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 UVALDE COUNTY SHERIFF RUBEN NOLASCO, UVALDE COUNTY CONSTABLE EMMANUEL ZAMORA, AND UVALDE COUNTY CONSTABLE JOHNNY FIELD'S MOTION TO DISMISS

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

Christina Zamora, individually and as next friend of M.Z.; Ruben Zamora, individually as next friend of M.Z.; and Jamie Torres, individually as next friend of K.T. (collectively "Plaintiffs") file this brief in opposition to the motion to dismiss filed by Defendants Uvalde County Sheriff Ruben Nolasco, Uvalde County Constable Emmanuel Zamora, and Uvalde County Constable Johnny Field (collectively "Uvalde County Defendants"). The Court should deny that motion for the reasons set forth below.

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UVALDE COUNTY 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 Uvalde County 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. Just 10 minutes after the shooting began, officers including the Uvalde County Defendants arrived at the scene of the massacre, separated from the shooter only by a classroom door. There was only one reasonable course of action available to Uvalde County Defendants: to breach the door to classrooms 111 and 112, immediately engage the active shooter, and neutralize the shooter mere minutes after he began shooting. The Uvalde County Defendants could have saved countless lives that day. Instead, they barricaded the children in the classroom with the shooter, which led to the needless deaths of dozens. And they actively thwarted others from rescuing the children: "[m]any family members, hearing gunfire and seeing no discernable police response, wanted to go into the classroom themselves. Defendant Nolasco kept parents from entering the school, even as parents yelled at him to do something, anything, to rescue their children."

The Uvalde County 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 via both the state-created danger and custodial relationship theories of liability.

The Uvalde County 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. *Id.* 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., the 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.* ¶¶

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

3-4. He remained in those classrooms for a total of 77 minutes before 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. The Uvalde County Defendants are responsible for a significant portion of this ordeal.

Faced with the chance to save the lives of several fourth-grade children, the Uvalde County Defendants chose—and instructed others—to do the opposite.

Defendant Nolasco

Prior to going to his rampage at Robb Elementary, the shooter attempted to kill his grandmother, shooting and injuring her. *Id.* ¶ 112. At 11:38 a.m., Defendant Nolasco responded to the shooter's grandmother's house, learned that he had shot her, and was told his name—but Nolasco did not share this information with other officers despite being asked for it. *Id.* ¶ 150. Nolasco arrived at Robb Elementary by 11:49 a.m., at which time he communicated to other officers that they were to consider the shooter as a "barricaded" subject that needed to be "contained," rather than one that needed to be engaged and stopped. *Id.* ¶¶ 164-65. Despite being the County Sheriff, Nolasco had never completed a state active shooter training, and his office did not have an active shooter policy as of the shooting. *Id.* ¶ 166. At approximately 12:12 p.m., Nolasco learned that one of the classrooms was "full of victims." *Id.* ¶ 170. As the events of May 24 unfolded, "[m]any family members, hearing gunfire and seeing no discernable police response, wanted to go into the classroom themselves. Defendant Nolasco kept parents from entering the school, even as parents yelled at him to do something, anything, to rescue their children." *Id.* ¶ 181. As a result of Nolasco's decision—in his capacity as County Sheriff—to prevent parents from entering the school, officers "began yelling at, shoving, restraining, and tackling people outside." *Id.* ¶ 182. Some parents were even "tased,

handcuffed, and pepper sprayed outside the building, all while the police failed to engage the shooter" as a result of Nolasco's orders. *Id.*

Defendants Field and Zamora

Defendants Field and Zamora arrived on scene at Robb Elementary approximately 8 minutes after the shooting began. *Id.* ¶ 152. Both were instructors at the regional police academy, and were thus well aware that they should have treated the situation as one involving an active shooter, rather than a barricaded subject. *Id.* At 11:44 a.m., approximately three minutes after their arrival, the shooter began shooting again. *Id.* ¶ 155. Instead of doing what they trained other officers to do—breach the classroom and neutralize the active shooter—Defendants Field and Zamora did the opposite: they stood by and treated the shooter as a "barricaded subject," thereby "trapping him inside a classroom with dozens of victims" which "made the situation much more dangerous than it had been" before they arrived. *Id.*

