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

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 Uvalde police officers Justin Mendoza, Max Dorflinger, Sergeant Telesforo Coronado, and Lieutenant Mariano Pargas (collectively "UPD Defendants"). The Court should deny that motion for the reasons set forth below.

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Statutes

Other Authorities

Rules

UPD 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 UPD 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. Fewer than three minutes after the shooting began, officers including the UPD Defendants arrived at the scene of the massacre, separated from the shooter only by a classroom door. In accordance with their active shooter training, there was only one reasonable course of action available to the UPD Defendants: to breach the door to classroom 112, immediately engage the active shooter, neutralize the shooter mere minutes after he began shooting. The UPD Defendants could have saved countless lives that day. Instead, 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 UPD 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 UPD 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., a shooter 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.* ¶¶ 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

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

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 UPD 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 UPD 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 UPD Defendants' responsibility: she could "open the door to her classroom so that the police gathered outside could enter." *Id.* But because the UPD 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 UPD Defendants are responsible for a significant portion of this ordeal. Faced with the chance to save the lives of several fourth-grade children, the UPD Defendants chose—and instructed others—to do the opposite.

Defendant Pargas

At all relevant times, Defendant Mariano Pargas was a lieutenant and acting chief of the Uvalde Police Department ("UPD") and the chief policymaker of the UPD with final policymaking authority for the City of Uvalde and the UPD. *Id.* ¶ 30. Pargas was among the first law enforcement officers to arrive on scene soon after the shooting began. *Id.* ¶ 116. Fewer than three minutes after the

shooting began, a group of officers entered Robb Elementary and approached classrooms 111 and 112; Pargas was "right behind the initial group." *Id.* ¶ 128. At 11:35 p.m., the initial group of officers, including Pargas, "heard the shots being fired in the classrooms" and "[a]ccording to training and prior policy," were thus "required to engage [the] active shooter[] immediately." *Id.* Pargas ignored his training and overrode existing active shooter policy and instead "created a new policy" choosing "to barricade children, including M.Z. and K.T., inside a classroom with an active shooter, delaying emergency medical and rescue services and depriving them of the comfort of their family." *Id.* ¶ 129. Once Pargas and the officers with him "realized that [the shooter] was armed with an AR-15 rifle," they requested additional equipment "instead of doing what was required under the active shooter policy, to breach the classroom immediately and to stop the killing." *Id.* ¶ 131. In so doing, Pargas "violated active shooter protocols and began implementing the new policy of barricading [the shooter] in the classroom with the students." *Id.* Pargas was captured on body camera footage "standing back from the classroom," rather than leading the breach. *Id.* ¶ 140.

Pargas acted intentionally and with full knowledge that his conduct would lead to additional needless deaths of fourth graders. At 12:12 p.m., as Pargas and his co-defendants stood back and allowed the massacre to continue, Pargas received a direct communication from a radio dispatch "that one of the classrooms was 'full of victims.'" *Id.* ¶ 170. At that point, Pargas "stepped out of the school building to contact the dispatcher for more information about [] K.T.'s 911 call" as described above, and "was even given her name." *Id.* Still, despite having received official confirmation that children were still alive in the classrooms, Pargas and the other UPD Defendants "did not make any attempt to 'stop the killing,' the primary tenet of all active shooter training and responses. Instead, they ignored this information and continued to treat [the shooter] as a 'barricaded subject.'" *Id.*

At 12:16 p.m., Pargas called "his UPD dispatchers to get further details about the radio message concerning a classroom 'full of victims' that he received four minutes earlier." *Id.* ¶ 172. He was informed that the call came from a student (later learned to be K.T.) and "that eight or nine were

still alive in the room, but the student couldn't be sure of the exact number because it was hard to tell who was injured versus who was already dead." *Id.* Not to be swayed by the fact that there were eight or nine children that he could still save by breaching the classroom, Pargas responded "'Oh, ok, thanks,' and ended the call with dispatch." *Id.* At 12:17 p.m., he re-entered the school briefly, "mentioned victims to a Border Patrol Officer, and walked back out of the school at 12:20." *Id.* Pargas knew that his decision could result in many deaths including additional deaths of "eight or nine" children, yet Pargas "spent the next 30 minutes outside and never attempted to breach the classroom as the active shooter protocol required." *Id.*

