UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

CHRISTINA ZAMORA, Individually and as Next Friend of M.Z., et al.,	§	
Plaintiffs,	§	**Case No. 2:23-CV-00017-AM**
v.	§	
DANIEL DEFENSE, LLC, et al,	§	
Defendants.	§	

DEFENDANT PEDRO "PETE" ARREDONDO'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFFS' ORIGINAL COMPLAINT

Defendant Arredondo files this Reply in support of his motion to dismiss (Dkt # 44) and would respectfully show the court as follows:

Bloodbaths overwhelm; their patterns repeat. Slouching toward an existence which is solitary, poor, nasty, brutish, and short,[1] we attack those in the arena[2] who strive to return us to some semblance of order and then wonder why the center cannot hold.[3]

SUMMARY

Peter Arredondo rushed to the scene to try to save children and teachers from a madman who held them hostage[4] and who "fired his gun for the first time in his life in what would turn out to be a sadistic and tragic mass murder of school children and teachers."[5] Plaintiffs seek to hold

[1] Leviathan, Thomas Hobbes
[2] Theodore Roosevelt, "Citizenship in the Republic," April 23, 1910.
[3] The Second Coming, by William Butler Yeats.
[4] Dkt. #1, ¶135 ("The gunman was barricaded in the classroom with the victims that were dead or dying."). See also Dkt.. # 77, p. 5
[5] Dkt # 1 at ¶112.

Arredondo liable despite the fact that he: (1) ordered officers to clear children from surrounding classrooms (since the shooter's rounds were penetrating classroom walls); (2) he called Uvalde police "asking for a radio, rifle, and additional ammunition" and for the building to be "surrounded by as many AR-15s as possible" (since the shooter was armed with a "military combat weapon"); (3) he "attempted to make verbal contact with [the shooter]" (in an attempt to negotiate the shooter's surrender); and, most importantly, (4) he ran toward the shooting, took a position in the hallway, and never left.[6]

Plaintiffs begin with the bold assertion that qualified immunity does not exist, ignoring over sixty (60) years of precedent regarding §1983[7], over fifty (50) years of precedent regarding qualified immunity[8], the interaction of the two areas of law, and the "enhanced force"[9] of statutory *stare decisis*. In support of their attempted overthrow, they refer to a single concurring opinion of a single "middle-management" judge[10] who merely mentions, but does not adopt, the position taken by a single law professor who has presented his theory *du jour*[11] that sixteen critical words of a federal statute, enacted in 1871, were inexplicably omitted from the first compilation of federal law in 1874.[12] Apparently satisfied that they have successfully eliminated the doctrine of qualified, they practically ignore the heightened standard of proximate cause applicable to §1983 cases[13] and the heightened standard of review—the qualified immunity "wrinkle"[14]—applicable in this case

[6] Plaintiffs claim the better practice would have been to abandon the hallway and, therefore, the children. Dkt. #1 at ¶¶132, 151, 153, 158.
[7] See *Monroe v. Pape,* 365 U.S. 167 (1961) and its progeny.
[8] *Pierson v. Ray,* 386 U.S. 547 (1967)
[9] *Kimble v. Marvel Entertainment, LLC,* 135 S. Ct. 2401 (2015).
[10] *Rogers v. Jarrett,* 63 F. 4th 971, 979-981(2023) (Willett, J. concurring).
[11] "A professor must have a theory as a dog must have fleas." H. L. Mencken. While law professors are free to debate these issues and do so on a regular basis (when all is said and done, a lot more is said than done), the Supreme Court's decisions regarding qualified immunity remain binding precedent on all lower federal courts and, as a result, Plaintiffs bold assertion that "Qualified Immunity Does Not Exist" is meritless.
[12] *Rogers v. Marvel, at 980.*
[13] *Doe v. Rains Indep. Sch. Dist.,* 66 F.3d 1402, 1415 (5th Cir. 1995).
[14] *Arnold v. Williams,* 979 F. 3d 262, 266-67 (5th Cir. 2020).

while they concede, as they must, their official-capacity and supervisory liability claims against Arredondo.

Plaintiffs failed to allege facts to establish a plausible Fourth Amendment seizure claim against Arredondo; they were seized by the gunman, not by Arredondo. Moreover, Plaintiffs have failed to point to any cases creating clearly established law that Arredondo's conduct was a constitutional violation. Plaintiffs' assertions of a state-created danger and special relationship are also without merit as those theories have been consistently rejected by the Fifth Circuit. But even if the Fifth Circuit were to adopt those theories, Arredondo would still be entitled to qualified immunity because those theories were not clearly established law at the time of the event. All of Plaintiffs' claims against Arredondo should be dismissed.