At approximately 12:19 p.m., Defendant Zamora "suggested, without evidence, that perhaps [the shooter] had shot himself. He was wrong. He also continued to stand in the hallway, barricading the students and teachers inside the classrooms." *Id.* ¶ 173. Two minutes later, the shooter began shooting again. *Id.* ¶ 175.

At 12:10 p.m., while the Uvalde County 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 Uvalde County 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.* ¶ 179. K.T. bravely suggested to the dispatcher that she could do what should have been Uvalde County Defendants' responsibility:

she could "open the door to her classroom so that the police gathered outside could enter." *Id.* But because the Uvalde County 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.

Despite knowing that their actions would likely lead to more kids being murdered, the Uvalde County 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 Uvalde County Defendants had arrived on scene. *Id.* ¶ 188.[2]

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

[2] The Uvalde County Defendants attach as an exhibit to their motion portions of an ALERRT report investigating the shooting to provide "context," but they disclaim that "[n]o portion of this [report] is meant to be relied upon by the Court." Br. at 3, n1. As they appear to recognize, this is improper at the motion to dismiss stage, even for the purposes of "context." *Id.* It is important to note, however, that the section of the report that they provide to the Court is misleading, since they omit the "tactical assessment" portions that detail what responding law enforcement officers did wrong.

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.

II. QUALIFIED IMMUNITY DOES NOT EXIST

The Uvalde County 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 United States Nat'l*

[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).

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

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

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). The Uvalde County Defendants do not attempt to argue that Plaintiffs failed to adequately plead facts giving rise to the state-created danger theory of liability under the Due Process Clause. Instead, they argue that "the Fifth Circuit has held time and time again that state-created danger is explicitly not an available theory of recovery" and thus that they are entitled to qualified immunity on this point. Br. at 7.[4] But the state-created danger theory of liability is clearly established.

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).

[4] Citations to "Br." are to Defendants Uvalde County Sheriff Ruben Nolasco, Uvalde County Constable Emmanuel Zamora, and Uvalde County Constable Johnny Field's 12(b)(6) Motion to Dismiss for Failure to State a Claim, ECF No. 48.

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 v. Dallas Independent School District*, 38 F.3d 198 (5th Cir. 1994). Its discussion clearly defined the "contours" of the theory:

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

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

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

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

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

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

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

Second, *ten* courts of appeals have adopted the state-created danger theory stemming from *DeShaney*. *Irish v. Fowler*, 979 F.3d 65, 67, 74-75, 77 (1st Cir. 2020) (the state-created danger "theory of substantive due process liability is viable" and clearly-established); *Okin v. Vill. of Cornwall-On-Hudson P.D.,* 577 F.3d 415, 434 (2d Cir. 2009) (state-created danger theory a clearly established right); *Kneipp v. Tedder*, 95 F.3d 1199, 1211 (3d Cir. 1996) ("[T]he state-created danger theory is a viable mechanism for establishing 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 Uvalde County 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.

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

Prior Fifth Circuit cases declining to apply the state-created danger theory on particular facts have lacked a key requirement: that the state actor actually knew or had reason to know that the private bad actor was likely to commit misconduct as a result of the state actor's conduct, evidenced by the state actor impeding *others* from preventing the bad actor's misconduct. "The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, *or cutting off potential sources of private aid." Id.* at 201 (cleaned up) (emphasis added). The Fifth Circuit's analyses on the merits of the theory have 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.[5] As the Complaint alleges, the Uvalde County Defendants "knowingly place[d]" M.Z. and K.T. in danger. *Johnson*, 38 F.3d at 200. On this point, the Uvalde County Defendants argue that if true, their conduct "is at most negligence" due to a supposed failure by Plaintiffs to allege affirmative conduct—that "at most," Plaintiffs allege "that officers failed to reengage a school shooter as fast as possible," and suggest that Plaintiffs are second-guessing "split-second judgments." Br. at 17–18. This is factually incorrect. By mischaracterizing Plaintiffs' allegations, the Uvalde County Defendants misleadingly describe Plaintiffs' case as "built on omissions alone." *Id.* at 18. But this argument is belied by the many allegations in the Complaint of the Uvalde County Defendants' "affirmative conduct."

