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

SANDRA C. TORRES, individually and as Mother and Representative of the Estate of Decedent, E.T., and as Next Friend of E.S.T., Minor Child ; Eli Torres, Jr., and Justice Torres	§	**Civil Action No. 2:22-cv-00059**
Plaintiffs,	§	
v.	§	
DANIEL DEFENSE, LLC, et al.	§	
Defendants.	§	

DEFENDANTS BETANCOURT, MALDONADO, & KINDELL'S
REPLY IN SUPPORT OF THEIR
MOTION TO DISMISS PURSUANT TO RULES 12(B)(1), 12(B)(6), AND 12(B)(7)

Defendants DPS Captain Joel Betancourt, DPS Sergeant Juan Maldonado, and DPS Ranger Christopher Kindell file this reply to Plaintiff's response to their motion to dismiss pursuant to Rules 12(b)(1), 12(b)(6), and 12(b)(7) of the Federal Rules of Civil Procedure [ECF No. 107-1].

I. REPLY

A. This Court cannot reverse Supreme Court precedent.

Plaintiffs seek for this Court to overturn decades of Supreme Court and circuit caselaw by asserting that qualified immunity does not exist. ECF No. 107-1 at 15. Plaintiffs assert in the same paragraph that doctrine of qualified immunity is flawed due to some missing text in the first compilation of federal law. Judge Willet's concurring opinion in *Rogers*, the sole authority on which Plaintiff's rely, is not controlling precedent. *See Rogers v. Jarrett,* 63 F.4th 971, 979 (5th Cir. 2023) (Willet, J., concurring). In his same opinion, Judge Willet recognizes the Fifth Circuit upheld qualified immunity because it's compelled do so by controlling precedent. *Id.* at 979. Finally, Judge Willet

concludes his concurrence by stating that the Fifth Circuit "cannot overrule the Supreme Court." *Id.* at 981 (citing *Sims v. Griffin*, 35 F.4th 945, 951 n.17 (5th Cir. 2022) (quoting *Whole Woman's Health v. Paxton*, 978 F.3d 896, 920 (5th Cir. 2020) (Willett, J., dissenting)), *rev'd en banc*, 10 F.4th 430 (5th Cir. 2021)). Simply put, qualified immunity exists because controlling precedent upholds it.

B. Plaintiffs failed to state a claim for Fourth Amendment seizure.

Plaintiffs failed to allege any personal involvement of the DPS Defendants. In a failed attempt to remedy this fatal flaw, Plaintiffs now contend that their theory is 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," which prevented others from saving the children. ECF No. 107-1 at 7. Plaintiffs now claim that Cpt. Betancourt was one of the "initiators of the policy to establish a perimeter" when he instructed his officers to "barricade the shooter in the classroom."[1] *Id.* As to Ranger Kindell and Sgt. Maldonado, Plaintiffs simply repeat their threadbare allegations that Kindell was "on scene" and "clogging the hallway" and Maldonado was told by another officer, "shots fired, we got to get in there," and later acknowledged that children were shot by Ramos. *Id.* at 8. These threadbare recitals, some of which were never initially pleaded and cannot now be relied upon, are not enough to establish a Fourth Amendment seizure.

Based solely on the aforementioned allegations, Plaintiffs conclude that the actions of the DPS Defendants' "decision to barricade E.T. in a classroom, forbidding anyone from opening the door and attempting to save her, constitutes a seizure, and caused E.T. to believe she could not leave the classroom, despite making efforts to do so." *Id.* at 9. This is the first time Plaintiffs allege that: 1). E.T.

[1] The First Amended Complaint alleges that Cpt. Betancourt "instructed TDPS officers on the scene that they should remain outside Robb Elementary and establish a perimeter." ECF No. 26 at 52, ¶158. From these facts, it cannot be reasonably inferred by the Court that Cpt. Betancourt instructed his officers to "*barricade* the shooter in the classroom." ECF No. 107-1 at 16–17. Establishing a perimeter on the outside of school to restrict bystanders from entering the school is not the equivalent of setting up a barricade inside the school hallway to restrict the students from exiting the classroom.

had the subjective belief that she could not leave the classroom and, 2). E.T. made efforts to leave the classroom but was stopped by the DPS Defendants.

The Court must only consider the facts contained in the Complaint and any proper attachments, but not any new factual allegations made outside the Complaint. *Walters v. LaSalle Corr.*, No. EP-22-CV-00035-KC-ATB, 2022 U.S. Dist. LEXIS 110167, at *14 n.4 (W.D. Tex. 2022) (citing *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) ("Generally, a court ruling on a motion to dismiss may rely on only the complaint and its proper attachments…Because the court reviews only the well-pleaded facts in the complaint, it may not consider new factual allegations made outside the complaint…"); *Shobney v. Sessions*, No. EP-17-CV-00234-DCG, 2018 U.S. Dist. LEXIS 67680, 2018 WL 1915490, at *2 (W.D. Tex. Apr. 23, 2018) (declining to consider plaintiff's new allegations in response to motion to dismiss). Even if these allegations were true, and were included in the Plaintiffs' active complaint, Plaintiffs still fail to state a claim.