ARGUMENT AND AUTHORITIES

A. Plaintiffs Conceded Nearly All of Arredondo's Arguments.

Plaintiffs conceded that (1) the Court lacks jurisdiction over the claims Plaintiffs Christina Zamora, Ruben Zamora, and Jamie Torres assert individually for alleged violations of M.Z. and K.T.'s constitutional rights because Christina Zamora, Ruben Zamora, and Jamie Torres lack standing to recover individually for such alleged violations (Dkt. #77 at p. 12 n.2);[15] (2) the Court should dismiss Plaintiffs' claims against Arredondo in his official capacity because these claims are redundant of Plaintiffs' claims against UCISD (Dkt. #77 at p. 12 n.2); and, therefore, (3) Plaintiffs' claims for supervisor liability have been abandoned. The Court should, therefore, dismiss these claims.[16]

B. Plaintiffs Identify an Obsolete Standard of Review.

[15] Defendant refers to the ECF page numbers.
[16] *Arnold v. Williams*, 979 F.3d 262, 266-67 (5th Cir. 2020); *Scott v. Harris*, 550 U.S. 372, 377 (2007).

Plaintiffs mistakenly claim that a complaint "need only include sufficient factual allegations … to provide 'fair notice' of plaintiff's claims." Dkt. #77 at p. 11. The Supreme Court long ago overturned the notice standard, holding instead that a plaintiff must meet the plausibility standard, under which the plaintiff must plead "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). A complaint that pleads facts which are "merely consistent with' a defendant's liability" is insufficient to defeat a motion to dismiss for failure to state a claim. *Id*. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Complaints which offer only legal conclusions, a formulaic recitation of the elements of a claim, or "'naked assertions' devoid of 'further factual enhancement'" do not suffice. *Id*. (quoting *Twombly*, 550 U.S. at 555, 557).

Additionally, because Arredondo has asserted qualified immunity in response to Plaintiffs' claim, he is entitled to dismissal unless Plaintiffs have pleaded "specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm [Plaintiffs have] alleged and that defeat a qualified immunity defense with equal specificity." *Arnold*, 979 F.3d at 266-67 (quoting *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012)). To defeat Arredondo's qualified immunity defense, Plaintiffs needed to identify well-pleaded allegations to support a finding that Arredondo violated a constitutional right and that the contours of that right were clearly established at the time of the challenged conduct, in the specific context of the case. *Scott*, 550 U.S. at 377; *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc); *Brumfiled v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008)). Simple "fair notice" is not the proper standard in a qualified immunity case.

C. <u>None of the Individual Law Enforcement Defendants, Including Arredondo, Seized Plaintiffs Because Plaintiffs—Plaintiffs were Hostages of the Shooter.</u>

Plaintiffs assert that they "have stated a claim for unlawful seizure in violation of the Fourth Amendment." Dkt. #77 at 15.[17] Plaintiffs allege that "the Law Enforcement Individual Defendants illegally seized M.Z. and K.T." Dkt. #1 at ¶273. But this conclusory allegation is contradicted by Plaintiffs pleading that the shooter had barricaded himself in Rooms 111 and 112 effectively holding M.Z., K.T., and the other students hostage. *Id*. at ¶135. "[A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement, ... but only when there is a governmental termination of freedom of movement *through means intentionally applied*." *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (emphasis in original). And the "[v]iolation of the Fourth Amendment requires ... [that the] detention or taking itself must be willful." *Id*. at 596. Consequently, the Supreme Court and the courts of appeal have long distinguished between force directed at a particular person and force that incidentally restricts a third-party's movement in holding that a hostage or bystander has no constitutional claim against an officer. *See Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 795 (1st Cir. 1990) (hostage injured by police fire was not "seized" because he was not an intended target); *Medeiros v. O'Connell*, 150 F.3d 164, 169 (2d Cir. 1998) (same); *Davis v. Township of Hillside*, 190 F.3d 167, 169 n.1 (3d Cir. 1999) ("[bystander] plaintiff's claim is not covered by the Fourth Amendment."); *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991) (One is seized within the Fourth Amendment's meaning only when one is the intended object of a physical restraint.); *Pearce v. Doe*, 849 F. App'x 472, 475 (5th Cir. 2021) (dismissing Fourth Amendment claim brought by the estate of a hostage shot by officers because officers did not intend to shoot him

[17] Accordingly, Plaintiffs have abandoned any seizure claims based upon a Fourteenth Amendment. Regardless, the Fourteenth Amendment seizure claim is unavailable since it is more properly considered under the Fourth Amendment, the more specific constitutional right implicated by their allegations. *Mayfield v. Currie*, 976 F.3d 482, 486 n.1 (5th Cir. 2020) (citing *Nieves v. Bartlett*, 139 S. Ct. 115, 1723 (2019), *Catellano v. Fragozo*, 352 F.3d 939, 945, 953 (5th Cir. 2003) (en banc), and *Blackwell v. Barton*, 34 F.3d 298, 302 (5th Cir. 1994)) (cleaned up).