Defendant Coronado

Like Pargas, Defendant Daniel Coronado was among the first law enforcement officers to arrive on the scene of the shooting, arriving less than three minutes after the shooting began. *Id.* ¶¶ 116, 128. Coronado later testified to the Texas House of Representatives that he and the other initial responders "heard shots being fired as the approached the building." *Id.* ¶ 126. At 11:35 a.m., as he approached the building, "he yelled 'oh shit, shots fired, get inside,' according to the recording from his body camera." *Id.* ¶ 130. With the knowledge that the shooter was actively shooting at classrooms of fourth graders, Coronado too was required by training and prior policy to "engage [the] active shooter[] immediately." *Id.* ¶ 128. He did not do so. *Id.*

Coronado was one of the primary perpetrators of the unreasonable decision to treat the shooter as a barricaded subject, rather than an active shooter. At 11:38 a.m., he instructed other officers "that the suspect was 'contained' and 'barricaded.'" *Id.* ¶ 142. A "contained" suspect is one that is a *non-active* shooter—Coronado's statement to his fellow officers was thus "was factually incorrect since the shooter was actively firing his gun even as Coronado relayed this information." *Id.* Coronado perpetuated the fiction of a "barricaded" shooter despite having heard the gunshots as he approached the school, and thus knowing that this was an active shooter situation with "dying children in the classroom with [the shooter] who needed, but could not access, medical treatment." *Id.* At one

point, the shooter shot at the officers, again reinforcing the indisputable fact that he was an active shooter—yet, in retreating and exiting the building through the south door, Coronado still "erroneously announced on his radio that the shooter was 'contained.'" *Id.* The notion that the shooter was contained is further belied by the fact that Coronado then "used his radio to request ballistic shields and helicopter support." *Id.*

At 11:43 a.m., Coronado heard, as captured on his body camera footage, that classrooms 111 and 112 "should be in session," meaning that there were children in the classroom with the shooter. *Id.* ¶ 154. "Instead of following active shooter protocol and entering the building based on this information, Coronado remained outside the building for 30 more minutes, warning entering officers about a 'fatal funnel' if they lined up incorrectly in the hallway," referring to the concern of creating a doorway where one can be "easily seen but have difficulty moving out of in the case of incoming projectiles." *Id.* Had Coronado simply followed active shooter protocol and immediately engaged the shooter, this would not be a concern—but instead, "Coronado's warning provided an excuse for delay and is an example of responding officers considering their own safety ahead of the children and teachers they had barricaded inside the classrooms with [the shooter]." *Id.*

As concerned family members of students "began amassing near the school," Coronado "directed officers to perform crowd control." *Id.* ¶ 157. This "crowd control" was in response to parents "yell[ing] at officers to in," and "hearing gunfire and seeing no discernible police response, want[ing] to go into the classroom themselves." *Id.* ¶ 181. Coronado's order to perform "crowd control" ultimately resulted in officers' preventing any parents from trying to save their dying children. *Id.*

At 12:34 p.m., Coronado conferred with Defendant Pedro Arredondo and "agreed that there were people in the room with [the shooter] and casualties as well," *id.* ¶ 178, acknowledging not only the deaths that already resulted from his decision to barricade the children in the classrooms, but also the deaths to come of those still alive "in the room with [the shooter]." *Id.*

Defendants Mendoza and Dorflinger

Defendants Justin Mendoza and Max Dorflinger were at all relevant times UPD officers. *Id.* ¶¶ 33–34. Like their co-defendants, Mendoza and Dorflinger carried out the policy of barricading the children in classrooms 111 and 112 with the shooter and preventing others—officers and desperate parents alike—from attempting to save the children. In response to concerned parents trying to enter the school themselves in the face of the officers' inaction, Dorflinger "began yelling at, shoving, restraining, and tackling people outside." *Id.* ¶ 182. "A fence was destroyed as police threw a man into it. Other parents were tased, handcuffed, and pepper sprayed outside the building," all while Dorflinger and his co-defendants "failed to engage the shooter." *Id.*

As of at least 11:44 a.m., Mendoza was present in the hallway outside the classrooms, at which time [the shooter] started shooting again. *Id.* ¶ 155. Despite having been a police academy instructor, Mendoza did not respond as required by active shooter protocol. *Id.* Mendoza continued to breach active shooter policy despite the gunfire being "further proof that treating [the shooter] as a 'barricaded subject,' and trapping him inside a classroom with dozens of victims, made the situation much more dangerous than it had been before law enforcement arrived." *Id.* M.Z. and K.T. heard the officers outside in the hallway, including Mendoza, and thus knew that they were not immediately engaging the active shooter. *Id.*

"Mendoza's body camera footage shows that he was standing or pacing in the hallway, barricading students inside by virtue of his show of authority, from 11:43 a.m.-12:02 p.m.; 12:08-12:16; and from 12:20 until at least 12:33. Gunshots can audibly be heard on his body camera footage at approximately 12:20, but Defendant Mendoza continue[d] to maintain the barricade, slowly moving toward the door. He then resumed pacing in the hallway. Officers would not breach the classroom for another 30 minutes." *Id.* ¶ 156.