Plaintiffs' new factual allegations as to E.T.'s subjective belief regarding whether she was free to leave has no relevance to the objective Fourth Amendment "reasonable person" test. The test for a "seizure" is whether, "in view of all of the circumstances surrounding the incident, a *reasonable person* would have believed that he was not free to leave." *California v. Hodari D.*, 499 U.S. 621, 638 (1991) (quoting *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980)) (emphasis added). The rule looks, not to the subjective perceptions of the person allegedly seized, but rather, to the objective characteristics of the encounter that may suggest whether a reasonable person would have felt free to leave. *Id.* at 640. Examples of seizures include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 638 (quoting *Mendenhall*, 446 U.S. at 554). In this case, the only person with a threatening physical presence, displaying a weapon, and verbally threatening the children, was Ramos.

Although there was a presence of several officers at the school, their presence was not threatening. Taking Plaintiffs specific facts as true, "clogging a hallway" by talking to another officer, instructing officers to establish a perimeter *outside of the school*, or having the subjective knowledge that shots were fired and children were injured by the shooter, does not amount to a "threatening presence" for purposes of the objective Fourth Amendment seizure test. There are no facts alleging the individual DPS Defendants were inside the school waiving their weapons at the children and yelling at them to stay in the room. In fact, Plaintiffs' complaint alleges that the law enforcement defendants treated *Ramos* as a "barricaded subject," the *effect* of which was to trap the students inside the classroom. ECF No. 26 at 49, ¶¶142–43. These facts indicate the law enforcement defendants intended to seize Ramos, the "barricaded subject," not the innocent children and teachers who were being held hostage by Ramos.

Instead of responding the DPS Defendants' argument and authority that E.T. was not the intended subject to be seized, Plaintiffs focus on the DPS Defendants' "show of authority." ECF No. 107-1 at 18–19. Except that Plaintiffs do not allege how establishing a perimeter outside of the school to prevent bystanders from *entering the school* is the equivalent of showing authority such that a reasonable person would feel they couldn't *leave* the school. There are no facts alleged that the students knew that Sgt. Maldonado and Cpt. Betancourt (assuming he was present at the school) were standing outside of the school or that Ranger Kindell was talking to other officers in the hall. In sum, there are no facts from which this Court could infer a "show of authority" by the DPS Defendants intended to threaten E.T. and "coerce" her into remaining in the classroom. To the contrary, Plaintiffs' alleged facts indicate that the police presence made at least one student feel safe enough to open the door to let the police into the room, until she was instructed not to by the dispatcher. ECF No. 26 at 56–57, ¶175.

Plaintiffs' facts as alleged do not state a claim for unreasonable seizure under the Fourth Amendment. At the motion-to-dismiss stage, as here, the Fifth Circuit requires plaintiffs invoking Section 1983 to plead "specific facts that, if proved, would overcome the individual defendant's immunity defense." *Jackson v. Beaumont Police Dep't*, 958 F.2d 616, 620 (5th Cir. 1992) (internal quotation and citation omitted). Accordingly, to rebut the qualified immunity of the DPS Defendants, Plaintiff must allege facts that, if proved, establish that these officers violated Plaintiff's clearly established constitutional rights. *Saucier v. Katz*, 533 U.S. 194, 206 (2001). Because the specific facts alleged against the individual DPS Defendants do not amount to a violation of a clearly established constitutional right, the claim must be dismissed.

C. The state-created danger theory does not exist in this circuit or the Supreme Court, but qualified immunity does, and it applies here.

Ignoring clearly established Supreme Court precedent that "a state official has no constitutional duty to protect an individual from private violence," Plaintiffs contend that this Court should hold the DPS Defendants to a constitutional standard that is non-existent in either the Fifth Circuit or the Supreme Court. *See DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989)). Even if Plaintiffs had pleaded facts sufficient to state a claim under the state-created danger theory—which they have not—Plaintiffs come to a full stop at the qualified immunity analysis. Citing to "the robust consensus of ten [other] circuits," Plaintiffs argue the TDPS Defendants were put "on notice [their] conduct [was] unlawful." ECF No. 107-1 at 24. Plaintiffs' argument requires this Court to assume that the law of other circuits, not even including the circuit within which this case was filed, can clearly establish the law for qualified immunity purposes. The Supreme Court has never decided that *any* circuit law can constitute clearly established law, much less a law of different circuit than the one in which the action is brought. *Ramirez v. Escajeda*, 44 F.4th 287, 293 n.9 (5th Cir. 2022); *see Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (per curiam) ("assuming" the proposition that "controlling Circuit precedent clearly establishes law for purposes of § 1983"); *see also Betts v. Brennan*, 22 F.4th 577,

584–85 n.6 (5th Cir. 2022) (assuming without deciding that circuit precedent can clearly establish the law); *Crittindon v. LeBlanc*, 37 F.4th 177, 199 n.4 (5th Cir. 2022) (Oldham, J., dissenting) ("The Supreme Court has never said that we can hold…officers liable under § 1983 for violating the commands of *our* precedent (as opposed to theirs)."). "By citing no factually similar Supreme Court cases, [the plaintiffs] effectively concede[] that Supreme Court precedent offers [them] no help." *Salazar v. Molina*, 37 F.4th 278, 286 (5th Cir. 2022).