(citing *Brower*, 489 U.S. at 596)); *Moore v. Indehar*, 514 F.3d 756, 760 (8th Cir. 2008) ("[T]o establish a Fourth Amendment claim," the plaintiff "must show that [the] Officer ... intended to seize [him] through the means of firing his weapon."); *United States v. Lockett*, 919 F.2d 585, 590 n.4 (9th Cir. 1990) (An unarmed suspect shot by a police officer might have a Fourth Amendment claim against the officer. However, an innocent bystander struck by a stray bullet from the officer's weapon would not have such a claim.); *Childress v. City of Arapaho*, 210 F.3d 1154, 1156-57 (10th Cir. 2000) (dismissing Fourth Amendment claim brought by hostages because "officers intended to restrain the minivan and the fugitives, not [the hostages]"); *Ansley v. Heinrich*, 925 F.2d 1339, 1344 (11th Cir. 1991) (the unintended consequences of government action cannot form the basis for a Fourth Amendment violation); *Emanuel v. District of Columbia*, 224 F. App'x 1, 2 (D.C. Cir. 2007) (officers were not liable under the Fourth Amendment because they did not intend to shoot bystander); *City of El Centro v. United States*, 922 F.2d 816, 822 (Fed. Cir. 1990).

Again, "[w]hen a person 'has no desire to leave for reasons **unrelated to the police presence**, the coercive effect of the encounter can be measured better by asking whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'" *United States v. Wright*, 57 F.4th 524, *11 (5th Cir. 2023)(quoting *United States v. Flowers*, 6 F.4th 651, 655 (5th Cir. 2021)). Plaintiffs allege that the shooter entered the classroom "dropped to his knees and told the children it was 'time to die.'" Dkt. #1 at ¶125. One of the Plaintiffs played dead to avoid being shot by the shooter. *Id.* at ¶148. Regardless of the police presence, Plaintiffs could not leave the classrooms while the shooter remained. Plaintiffs were at all times relevant hostages of the shooter and, therefore, no constitutional violation occurred.

D. <u>Plaintiffs Fail to Point to Any Clearly Established Law Establishing a Seizure.</u>

To defeat qualified immunity, a plaintiff must show: (1) that the official violated a statutory or constitutional right; and (2) that the right was clearly established at the time of the challenged conduct, in the specific context of the case. *Scott*, 550 U.S. at 377; *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008). Even if Plaintiffs had established a Fourth Amendment seizure, which they have not, they have failed to meet their burden of establishing that Arredondo violated clearly established by clearing surrounding classrooms, calling Uvalde police "for a radio, rifle, and additional ammunition"; calling for the building to be "surrounded by as many AR-15s as possible"; "attempt[ing] to make verbal contact with [the shooter]"; and running toward the shooting, taking a position in the hallway, and never leaving that position. Dkt. #1 at ¶¶132, 151, 153, 158.

Plaintiffs fail to point to any case clearly establishing that it is a constitutional violation to barricade a shooter armed with a high-powered, "military-inspired" assault rifle in a room with hostages. Dkt. #1 at ¶¶52-53. Instead, Plaintiffs argue without citation that "[n]o one claims police detained children or anyone in order to get a warrant." Dkt. #77 at 17. While Plaintiffs may claim that Arredondo's cited cases are "inapposite" (*see id.*) it is Plaintiffs' burden, not Arredondo's, to show that cases clearly established that Arredondo's conduct violated the constitution. Plaintiffs have failed to meet that burden. Furthermore, the cases cited by Arredondo in his motion to dismiss (Dkt. #44, Section D) and *supra*, Section C, demonstrate that the law is not clearly established that a hostage can have a constitutional claim against a responding law enforcement officer under the Fourth Amendment. Accordingly, Plaintiffs' claim against Arredondo for an unlawful seizure should be dismissed with prejudice.

E. <u>The Fifth Circuit Recently Reaffirmed that the State-Created Danger is Not Clearly Established Law in the Fifth Circuit Despite Plaintiffs' Argument to the Contrary.</u>

Plaintiffs misleadingly argue that "[t]he Fifth Circuit has 'recognized' the state-created danger theory and defined it with particularity." Dkt. #77 at 17. What Plaintiffs fail to mention to is that in March of this year the Fifth Circuit again affirmed that "the Fifth Circuit has never recognized th[e] 'state-created-danger exception.'" *Fisher v. Moore*, 62 F. 4th 912, 916 (5th Cir. 2023). In *Fisher*, the Fifth Circuit reiterated that "[t]his circuit has never adopted a state-created danger exception to the sweeping 'no duty to protect' rule. And a *never*-established right cannot be a *clearly* established one." *Id*.; *See also Walker v. Livingston*, 381 F. App'x 477, 479–80 (5th Cir. 2010) ("[T]his court has held that the state created danger theory is 'not clearly established law within this circuit such that a § 1983 claim based on this theory could be sustained'").