For example, it was not just a "failure" to engage the shooter that violated Plaintiffs' constitutional rights. Rather, the Complaint alleges that Uvalde County 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. Compl. ¶¶ 155, 164–65, 173, 181–82. Defendant Nolasco affirmatively told his deputies to treat the shooter as a "contained" subject, rather than an active shooter. *Id.* ¶ 165. So too did Defendants Field and Zamora—at one point, Defendant Zamora even "suggested, without evidence, that perhaps [the shooter] had shot himself. He was wrong. He also continued to stand in the hallway, barricading the students and teachers inside the classrooms."

[5] The Uvalde County Defendants rely on the *Vielma* decisions in arguing that no liability can be imposed in this case. *See* Br. at 8–9 (citing *Vielma v. Gruler*, 347 F. Supp. 3d 1122 (M.D. Fla. 2018), *aff'd*, 808 F. App'x 872 (11th Cir. 2020)). But the *Vielma* decisions are inapposite, as the plaintiffs there did not argue that the state-created danger exception to *DeShaney*'s general rule applied, and thus those decisions did not discuss the theory's potential applicability in the context of shootings. Further, *Vielma* only dealt with a delay in officers engaging that shooter. It did not involve allegations (as Plaintiffs in this case allege) that the officers took *affirmative* steps to prevent *others* from saving the shooting victims while knowing that those affirmative steps would lead to more deaths. *Vielma* "begins and ends with a private actor," *Vielma*, 347 F. Supp. at 1132, and is thus distinguishable.

Id. ¶ 173. As a result of this affirmative suggestion that the shooter had shot himself, no one breached the classroom at that time—two minutes later, the shooter began shooting again. *Id.* ¶ 175. And as a rare example of a state actor "cutting off potential sources of private aid," *Johnson*, 38 F.3d at 201, Defendant Nolasco *actively prevented* "parents from entering the school, even as parents yelled at him to do something, anything, to rescue their children." Compl. ¶ 181. These were affirmative actions taken over the course of an hour by the Uvalde County Defendants, not "split-second judgments."

The Complaint more than adequately alleges that the Uvalde County 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 [Defendant Nolasco] 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 Uvalde County Defendants "cut[] off potential sources of private aid" to M.Z. and K.T, *Johnson*, 38 F.3d at 201, with Nolasco going as far as preventing *others* from breaching the classroom. This is exactly the scenario envisioned by the state-created danger theory. The Uvalde County 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.

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

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

The Uvalde County 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 Uvalde County Defendants (*see* Br. at 12–16),[6] 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).[7]

The Uvalde County 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

[6] The Uvalde County Defendants argue that the cases arising out of the Columbine shooting are instructive. However, they only cite cases favorable to them and conveniently omit other Columbine cases where courts found that a "custodial" or "special" existed. For example, in *Sanders v. Board of County Commissioners of Jefferson*, the court found that certain officers "acted affirmatively to restrain the freedom of [shooting victims including the plaintiff], to act on their own behalf" and thus that the plaintiff properly stated a substantive due process claim "under the special relationship doctrine." 192 F. Supp. 2d 1094, 1119 (D. Colo. 2001). That is precisely the argument Plaintiffs make here. What is more, the court in *Sanders* concluded that the plaintiff could overcome qualified immunity because "[u]nder the unique circumstances of the case, the alleged unlawfulness was apparent in light of existing law." *Id.* at 1124.