* * *

Just as K.T. followed orders not to open the door to her classroom, the UPD Defendants, too, never opened the classroom door. Despite knowing that their actions would likely lead to more kids being murdered, the UPD 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 remaining living children, over an hour after the UPD Defendants had arrived on scene. *Id.* ¶ 188.

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,[2] 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

[2] The UPD Defendants' argument that the Court lacks jurisdiction over claims regarding an "alleged failure to enforce criminal laws to the Plaintiffs' satisfaction" is meritless. ECF No. 51 at 3. ("Br.") The Court has jurisdiction over Plaintiffs' § 1983 claims because they stem from constitutional violations of their rights under the Fourth and Amendments. *See Doe v. Univ. of Texas Health Sci. Ctr. at Houston*, No. CV H-21-1439, 2021 WL 5882625, at *4 (S.D. Tex. Dec. 13, 2021) (citing *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450 (5th Cir. 1994)) ("42 U.S.C. § 1983 creates a cause of action against any person who, acting under color of state law, abridges rights created by the Constitution and laws of the United States.").

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.[3]

II. QUALIFIED IMMUNITY DOES NOT EXIST

The UPD 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.[4] 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 United States Nat'l*

---

[3] Plaintiffs Christina and Ruben Zamora and Jamie Torres no longer maintain their individual claims. The UPD Defendants do not challenge the Court's jurisdiction over their claims as next friends of Plaintiffs M.Z. and K.T., respectively. Similarly, Plaintiffs no longer maintain their claim against Defendant Pargas in his official capacity.

[4] 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).

Bank of Or. v. Independent Ins. Agents of Am., 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 the UPD Defendants cannot invoke it as a defense. Even if it did exist, it would not be available to the UPD Defendants. *See* Sections III.B., IV.A.-B., V., *infra*.

III. PLAINTIFFS HAVE ALLEGED PERSONAL INVOLVEMENT OF EACH UPD DEFENDANT

As a threshold matter, the Complaint adequately alleges that the UPD 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 UPD 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 UPD Defendants and their co-defendants 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 UPD Defendants downplay the severity of their actions, the Complaint alleges that each of the UPD Defendants was "personally involved" in perpetuating this policy and in "causing the deprivation" of Plaintiffs' constitutional rights. *Id.* Defendant Dorflinger himself prevented people from entering the school and attempting to save their children. Compl. ¶ 182; *see also* Factual Background, *supra*. He was 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).

Defendant Pargas was present at the scene of the shooting and one of the initiators of the "new policy" "to barricade children, including M.Z. and K.T., inside a classroom with an active shooter, delaying emergency medical and rescue services and depriving them of the comfort of their family." Compl. ¶ 129. His personal involvement in creating and thereafter perpetuating that policy is alleged in the Complaint, including, for example, that he was among the officers who requested additional equipment in support of the barricade policy, rather than breaching the classroom. *Id.* ¶ 131. The Complaint is also replete with allegations of his personal knowledge that his actions would lead to a more dangerous situation; for example, he was told there were "eight or nine" children still alive in the classroom, whom he barricaded with the shooter. *Id.* ¶ 172; *see also* Factual Background, *supra*; Section IV.A., *infra*. This personal involvement 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.

Defendant Coronado was similarly personally involved in perpetuating the unconstitutional decision to barricade Plaintiffs in the classroom and in "cutting off potential sources of private aid." *Id.* Coronado personally instructed other officers that the shooter was "contained" and "barricaded" on multiple occasions, Compl. ¶ 142; personally "used his radio to request ballistic shields and helicopter support" to fortify the barricade, *id.*; personally used the excuse of a possible "fatal funnel" to cause further delay and prevent anyone from breaching the classroom; *id.* ¶ 154; and personally instructed officers to "perform crowd control," *id.* ¶ 157, resulting in parents' being prevented from attempting to save their dying children and thereby "cutting off potential sources of private aid." *Johnson*, 38 F.3d at 200. And like Pargas, Coronado knew that he was barricading students who were still alive in the classrooms with the shooter, Compl. ¶¶ 154, 178, evidencing the "culpable knowledge" needed to prove a state-created danger claim. *Johnson*, 38 F.3d at 200. Finally, Mendoza was also

personally involved in the barricade policy, deciding to contravene active shooter policy in refusing to engage with the shooter upon hearing gunshots. Compl. ¶ 155. As one of the officers standing or pacing in the hallway, including when gunshots were audibly heard on his body camera footage, Mendoza was personally involved in the show of authority that caused Plaintiffs to believe that they were not free to leave the classroom—a key element of Plaintiffs' claim under the Fourth Amendment. *See* Section IV.A., *infra.*