The *Fisher* court went on to explain that "[i]n our published, and thus binding, caselaw, '[w]e have repeatedly declined to recognize the state-created danger doctrine.'" *Fisher*, 62 F.4th at 916 (citing *Joiner v. United States*, 955 F.3d 399, 407 (5th Cir. 2020); *see also, e.g., Shumpert v. City of Tupelo*, 905 F.3d 310, 324 n.60 (5th Cir. 2018) ("[T]he theory of state-created danger is not clearly established law." (listing cases)); *Kovacic v. Villarreal*, 628 F.3d 209, 214 (5th Cir. 2010) ("The Fifth Circuit has not adopted the 'state-created danger' theory of liability."); *Bustos v. Martini Club Inc.*, 599 F.3d 458, 466 (5th Cir. 2010) ("But this circuit has not adopted the state-created danger theory."); *Rios v. City of Del Rio*, 444 F.3d 417, 422 (5th Cir. 2006) ("[N]either the Supreme Court nor this court has ever either adopted the state-created danger theory or sustained a recovery on the basis thereof."); *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004) ("This court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability even where the question of the theory's viability has been squarely presented."). Against this backdrop, Plaintiffs claim that the state-created danger theory "remains unquestioned (though never expressly adopted) by the Fifth Circuit. It is clearly established." Dkt. #77 at 19.

Plaintiffs are plainly wrong. As the Fifth Circuit has reiterated time and time again—from 2004 to 2023—the state-created danger theory is not recognized and is not clearly established law in this Circuit. Therefore, Plaintiffs have failed to meet their burden of defeating Arredondo's qualified immunity and their Fourteenth Amendment claims based upon the state-created-danger exception should be dismissed with prejudice.

F. <u>The Custodial-Relationship Theory is Inapplicable in the Public-School Context.</u>

Plaintiffs argue *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995), stands for the proposition that there is a special relationship in this case since they allege that Arredondo was barricading Plaintiffs as opposed to the shooter. But in *Walton* the Fifth Circuit rejected the plaintiff's argument that he had a special relationship since he was a residential student staying in an on-campus dormitory. *Walton*, 44 F.3d at 1305. The Fifth Circuit held that the exception was not applicable in that case because the plaintiff was not in custody or restrained at the time of the alleged failure to protect. *Id*. at 1303. Again, this goes to the same analysis as in the Fourth Amendment context and turns on the fact that Plaintiffs were hostages of the shooter. *See supra* Section C. The Fifth Circuit has repeatedly rejected the argument that public schools have a special relationship with their students. *See, e.g. Doe ex rel. Magee v. Covington County Sch. Dist.*, 675 F.3d 849, 857-58 (5th Cir. 2012).[18]

Moreover, Plaintiffs' argument that such a decision should be a summary-judgment matter is a complete red herring. Dkt. #77 at 23. None of the district court cases Plaintiffs rely upon for their argument involved qualified immunity. Plaintiffs are again attempting to shirk their burden to identify well-pleaded allegations to support a finding that Arredondo violated a constitutional right and to establish that the contours of that right were clearly established at the time of the

[18] As the Fifth Circuit explained, "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duty of care arising out of tort law." *Covington*, 675 F.3d at 858.

challenged conduct, in the specific context of this case. *Scott*, 550 U.S. at 377. Plaintiffs simply have failed to meet that burden.

CONCLUSION

Plaintiffs conceded the validity of Defendant Arredondo's arguments seeking dismissal of (1) Plaintiffs' claims for Christina Zamora, Ruben Zamora, and Jamie Torres individually for alleged violations of M.Z. and K.T.'s constitutional rights; (2) Plaintiffs' claims against Arredondo in his official capacity; and (3) Plaintiffs' claims for supervisor liability. Plaintiffs have failed to establish a constitutional seizure of M.Z. and K.T. and have failed to meet their burden to defeat Defendant Arredondo's entitlement to qualified immunity with respect to that claim. Likewise, Plaintiffs have failed to meet their burden to defeat Defendant Arredondo's entitlement to qualified immunity with respect to Plaintiffs' claims under the state-created-danger and special-relationship theories. The Court should, therefore, recognize Defendant Arredondo's entitlement to qualified immunity from Plaintiffs' claims, and dismiss with prejudice Plaintiffs' claims based on lack of jurisdiction and/or a failure to state a claim upon which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June 2023, I electronically filed the foregoing document with the Clerk of the Court through the ECF system and an email notice of the electronic filing was sent to all attorneys of record.

/s/ *Christopher D. Livingston*
CHRISTOPHER D. LIVINGSTON