[7] The Uvalde County Defendants rely upon *L.S. ex rel. Hernandez v. Peterson*, an 11th Circuit case arising out of the Parkland school shooting. 982 F.3d 1323 (11th Cir. 2020). Br. at 12–14. But in that case, the students argued that a custodial relationship had arisen from the presence of armed school-safety officers. *Id.* at 1330. That is a far cry from the hundreds of armed officers present at Robb Elementary School on May 24, 2022, who barricaded students inside the school and used force (including tasers and handcuffs) to prevent parents from entering. Compl. ¶¶ 151, 159, 181–82.

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) ("[T]his issue involves factual questions inappropriate for resolution at the motion-to-dismiss stage.") (cleaned up), *report and recommendation adopted*, No. 1:18-CV-973-LY, 2019 WL 13150084 (W.D. Tex. Dec. 11, 2019). 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 in Section III.C., *supra*, and in Section V.A., *infra*, the Complaint alleges that the Uvalde County Defendants and their co-defendants knowingly trapped M.Z. and K.T. in classroom 112 with an active shooter, preventing parents and other officers from saving them. The Uvalde County 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 below, 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 Uvalde County Defendants' and their co-defendants' orders. 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 Uvalde County 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.

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

A. The Uvalde County Defendants' Decision to Barricade Plaintiffs in Classroom 112 Constitutes a Seizure by "Show of Authority."

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

Here, the Uvalde County 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 Uvalde County Defendants central, factual, and false claim is that "[n]othing in the Original Complaint would lead to the plausible conclusion that the students or teachers believed they could not leave the classrooms for any reason other than the threat of being killed by the murderer inside." Br. at 19.

But these arguments are belied by the allegations in the Complaint that the Uvalde County Defendants, time and time again, prevented others from breaching the classrooms, killing the shooter, or allowing Plaintiffs to leave the classrooms. They decided to treat the shooter as "barricaded," thereby barricading children inside a classroom with the shooter. *Id.* ¶ 164. By "treating [the shooter] as a 'barricaded subject,' and trapping him inside a classroom with dozens of victims, [the Uvalde County 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.*

The notion that Plaintiffs could not have believed they could not leave the classrooms due to the Uvalde County Defendants' actions, rather than the shooter's, is similarly incorrect. As the Complaint alleges, Plaintiff K.T. called 911 multiple times while trapped in the classroom with the shooter, begging for assistance from the Uvalde County 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 asked 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 Uvalde County 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 Uvalde County 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.

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 Uvalde County Defendants Are Not Entitled to Qualified Immunity.

Qualified immunity (if it exists) 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. Instead, as Justice Scalia reinforced, it is "plainly incompetent." 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) (quoting *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 621–22 (5th Cir. 2004)), *report and recommendation adopted*, 2020 WL 1445701 (S.D. Tex. Mar. 24, 2020), *aff'd*, 2 F.4th 407 (5th Cir. 2021). The egregious facts of this case should have provided the Uvalde County Defendants with notice that trapping children in a classroom with a school shooter violated their constitutional right to be free from unlawful seizure.

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

Plaintiffs have met the pleading standard necessary to assert viable claims, and the Uvalde County 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 Field's response to the shooting. Field had SWAT training, making him one of the most qualified officers to breach the classroom. Yet, just minutes after hearing shots fired in the classroom, Field ordered another officer to refrain from breaching the classroom and to treat the shooter as a barricaded subject, barricading the children in the process. On body-worn camera footage, an unidentified officer states, "dude, we've got to get in there, man," to which Field responds: "There's not, there's no active shooting. Stand by. Someone can be hurt, but, stand by." Field knew this statement was false, as the investigation revealed that he heard gunshots and ignored them, and also listened to a report of K.T.'s 911 phone call conveying that she was in a room full of victims.

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

for an amended complaint. 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 Uvalde County 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***

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