldonado, & Kindell's Motion to Dismiss Pursuant to Rules 12(B)(1) and 12(B)(6), ECF No. 71.

Plaintiffs to leave the classrooms. They actively decided to treat the shooter as "barricaded," thereby barricading children inside a classroom with the shooter. Compl. ¶ 164. By "treating Ramos as a 'barricaded subject,' and trapping him inside a classroom with dozens of victims, [the TDPS Defendants] made the situation much more dangerous than it had been before law enforcement arrived." *Id.* ¶ 155. These 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.*

As the Complaint alleges, Plaintiff K.T. called 911 multiple times while trapped in the classroom with the shooter, begging for assistance from the TDPS Defendants or any of their fellow officers. *Id.* ¶¶ 169–70, 179. The second time she called 911, she asked the dispatcher if they could "tell the police to come to my room," and if she was permitted to "open the door to her classroom so that the police gathered outside could enter" and so that she could leave. *Id.* ¶ 179. But because the TDPS Defendants barricaded children inside the classroom rather than breach it, the dispatcher ordered her not to do so. *Id.* And the children, including M.Z. and K.T., heard officers (like Defendant Kindell) in the hallway, *id.* ¶¶ 147, 155, 179, and thus believed that the police were intentionally keeping them in the classroom, which they were. Given the dispatcher's instruction and the known presence of officers, a jury could infer that it was reasonable for K.T. to "have believed that [she] was not free to leave," *Michigan*, 486 U.S. at 573, due to the TDPS Defendants' show of authority, and thus that a seizure occurred. Indeed, a jury could easily conclude that had K.T. attempted to leave the classroom, the masses of law enforcement officers waiting outside the classroom, including Kindell, would have assumed that the person opening the door was the shooter and therefore would have been likely to shoot her. Therefore, 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.

C. The TDPS Defendants Are Not Entitled to Qualified Immunity.

Assuming qualified immunity exists as a defense, it 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, as every minimally competent officer in the country ought to know. Qualified immunity is not intended to protect officials like them 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 the TDPS Defendants with notice that trapping children in a classroom with a school shooter violated their constitutional right to be free from unlawful seizure.

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

The state-created danger theory of liability is clearly established, and the facts of this case state a claim under that theory. 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.").

The TDPS Defendants argue that they are entitled to qualified immunity because the theory has not been expressly adopted in this circuit. But a legal theory need not have been expressly adopted by the Fifth Circuit 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 Ind. Sch. Dist.*, 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. 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*, 38 F.3d 198. 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 Univ.*, 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. 2014) ("[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 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 a 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 plainly 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 the TDPS Defendants "on notice [their] conduct [was] unlawful." *Hope*, 536 U.S. at 739. They cannot credibly argue that their 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. Their deliberate decision to 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.

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. If ever a set of facts justified the express adoption of this theory of liability, this case would manifestly qualify. Plaintiffs should thus be allowed to develop evidence as to a state-created danger claim in discovery and at trial. *See Kemp*, 2013 WL 4459049, at *6 (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.").

The TDPS Defendants argue that "the facts as pleaded show that law enforcement officials acted to protect the victims and the public by barricading the classroom and the school." Br. at 16. They argue, as a result, that the TDPS Defendants did not treat Plaintiffs "with 'wanton disregard'" which would evince deliberate indifference. *Id.* But the Complaint plainly alleges that they did so. "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." Johnson*, 38 F.3d at 201 (cleaned up) (emphasis added). The Fifth Circuit's analyses on the merits of the theory have 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 alleges, the TDPS Defendants "knowingly placed[d]" M.Z. and K.T. in danger. *Johnson*, 38 F.3d at 200. The Complaint in no way supports the TDPS Defendants' distorted interpretation of their response to the shooting as them having "acted to protect" Plaintiffs and other victims. Br. at 16. Rather, the Complaint alleges that the TDPS Defendants *knew* children were still alive and being shot at, and yet decided to barricade them in the classroom anyways. Compl. ¶¶ 138, 163–64, 175–77, 186–87. Maldonado all but acknowledged as much when he "told another officer, 'This is so sad, dude. He shot kids, bro.'" *Id.* ¶ 186.

And as a rare example of a state actor "cutting off potential sources of private aid," *Johnson*, 38 F.3d at 201, because of "the law enforcement perimeter that Defendant Betancourt had ordered into place," Plaintiff Ruben Zamora "was prevented from mounting a rescue operation" and attempting to rescue his daughter and the other children in the classrooms. Compl. ¶ 183. These were affirmative decisions by the TDPS Defendants—decisions they made knowing full-well that children were alive and being shot at in the classrooms. That is "wanton disregard" amounting to deliberate indifference.

The Complaint appropriately alleges that the TDPS Defendants had "culpable knowledge and conduct in affirmatively placing [M.Z. and K.T.] in a position of danger." *Johnson*, 38 F.3d at 201. Their unconstitutional decisions—to barricade the students inside Classrooms 111 and 112, to prevent other officers from breaching the classroom, and to prevent Plaintiff Ruben Zamora "from mounting a rescue operation," Compl. ¶ 183—allowed the shooter to inflict the level of harm he did. As the Fifth Circuit put it in 1994, the TDPS Defendants "cut[] off potential sources of private aid" to M.Z. and K.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. The TDPS Defendants knowingly prolonged and exacerbated a dangerous environment, and for over an hour, they "used [their] 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 their attempt to escape accountability for their actions.

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

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

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, 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).

The TDPS Defendants may well disagree that their 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 above, the Complaint alleges that the TDPS Defendants and their co-defendants knowingly trapped M.Z. and K.T. in classrooms 111 and 112 with an active shooter, preventing parents and other officers from saving them. The TDPS Defendants took M.Z. and K.T.'s lives in their hands, placing them in a situation which provided "no realistic means of voluntarily terminating" the barricade they created. *Walton*, 44 F.3d. at 1305. As explained in more detail above, K.T. 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 the TDPS Defendants' and their co-defendants' orders and shows of authority outside the classroom. Compl. ¶ 179. Their decision to trap students inside the classroom thus deprived M.Z. and K.T. "of the ability or opportunity to provide for [their] 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, whereas 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 the TDPS Defendants 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 M.Z. and K.T.'s constitutional rights.

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

Plaintiffs have met the pleading standard necessary to assert viable claims, and the TDPS Defendants' motion should be denied. In the alternative, however, Plaintiffs respectfully request that the Court allow them to amend the Complaint to allege additional facts to the extent the Court finds the allegations insufficient on any claim. For example, on May 24, 2023, the Washington Post published an investigation into law enforcement officers' response to the shooting. *See* Joyce Sohyun Lee, et al., *A year after Uvalde, officers who botched response face few consequences*, WASHINGTON POST (May 24, 2023), https://www.washingtonpost.com/nation/2023/05/24/uvalde-school-shooting-police-response/. The investigation revealed new facts about Defendant Kindell's response to the shooting, including that he was within earshot of a dispatcher relaying the message about K.T.'s first 911 call from inside the classroom, and thus that he learned that she was in a room full of victims. Similarly, Plaintiffs also recently obtained unabridged audio recordings of K.T.'s 911 calls and can allege additional facts about those calls. Further, Plaintiffs expect to receive shortly additional, non-public footage of the shooting, including unreleased body camera footage, which may reveal additional facts as to the TDPS Defendants' personal involvement. 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 the TDPS Defendants' motion to dismiss. In the alternative, Plaintiffs respectfully request the opportunity to amend their Complaint.

Dated: New York, New York
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By: */s/ Laura Keeley*

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