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

A. The UPD 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). 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 UPD 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 UPD Defendants do not engage with Plaintiffs' allegations that they submitted to the UPD Defendants' show of authority, and thus were seized. They simply assert in conclusory fashion that the Plaintiffs were not seized. Br. at 10. But this assertion is belied by the allegations in the Complaint that the UPD Defendants, time and time again, prevented others from breaching the classrooms, killing the shooter, or allowing 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 [the shooter] as a 'barricaded subject,' and trapping him inside a classroom with dozens of victims, [the UPD 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 UPD 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 UPD 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 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 UPD 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 would have assumed that the person opening the door was the shooter and therefore would have been likely to shoot her.

The UPD Defendants also claim that any such seizure was objectively reasonable because they "sought to protect [the Plaintiff] students, and to deter… violent misconduct," and that "Plaintiffs fail to allege facts to show public safety was not the purpose motivating" the UPD Defendants' conduct. Br. at 9–10. These factual arguments are wrong. They directly contradict the allegations in the Complaint that the UPD Defendants did *not* seek to "protect" Plaintiffs and their classmates—which would involve trying to save them by engaging the active shooter—but in barricading them instead

"consider[ed] their own safety ahead of the children and teachers they had barricaded inside the classrooms with [the shooter]." Compl. ¶ 154. Pargas, for example, was informed that "eight or nine" children were still alive approximately 45 minutes after the shooting began, *id.* ¶ 172. Had he truly "sought to protect" Plaintiffs, he would have breached the classroom and done so. Similarly, Coronado's primary motivation was self-interested—rather than motivation to save the children—and this is evidenced by his decisions not to engage the shooter, but rather to radio for "ballistic shields and helicopter support," *id.* ¶ 142, serving only to protect himself and his co-defendants.

For the foregoing reasons and 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. The UPD 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. It is, as Justice Scalia has written, "plainly incompetent." *Id.* 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 UPD Defendants with notice that trapping children in a classroom with a school shooter violated their constitutional right to be free from unlawful seizure.

V. 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.

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 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. 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 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 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 UPD Defendants "on notice [his] 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.

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. If ever a set of facts justified the express adoption of this theory of liability, this case would manifestly qualify.

First, the UPD Defendants argue that Plaintiffs fail to allege that any of them, rather than the shooter, created the dangerous environment. *See* Br. at 13. This argument fails, as the Complaint alleges that UPD Defendants affirmatively acted to barricade M.Z. and K.T. inside a classroom with an active shooter, and affirmatively acted to prevent others from attempting to save them. *See* Factual Background; Section IV.A. *supra*. As the Complaint alleges, by "treating [the shooter] as a 'barricaded subject,' and trapping him inside a classroom with dozens of victims," the UPD Defendants "made the situation much more dangerous than it had been before law enforcement arrived." Compl. ¶ 155. Though the UPD Defendants did not cause the shooter to enter the school, their decision to barricade Plaintiffs in a classroom with him for 77 minutes rather than engaging him immediately plainly qualifies as "affirmatively placing an individual in a position of danger." *Johnson*, 38 F.3d at 201. Had they breached the classroom immediately, the danger over the next 77 minutes would not have existed.

Second, the UPD Defendants contend that the Complaint lacks allegations of deliberate indifference. But the Complaint plainly does so allege.

"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 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 UPD Defendants "knowingly placed[d]" M.Z. and K.T. in danger. *Johnson*, 38 F.3d at 200. On this point, the UPD Defendants argue that if true, their conduct constitutes errors in hindsight that amount only to "negligence." Br. at 13. Incorrect. The Complaint alleges that the UPD Defendants *knew* children were still alive and being shot at, and yet decided to barricade them in the classroom anyways. Compl. ¶¶ 128, 129, 154, 170, 172, 178. And as a rare example of a state actor "cutting off potential sources of private aid," *Johnson*, 38 F.3d at 201, Defendants Dorflinger and Coronado *actively prevented* parents from entering the school. Compl. ¶ 157, 182. These were affirmative decisions by the UPD Defendants—decisions they made knowing full-well that children were alive and being shot at in the classrooms. That is deliberate indifference.