Further, despite citing to ten circuits that have adopted the state-created danger theory, Plaintiffs fail to cite to any case within the circuits that "squarely govern[] the specific facts at issue." *Ramirez*, 44 F.4th at 292 (citing *Joseph ex rel. Est. of Joseph v. Bartlett*, 981 F.3d 319, 332 (5th Cir. 2020). Simply stating that other circuits have adopted a theory is such a "high level of generality" that it cannot be said to be clearly established. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011); *see also Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (finding that an officer can be stripped of qualified immunity only when "the violative nature of the *particular* conduct is clearly established . . . in light of the specific context of the case, not as a broad general proposition."). Existing precedent does not put the DPS Defendants' actions "beyond debate," so their actions under these unique circumstances did not violate clearly established law. *al-Kidd*, 563 U.S. at 741; *Ramirez*, 44 F.4th at 294.

D. No "special relationship" existed between the DPS Defendants and E.T.

Plaintiffs concede there is "typically no 'special relationship' between students and state actors" in this context, but believe that because this "is no ordinary case," the Court should apply the "special relationship" standard here nonetheless. Plaintiffs cite to *Walton v. Alexander*, in which the central issue was "whether the state created a 'special relationship' with Walton, as a resident student under its custodial care, so that it owed some duty—arising under the Due Process Clause of the Fourteenth Amendment to the United States Constitution—to protect Walton's bodily integrity from third party non-state actors." 44 F.3d 1297, 1306 (5th Cir. 1995). The *Walton* court found that as a

matter of law, there was there no special relationship created. *Id.* In coming to its decision, the *Walton* court stated that "it is important to apply *DeShaney* as written…extending the Due Process Clause to impose on the state the obligation to defend and to pay for the acts of non-state third parties is a burden not supported by the text or history of the Clause, nor by general principles of constitutional jurisprudence…It is under such extreme circumstances that the state itself, by its affirmative act and pursuant to its own will, has effectively used its power to force a special relationship," with respect to which it assumes a certain liability. *Id.* at 1305 (citing *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 109 S. Ct. 998 (1989)).

Applying *DeShaney* as written, due process is implicated when the state affirmatively restrains a person's liberty "through incarceration, institutionalization, or other similar restraint," not its failure to act. *DeShaney,* 489 U.S. at 200. Plaintiffs contend that the DPS Defendants placed E.T. in a situation which deprived her "of the ability or opportunity to provide for her own care and safety." ECF No. 107-1 at 28. But those are not the facts. Here, a third party actor entered a school where he held innocent teachers and students hostage at gunpoint, preventing them from providing for their own care and safety. The alleged actions of the DPS Defendants in initiating a perimeter outside of the school or conferring the hallway does not constitute the "incarceration, institutionalization, or similar restraint" required for the special relationship to apply. There is nothing "fact-intensive" about these allegations necessitating further discovery into this claim. Nor is there any precedent holding law enforcement liable in a situation such as this. Even if Plaintiffs were to state a claim under the "special relationship" theory, there is no clearly established law that put the DPS Defendants on notice that their actions were unconstitutional. This claim must be dismissed.

E. Plaintiffs' amendments are futile.

A district court acts within that discretion when it denies leave to amend because any amendment would be futile. *Sigaran v. United States Bank Nat'l Ass'n*, 560 F. App'x 410, 416 (5th Cir.

2014). Amending a complaint is futile when "the proposed amendment . . . could not survive a motion to dismiss," *Rio Grande Royalty Co. v. Energy Transfer Partners, L.P.*, 620 F.3d 465, 468 (5th Cir. 2010), or when "the theory presented in the amendment lacks legal foundation," *Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985). Plaintiffs have already alleged new facts in their response to the DPS Defendants' motion to dismiss, and even with those facts, Plaintiffs fail to state a claim. Plaintiffs contend that a new article was published, revealing that Ranger Kindell had knowledge there were victims in the classroom. ECF No. 107-1 at 25. However, that fact does not make any of Plaintiffs' claims viable; there are no facts that can be alleged that are sufficient to establish the Fourth Amendment seizure claim or the "special relationship" theory, and there are no facts that can make the state-created danger theory a viable claim in the Fifth Circuit. Most importantly, there is nothing Plaintiffs can allege to overcome the DPS Defendants' qualified immunity because there is no clearly established law that their actions were unconstitutional.

II. CONCLUSION

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

Respectfully submitted.

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NOTICE OF ELECTRONIC FILING

I, **BRIANA M. WEBB,** Assistant Attorney General of Texas, do hereby certify that I have electronically submitted for filing a true and correct copy of the above and foregoing in accordance with the Electronic Case Files System of the Western District of Texas, Del Rio Division on June 22, 2023.

/s/ Briana M. Webb
BRIANA M. WEBB
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CERTIFICATE OF SERVICE

I, **BRIANA M. WEBB**, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing has been served via electronic mail on June 22, 2023 to all counsel of record.

/s/ Briana M. Webb
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