The Complaint appropriately alleges that the UPD 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 keep "parents from entering the school, even as parents yelled at [them] to do something, anything, to rescue their children," Compl. ¶ 181—allowed the shooter to inflict the level of harm he did. As the Fifth Circuit put it in 1994, the UPD Defendants "cut[] off potential sources of private aid" to M.Z. and K.T, *Johnson*, 38 F.3d at 201, with Dorflinger and Coronado going as far as preventing *others* from breaching the classroom. This is exactly the scenario envisioned by the state-created danger theory. The UPD 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.

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

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

The UPD Defendants are 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 discussed by the UPD Defendants (*see* Br. at 11–12), 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).

The UPD 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 *supra*, Section IV.A., the Complaint alleges that the UPD 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 UPD 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 UPD 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, 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 the UPD 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.

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

Plaintiffs have met the pleading standard necessary to assert viable claims, and the UPD 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 Coronado's response to the shooting, including that: (1) he had SWAT training, making him one of the most qualified UPD officers to breach the classroom, yet he did not do so; (2) as he instructed officers over his radio to treat the shooter as barricaded and contained, Coronado stated, "male subject is still shooting," further evidencing his knowledge that this was an active shooter situation and that police were wrongly barricading children inside the classroom; and (3) he heard shots being fired and acknowledged several times that there were children in the classroom. He also publicly admitted to ordering officers outside the building to refrain from confronting the shooter, saying: "Everybody was like let's go, let's, let's

keep going forward. I'm like, 'hey, get the fuck back, dude. Like, what are you doing, like, you, you're going to get shot, and then we're going to have to drag your, you know, we're going to have to worry about you."

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 UPD 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 UPD Defendants' motion to dismiss. In the alternative, Plaintiffs respectfully request the opportunity to amend their Complaint.

Dated: May 31, 2023

By: /s/ Molly Thomas-Jensen

EVERYTOWN LAW
Eric Tirschwell (*Application for admission pending*)
Molly Thomas-Jensen
Laura Keeley
450 Lexington Avenue, P.O. Box #4184
New York, NY 10017
(646) 324-8226

ROMANUCCI & BLANDIN, LLC
Antonio M. Romanucci (*pro hac vice*)
David Neiman (*pro hac vice*)
Sarah Raisch (*pro hac vice*)
321 N. Clark Street, Suite 900

Chicago, IL 60654
(312) 253-8100

LAW OFFICES OF BLAS DELGADO, P.C.
Blas H. Delgado
2806 Fredericksburg Rd., Ste. 116
San Antonio, TX 78201
(210) 227-4186

LM LAW GROUP, PLLC
David Lopez (*application for admission forthcoming*)
2806 Fredericksburg Rd., Ste. 118
San Antonio, TX 78201
(210) 396-2045

EMERY CELLI BRINCKERHOFF
ABADY WARD & MAAZEL LLP
Ilann M. Maazel*
Eric Abrams*
600 Fifth Avenue, 10th Floor
New York, NY 10020
(212) 763-5000

* Applications for *pro hac vice* pending

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of May 2023, I served the following counsel through electronic service (ECF) as authorized by Fed. R. Civ. Pro. 5:

David M. Prichard
David R. Montpas
Prichard Young, LLP
Union Square, Suite 600
10101 Reunion Place
San Antonio, Texas 78216

Stephen B. Barron
Blair J. Leake
Wright and Greenhill PC
4700 Mueller Blvd.
Suite 200

Andre M. Landry, III
Gray Reed
1300 Post Oak Blvd., Suite 2000
Houston, TX 77056

Clarissa M. Rodriguez
Patrick Charles Bernal
Denton, Navarro, Rocha & Bernal PC
2517 North Main Avenue
San Antonio, TX 78212

Charles Straight Frigerio

Austin, TX 78723

Thomas Phillip Brandt
Charles D. Livingston
Laura Dahl O'Leary
Fanning Harper Martinson Brandt & Kutchin, P.C.
One Glen Lakes
8140 Walnut Hill Lane
Ste 200
Dallas, TX 75231

D. Craig Wood
Katie E. Payne
Walsh Gallegos Trevino Kyle & Robinson P.C.
1020 N.E. Loop 410, Suite 450
San Antonio, Texas 78209

Hector Xavier Saenz
Law Offices of Charles S Frigerio
Riverview Towers
111 Soledad, Suite 465
San Antonio, TX 78205

William Scott Helfand
Norman Ray Giles
Randy Edward Lopez
Lewis Brisbois Bisgaard & Smith LLP
24 Greenway Plaza, Suite 1400
Houston, TX 77046

Briana Webb
Office of the Attorney General
Law Enforcement Defense Division
300 W 15th St.
Austin, TX 78701

/s/ Molly Thomas-Jensen
Molly Thomas-Jensen